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Brainerd Currie, "The Silver Oar and All That: A Study of the Romero Case," 27 University of Chicago Law Review 1 (1959).

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THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 27

AUTUMN 1959

NUMBER 1

THE SILVER OAR AND ALL THAT: A STUDY OF THE ROMERO CASE

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I. INTRODUCTION

ON MAY 12, 1954, the Spanish S.S. Guadalupe was berthed at Pier No. 2 in Hoboken, New Jersey, preparing to load a cargo of wheat. A Spanish seaman, Francisco Romero, employed as a member of the Guadalupe's crew, was engaged in "topping the boom" when something went wrong. The wire cable employed in the operation slipped, the boom fell, and the cable whipped around Romero's legs. His left leg was severed; his right leg sustained multiple fractures. He was removed by ambulance to St. Mary's Hospital in Hoboken, where he remained under treatment for eight months, ultimately being fitted with an artificial leg.¹

Twelve days after the injury Romero filed an action in the United States District Court for the Southern District of New York. His amended complaint named four defendants and set forth several grounds for recovery. The defendants, and the causes of action asserted against them, were:

(1) *Compania Trasatlantica*, also known as the Spanish Line, a Spanish corporation which was owner of the Guadalupe and employer of Romero. Against this defendant the plaintiff asserted claims (a) under the Jones Act,² (b) for unseaworthiness, and (c) for maintenance and cure.

(2) *Garcia & Diaz, Inc.*, a New York corporation acting as ship's husband

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This study was originally undertaken as a joint project with Professor Philip B. Kurland. More because of divergent interests than divergent opinions, we decided in the end to publish our conclusions separately. I owe much to him as a result of the collaboration.

¹ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). Certain details not found in the opinion are supplied by the record and briefs.

² 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

under an agency agreement with the Spanish Line. On the theory that this defendant "operated and controlled and managed" the Guadalupe, the same claims asserted against the Spanish Line were asserted against Garcia, with the addition of a general claim for simple maritime tort.

(3) International Terminal Operating Co., Inc., a Delaware corporation which had been engaged as stevedoring contractor to load the cargo. The claim against International was simply for maritime tort on the theory that its employees had contributed to the injury.

(4) Quin Lumber Co., Inc., a New York corporation whose employees were aboard for the purpose of installing shifting boards preparatory to reception of the cargo. Against this defendant, as against International, the claim was for simple maritime tort.³

All four defendants moved to dismiss the action *for lack of jurisdiction*. After a pre-trial hearing on some matters which were thought to bear on the jurisdictional question, the district court granted the motions to dismiss,⁴ and the court of appeals affirmed.⁵ On the face of the matter such a disposition of the case seems surprising and anomalous. Under the Constitution the judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction";⁶ under the Judicial Code the district courts of the United States are given "original jurisdiction, *exclusive* of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."⁷ This—an action for personal injuries to a seaman, sustained on board a vessel in navigable waters—was certainly a case within the admiralty and maritime jurisdiction. On what possible theory, then, could it be dismissed on the ground that the district court had no jurisdiction?

The Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court for further proceedings.⁸ The plaintiff's

³ A degree of interpretation is involved in stating the causes of action asserted. The amended complaint (Record, vol. 1, p. 223a, appears to assert the claims under the Jones Act, for unseaworthiness, and for maintenance and cure against International; but no basis for thus treating that defendant as owner and employer is suggested, and the point is not developed in later stages of the litigation. The district court treated the claim for maintenance and cure as directed solely against the Spanish Line (142 F. Supp. 570, 574 [S.D.N.Y. 1956]), and also characterized the complaint as asserting a cause of action against all four defendants for maritime tort. The Supreme Court, more accurately, read the claim for maintenance and cure as being asserted against both Garcia and the Spanish Line (358 U.S. at 356); but the Court also construed the complaint as asserting a claim for maritime tort against all four defendants. Why such a general claim should be asserted against the owner-employer is not clear. Cf. Brief for Respondent Compania Trasatlantica, p. 6. The small discrepancies in the various statements of the claims asserted seem unimportant.

⁴ 142 F. Supp. 570 (S.D.N.Y. 1956).

⁵ 244 F.2d 409 (2d Cir. 1957).

⁶ U.S. CONST. art. III, § 2, par. 1.

⁷ 28 U.S.C. § 1333 (1952). (Emphasis supplied.)

⁸ 358 U.S. at 385.

case was saved; the jurisdiction of the district court was vindicated. It was not vindicated, however, in any such simple and straightforward way as would seem to be indicated by the constitutional and statutory provisions which have been quoted here. The opinion of the Court, written by Mr. Justice Frankfurter, represents the views of only a bare majority of the justices. Twenty-two pages of the official reports were required for that opinion's exposition of the jurisdictional question. There were two separate minority opinions. Why all this pother over a question the answer to which seems crystal clear?

Romero's case seems certain to become a landmark decision. It deals with questions of considerable importance, long unsettled, in the law of seamen's injuries; it has facets which may be of significance in relation to questions of federal jurisdiction beyond the admiralty and maritime matters directly involved; and, in addition, it decides an important question of conflict of laws—*i.e.*, of the application of the Jones Act and the general American maritime law to cases having foreign aspects—in a way which has significance for basic conflict-of-laws theory and method. It is the purpose of this paper to consider (1) the phenomenon of the Court's preoccupation with the question of federal jurisdiction over maritime cases, and (2) the conflict-of-laws question.⁹

II. THE CASE IN CONTEXT

The injured seaman, like personal-injury claimants generally, places considerable store by the institution of trial by jury. Unlike most other such claimants, however, he suffers from an embarrassment of riches in the remedies which he may assert against his most obvious adversary, the ship-owning employer. His effort to take full advantage of the largesse which the law bestows upon him as a member of a favored class of workmen complicates his quest for the verdict of his peers. Generally speaking, when a seaman is injured aboard ship it is prudent for his counsel to file an action against the shipowner-employer in three counts: (1) under the Jones Act, (2) under the general maritime law for unseaworthiness, and (3) under the general maritime law for maintenance and cure. Thus, if he can establish negligence, he may recover under the Jones Act full indemnity, including damages for pain and suffering; or, even if he cannot prove negligence, he can recover similarly full indemnity on the theory of unseaworthiness if he can show that the injury resulted from any defect in the vessel or its appurtenances rendering the thing in question unfit for its intended purpose; or, in default of any proof of either negligence or defective equipment, he may recover maintenance and cure—*i.e.*, his living expenses and medical expenses during convalescence, plus unearned wages to the end of the voyage.¹⁰

⁹ For discussion of the significance of the decision for federal jurisdiction generally see Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. — (1960).

¹⁰ See generally GILMORE & BLACK, *THE LAW OF ADMIRALTY* ch. VI (1957).

It is probably desirable from the standpoint of the interest of the public, as well as that of the plaintiff, to have these three counts disposed of in a single proceeding. The claim is for a single injury, arising from a single incident; the evidence needed to establish the claim, or a defense, will be substantially the same under all three counts. Indeed, the law forces the plaintiff to join in a single action the counts under the Jones Act and for unseaworthiness; if one of these is asserted separately, the judgment precludes subsequent assertion of the other.¹¹ If the action is brought in a state court pursuant to the saving-to-suitors clause¹² all three counts may be disposed of in one proceeding, and by a jury if the state so provides. If the plaintiff prefers a federal forum, however, difficulties arise. While the Jones Act expressly gives the seaman the right to maintain an action "at law, with the right of trial by jury,"¹³ the claims for unseaworthiness and maintenance and cure rest upon the general maritime law and are cognizable in the federal court by virtue of its admiralty jurisdiction. In the exercise of that jurisdiction the court has traditionally proceeded without a jury.¹⁴ Thus, unless there is to be some kind of division of the issues, or of the function of deciding the issues, it has seemed necessary to establish that the court has jurisdiction of the claims for unseaworthiness and maintenance and cure independently of their maritime character. If, for example, the parties are of diverse citizenship, and if the jurisdictional amount is in controversy, the court has jurisdiction of each of these two claims under Section 1332 of the Judicial Code, and the right to jury trial is taken for granted. In the absence of diversity of citizenship, the only non-admiralty ground of jurisdiction having general utility would be (1) Section 1331 of the Judicial Code, on the theory that a case arising under the general maritime law is one arising under the Constitution or laws of the United States, or (2) "pendent" jurisdiction, on the theory that, jurisdiction of the Jones Act claim being present because of Section

¹¹ *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927); see *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *cf. Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 444 (2d Cir. 1959). The principle probably does not apply to maintenance and cure, *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928); *The Rolph*, 299 Fed. 52, 55 (9th Cir. 1924). Although the Peterson case involved only the acceptance of maintenance and cure rather than a prior judgment therefor, *Gilmore & Black* rely upon it for the statement that "By unquestionable authority a maintenance and cure claim is 'separate and independent' from both a Jones Act claim or an unseaworthiness claim for purposes of *res judicata* or § 1441(c) or anything else." *GILMORE & BLACK, op. cit. supra* note 10, at 301.

¹² *Supra* note 7. The choice of forum is complicated by the fact that the typical admiralty remedy of process in rem against the vessel to enforce a maritime lien is not available at all in the state courts, nor in the federal courts under the Jones Act. *Plamals v. Pinar del Rio*, 277 U.S. 151 (1928); *Lauritzen v. Larsen*, 345 U.S. 571, 574 (1953). This aspect of the choice will be given only incidental attention here. See, *e.g.*, note 268 *infra*.

¹³ *Supra* note 2.

¹⁴ By virtue of a fascinating little accident of legal history, there is a statutory right to jury trial in cases of contract or tort concerning certain Great Lakes vessels. 28 U.S.C. § 1873. Thus in a case involving such a vessel the count for unseaworthiness may clearly be submitted to the jury along with the Jones Act count; but it has been held that the statutory right to jury trial does not apply to the cause of action for maintenance and cure. *Miller v. Standard Oil Co.*, 199 F.2d 457 (7th Cir. 1952), *cert. denied* 345 U.S. 945, *rehearing denied* 345 U.S. 971 (1953).

1331, the two related claims may be retained and disposed of under the same authority.¹⁵

The courts seem simply to have drifted into the habit of treating the question as to jury trial in jurisdictional terms, although the assumptions involved in that treatment are by no means free from doubt. The mere fact that a case is cognizable under Section 1331 or Section 1332 does not mean that it will be tried to a jury; if, for example, the case is one which before the adoption of the Rules of Civil Procedure would have been a suit in equity, the issues are tried by the court.¹⁶ Similarly, certain actions of a maritime character founded on acts of Congress are cognizable by virtue of Section 1331, but are not tried by jury because Congress has made admiralty procedures applicable.¹⁷ Rather plainly, there is no constitutional right to jury trial in saving-clause cases, in view of the historic absence of that institution from admiralty proceedings. Congress, however, in saving to suitors the right to a common-law remedy, certainly intended that the plaintiff should have the right to choose a common-law forum, and probably intended that if he sued in the federal court (as he might if there were diversity of citizenship) he should have the right to a jury trial.¹⁸ Even in saving-clause cases, however, where the plaintiff seeks a common-law remedy which the common law is competent to give, there is not a *constitutional* right to jury trial; Congress could repeal the saving clause and make the federal admiralty jurisdiction exclusive, with the clear result that there would be no right to jury trial in maritime cases.

The objective of a unified procedure for seamen's injury cases, with all three of the counts being submitted to the jury, can be attained without resort to jurisdictional concepts. There is no constitutional barrier to jury trial in admiralty;¹⁹ certainly Congress could provide for such a mode of trial, and a simple

¹⁵ Cf. *Hurn v. Oursler*, 289 U.S. 238 (1933); 28 U.S.C. § 1338(b).

¹⁶ 5 MOORE, *FEDERAL PRACTICE* 115 *et seq.* (2d ed. 1951).

¹⁷ See, e.g., the Suits in Admiralty Act, 41 Stat. 525 (1920), 46 U.S.C. § 741 *et seq.* (1952), and the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. § 761 *et seq.* (1952).

¹⁸ Cf. Sections 9 and 12 of the Judiciary Act of 1789, 1 Stat. 76, 79, providing that the trial of all issues of fact should be by jury except in suits in equity and in "civil causes of admiralty and maritime jurisdiction." This provision, which was in § 770 of the old Judicial Code, was omitted by the Revisers from the 1948 revision. See Reviser's Note to 28 U.S.C. § 1873. "An action brought under the 'saving-to-suitors' clause, invoking the common law or equity jurisdiction of the district courts, would be governed by the Federal Rules [of Civil Procedure], and hence a right of trial by jury, if demanded, would be determined in accordance with the general principles governing civil actions generally." 5 MOORE, *FEDERAL PRACTICE* 270 (2d ed. 1951). Cf. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 454 (2d Cir. 1959) (concurring opinion.)

¹⁹ The provision for jury trial in Great Lakes cases (note 14, *supra*) dates from 1845, 5 Stat. 726, and its validity was sustained in *The Genesee Chief*, 53 U.S. (12 How.) 443, 460 (1851). An act of Congress providing for jury trial in cases of unseaworthiness and maintenance and cure might revive the strange argument which was directed against the Jones Act—that it unconstitutionally curtailed the federal admiralty jurisdiction; but the authoritative rejection of that argument in its original context should suffice to defeat it in the new. *Panama R.R. v. Johnson*, 264 U.S. 375 (1924).

judicial decision authorizing it in the typical seaman's injury case without reference to jurisdictional considerations would be, in practical effect, no more than a legitimization of what was once general practice.²⁰ It is understandable that, in the absence of Congressional action, the bar and the courts should have attempted to deal with the problem by seeking a nonadmiralty basis for the court's jurisdiction. This search, which in recent years has centered upon the theory that actions under the general maritime law are cognizable under Section 1331, has, however, involved such extreme concentration upon the question of "jurisdiction"—*i.e.*, jurisdiction independent of Section 1333—that discussion by lawyers, courts, and commentators takes on a strangely conceptual cast, as if two quite separate courts, one of law and one of admiralty, were involved, and as if a negative answer to the question of non-admiralty jurisdiction would be fatal to the plaintiff's cause. The tendency to talk in this way is aggravated by the persistent influence of the pre-1938 separation of law and equity. There are times when one feels impelled to protest that the excessive attention given to the jurisdictional difference between the "law side" of the court and the "admiralty side" is an anachronistic perpetuation of the same kind of evil which attended the strict separation of law and equity, and is quite inconsistent with the modern spirit in procedure.²¹ At the least, it may be suggested that less concern with the question whether there is jurisdiction on the "law side" and more concern with the real questions involved would facilitate intelligent settlement of the question as to how seamen's actions for personal injuries should be tried in the federal courts.

The tendency to dichotomize the district courts is encountered in the very first paragraph of the opinion of the Court in the *Romero* case, where we are told that the seaman's three-count complaint against his employer was filed "on the law side of the District Court for the Southern District of New York." If, curious as to how the Court knew which of the "sides" was selected by the plaintiff, one examines the complaint, the results are inconclusive. The caption, which might have identified the proceeding as a civil action, or as an action "at law," is omitted in the printed record; but it does appear that a jury trial was demanded.²² The jurisdiction of the court was invoked under the general maritime law and under the Jones Act,²³ except that as to the defendants International and Quin the diversity jurisdiction was invoked.²⁴ Going beyond the

²⁰ See notes 315 through 319, *infra*. Gilmore & Black suggest that the prevailing current practice is to allow the maritime law counts to go to the jury along with the Jones Act count, and even that there will be jury trial if maintenance and cure alone is involved. *Op. cit. supra* note 10, at 261-62, notes 44, 45. Their analysis, however, erroneously assumes that the jury problem in the federal courts is resolved by the saving-to-suitors clause alone. *Ibid*.

²¹ *Cf.* 5 MOORE, FEDERAL PRACTICE 65 *et seq.* (2d ed. 1951).

²² Record, vol. 1, p. 197a, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

²³ *Id.* at 200a.

²⁴ *Id.* at 201a-202a, 203a-204a.

complaint, we find that the case was referred to a particular "part" of the court for jury trial in accordance with the plaintiff's demand.²⁵ The language of the docket entries is more suggestive of the Rules of Civil Procedure than of the Admiralty Rules.²⁶ In the office of the clerk of the district court, of course, we could find unambiguous information, because in the Southern District of New York separate dockets are maintained for civil actions and for admiralty cases. Undoubtedly this complaint was entered on the civil docket. In many another district, however, this fairly conclusive information would be unobtainable. Through the courtesy of the clerks of all the district courts it has been learned that separate admiralty dockets are maintained in only 31 districts; there are no such dockets in the remaining 57. In half a dozen of the 57, local rules require that admiralty cases be captioned "In Admiralty"; in others it is the practice of the bar to caption the case so as to indicate that it is in admiralty, and in still others the clerk, while entering the case on the civil docket, will add a notation that it is "in admiralty." In some 36 districts admiralty cases appear to be treated in the clerk's office simply as civil actions, without any distinction at all.²⁷ In general, of course, these are the districts in which there is little or no maritime litigation; there are separate admiralty dockets in most of the districts which comprise areas of shipping activity. But in the Northern District of Illinois, which handles a substantial number of maritime cases and presumably will handle more with the improvement of the St. Lawrence Seaway, there is no separate admiralty docket and no rule as to caption; such cases are filed with "other civil actions."

Counsel in the *Romero* case would have had no doubt as to which side of the court they were on once they appeared before Judge Sugarman for the pre-trial hearing, for there they were confronted with the most conclusive evidence of all: the Silver Oar, symbol of the admiralty jurisdiction, was not on the bench; they could not very well have been on the "admiralty side." Unfortunately, however, no other district possesses a Silver Oar.

On its face, Judge Sugarman's dismissal of the complaint for lack of jurisdiction may seem to be an instance of carrying to an extreme the tendency to ignore the court's admiralty jurisdiction when the Silver Oar is absent; in fact the trial judge did not carry the tendency so far. Near the conclusion of the pre-trial hearing he inquired of counsel for the plaintiff whether, in the event the court should decide that there was no cause of action against the Spanish Line under the Jones Act, they would desire to amend the complaint (1) so as to proceed on the basis of diversity of citizenship against the other defendants or (2) so as to proceed in admiralty, without a jury. The response was nega-

²⁵ *Id.* at 2a.

²⁶ *Id.* at A.

²⁷ A compilation of the materials relating to docketing of admiralty cases in each of the district courts is now on file and available for reference at the Administrative Office of the United States Courts, Supreme Court Building, Washington 25, D.C.

tive.²⁸ It was only after the opportunity to amend had been thus refused that the court ordered dismissal, holding:

1. That since the Jones Act does not apply to injuries to alien seamen aboard foreign ships owned by aliens, the court had no "jurisdiction" under that Act of the claim against the Spanish Line;

2. That since Garcia was a mere husbanding agent and neither owned nor controlled the vessel the Jones Act claim against that defendant must also be dismissed;

3. That Section 1331 did not confer jurisdiction of the other claims because cases predicated on the general maritime law are not cases arising under the Constitution or laws of the United States;

4. That Section 1332 did not confer jurisdiction of the claims against the other defendants because "perfect" diversity of citizenship was lacking, the plaintiff and the defendant Spanish Line both being aliens; and

5. That, on forum non conveniens grounds, the court would not retain jurisdiction of the claim against the Spanish Line even in admiralty.²⁹

The court of appeals, in a brief per curiam opinion, affirmed on the basis of the "workmanlike" opinion of Judge Sugarman, adding only a rejection of an argument, based upon treaty, which had not been made in the district court.³⁰

The decision of the Supreme Court may be summarized as follows:

I. *Jurisdiction*

(a) *Under the Jones Act.* The Jones Act claims should not have been dismissed for want of jurisdiction. A substantial claim was asserted and the court had jurisdiction to determine whether the coverage of the act extended to a case involving such foreign elements.

(b) *Under Section 1331.* The claims asserted under the general maritime law are not claims "arising under the Constitution or laws of the United States."

(c) *Pendent jurisdiction.* The claims for unseaworthiness and maintenance and cure were, however, cognizable by virtue of the doctrine of "pendent" jurisdiction, since the court had jurisdiction of the Jones Act claims.³¹

²⁸ *Romero v. International Terminal Operating Co.*, *supra* note 22 at Record vol. 1, pp. 188a-190a.

²⁹ 142 F. Supp. at 574. The text is an interpretative paraphrase of the court's conclusions.

³⁰ 244 F.2d at 410-411.

³¹ "Rejection of the proposed new reading of § 1331 does not preclude consideration of petitioner's claims under the general maritime law. These claims cannot, we have seen, be justified under § 1331. However, the District Court may have jurisdiction of them 'pendent' to its jurisdiction under the Jones Act." 358 U.S. at 380. Although this language is broad, it seems quite clear that the Court was referring to the claims for unseaworthiness and maintenance and cure against the defendants alleged to be owner-employers, and not to the claims against the other defendants. The preceding discussion was directed to the claims against the employer; there was no need to find "pendent" jurisdiction to support the actions against the diverse respondents; and application of the rule of "pendent" jurisdiction to claims against

- (d) *Diversity of citizenship*. "Since the Jones Act provides an independent basis of jurisdiction over the non-diverse respondent . . . the rule of *Strawbridge v. Curtis*, 3 Cranch 267, does not require dismissal of the claims against the diverse respondents."³²

II. *The merits—conflict of laws and other matters*

- (a) *The claims against the Spanish Line*. In the absence of a clear Congressional directive to the contrary, neither the Jones Act nor the general maritime law as developed in this country will be applied to a case involving the foreign elements present here.
- (b) *The claims against Garcia*. While the district court properly found that Garcia was not liable under the Jones Act, nor for unseaworthiness, nor for maintenance and cure—not being the employer, nor in control of the vessel—there should be further proceedings to determine whether a cause of action was stated against that defendant for simple maritime tort.
- (c) *The claims against International and Quin*. Since the complaint as to these defendants was erroneously dismissed for lack of jurisdiction, there should be further proceedings to determine on the merits their liability for maritime tort.

We are now in position to consider the most fascinating statement in the majority opinion: "We are not called upon to decide whether the District Court may submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action be found to exist."³³ If the Court did not decide the issue as to jury trial *vel non*, what did it decide when it ruled that there was

additional parties, based upon different allegations as to fault, would be a more radical extension of the rule than its application to alternative counts against the same defendant. Moreover, to hold the claims against International and Quin sustained by pendent jurisdiction would be to produce a venue difficulty which Mr. Justice Frankfurter had used as an argument against jurisdiction under § 1331 (358 U.S. at 376-77): it is only when jurisdiction is based "solely" on diversity of citizenship that the plaintiff may sue in the district of his residence (28 U.S.C. § 1391(a)). If jurisdiction is sustainable also under § 1331 he may sue only in the district of the defendant's residence, and the same is presumably true if jurisdiction is sustainable not only because of diversity but because the claim is pendent to a § 1331 claim. Surely the Court did not mean to bring about through "pendent" jurisdiction the venue difficulty it had sought to avoid by holding § 1331 inapplicable.

³² 358 U.S. at 381.

³³ 358 U.S. at 381. In view of the Court's holding on the merits that neither the Spanish Line nor Garcia was liable by virtue of the employment relation, or control of the vessel, the reference to the contingency that "a cause of action be found to exist" seems to suggest that the Court conceived of the "pendent" jurisdiction as extending to the claims for simple maritime tort as well as to those based on the employment relation. Probably the better explanation is that this choice of language was made because of the structure of the opinion: at this point the Court had not treated the question on the merits; the contingency referred to was not a finding by the district court on remand that a cause of action was stated against Garcia, International, and Quin for simple maritime tort, but a finding by the Supreme Court in part II of its opinion that a cause of action was stated under the general maritime law against the Spanish Line or Garcia because of the employment relation.

pendent jurisdiction? If the Court did not decide that issue, what did it decide when it ruled that as to the claims under general maritime law the case was not one arising under federal law? It is safe to say that the only reason why counsel for the plaintiff put forward the theory that the general maritime law claims against the Spanish Line were cognizable under Section 1331, or by virtue of being ancillary to the Jones Act claim, was that thereby they expected to secure the right to jury trial on those claims. The conflict between the circuits, despite the elaborate intricacy of the arguments involved, concerned a single practical question: the propriety of jury trial on the maritime law counts. Yet we are told that the Court, while resolving the conflict, has left open the practical question at issue.

In as much as the claims for unseaworthiness and maintenance and cure were to be dismissed on the merits, Mr. Justice Frankfurter could well say that it was unnecessary to consider the effect of the jurisdictional ruling on the right to jury trial. But in that case, why consider jurisdiction "at law" at all? Mr. Justice Frankfurter gave this answer: "Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admiralty, as long as the complaint also properly alleges a claim under the Jones Act."³⁴ The reference, clearly, is to the claims asserted against the Spanish Line and Garcia under the general maritime law.

The question whether the complaint stated a cause of action as to these claims may be subdivided thus: (1) whether, in view of the foreign aspects of the case, the general American maritime law was applicable to impose liability on the Spanish Line—part of the conflict-of-laws question; (2) whether Garcia was liable for unseaworthiness and maintenance and cure as owner or employer; and perhaps (3) whether a cause of action for simple maritime tort had been stated against Garcia. The district court had not decided the first of these questions (unless such a decision be thought implicit in its holding that the Jones Act was not applicable); it had held only that as a matter of discretion, on *forum non conveniens* grounds, it would not retain the case for trial in admiralty.³⁵ Had it retained the case for trial in admiralty it would presumably have reached the question whether the general American maritime law could be applied and, if not, whether the plaintiff could recover under Spanish law. In answer to the second question the district court had ruled that Garcia was a mere husbanding agent and not liable for unseaworthiness and maintenance and cure. Neither court ruled on the third question, that being left for determination on remand. But since there was diversity of citizenship between the plaintiff and Garcia, and since the jurisdictional amount was in controversy between these parties, neither Section 1331 nor the "pendent" theory was necessary to sustain jurisdiction "at law" of the case against Garcia.

³⁴ 358 U.S. at 381.

³⁵ In so doing, did not the district court exercise its admiralty powers, though "sitting as a court of law?"

It follows that the sole reason for the Court's lengthy and contentious disposition of the jurisdictional question was to support the authority of the district judge to resolve the conflict-of-laws question; and, since the district court had not passed on that question, its jurisdiction to do so was involved at best only indirectly—perhaps in connection with its authority, on remand, to enter a judgment on that question in conformity with the opinion of the Supreme Court.³⁶

If this interpretation is correct it is matter for pause and reflection. There is only one United States district court in each judicial district. It may have one or more judges; in either case, each is equally competent as a judge administering the common law, a chancellor administering equity, or a doctor administering the maritime law. There are, indeed, difficulties attending the question of what law—state or federal—applies in maritime cases; but one thing is reasonably clear: In all maritime cases the same law, state or federal, is applied whether the action is in a state court or a federal court, and, if in a federal court, whether on the “law side” or the “admiralty side.”³⁷ There are, indeed, differences in procedure between a proceeding “at law” and a proceeding “in admiralty.” The federal courts alone exercise the admiralty jurisdiction. In those courts that jurisdiction is exercised (1) by the judge, sitting without a jury, and (2) pursuant to the Admiralty Rules. In a civil action the judge may proceed with a jury—though he does not necessarily do so—and the Rules of Civil Procedure are applicable. Here the United States district judge was sitting without a jury. By virtue of the admiralty jurisdiction he had complete authority to pass upon the question of conflict of laws with reference to the general maritime law;³⁸ and it seems clear that there is nothing in the Admiralty Rules

³⁶ Cf. Mr. Justice Brennan's comment in dissent: “I must say I cannot understand a sort of jurisdiction that allows the federal courts to make a preliminary exploration of the merits of the case, and a binding adjudication upon them, but which may not allow them to go further.” 358 U.S. at 413.

It may be that, overlooking the diversity basis for jurisdiction “at law” over the claims against Garcia, the Court was also concerned with justifying the district judge's determination of the factual question of Garcia's relation to the vessel. This is particularly likely in view of the plaintiff's insistence that his right to jury trial had been infringed. The question was not only whether the court as a law court could decide that question, but whether it could do so *without* a jury. The latter part of the question the Court answered by treating the issue as one appropriate for summary judgment. 358 U.S. at 357, n. 4.

³⁷ *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *United Pilot's Ass'n. v. Halecki*, 358 U.S. 613 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 374 *et seq.* (1957).

³⁸ Note that Judge Sugarman's jurisdiction to determine the conflicts question with reference to the Jones Act was not in question, the court clearly having jurisdiction “at law” so far as that Act was concerned. It is passing strange that his authority to decide the same question with reference to the non-statutory law was doubted (and that it would apparently be denied in the absence of the Jones Act claim), since “[T]he similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes.” 358 U.S. at 382.

which would have been inconsistent with his determination that there was no genuine issue of fact as to the relationship of Garcia to the vessel.³⁹ Any challenge to the district court's jurisdiction to make the determinations on the merits which were made could have been adequately met simply by reference to the court's admiralty jurisdiction.

Since it was not necessary to determine whether the claims under the general maritime law against the Spanish Line and Garcia based on the employment relation should be submitted to a jury—no cause of action having been stated—the rulings as to jurisdiction under Section 1331 and pendent jurisdiction were unnecessary to the decision unless one assumes that the admiralty and civil powers of the district court cannot be exercised in a single proceeding, and, indeed, that the judge is impotent so far as his admiralty powers are concerned unless the Silver Oar is properly in place.⁴⁰ Moreover, if the question of the right to jury trial was not determined, we are confronted with an anomaly: although certiorari was granted in part to resolve the conflict among the circuits,⁴¹ and although the Court reviewed thoroughly the arguments involved in the conflict, the real conflict is left unresolved. Oddly enough, however, the truth seems to be that even though it was not necessary to determine the right to jury trial, and even though the rulings as to Section 1331 and pendent jurisdiction were not necessary for any purpose, the issue as to the right of jury trial *was* resolved for all practical purposes, and resolved, moreover, in a beneficial way from the standpoint of law administration. The lack of clarity as to this point and the difficulties involved in its exposition are alike traceable to the tendency to speak of the admiralty and civil powers of the district court as being mutually exclusive, as if there were two separate courts. A clear recognition of the artificiality of this concept would have simplified the problem before the court and reduced the area of disagreement among the justices. The discussion immediately following will trace the influence of this concept.

After construing Section 1331⁴² in the light of its history, the Court turned

³⁹ The Admiralty Rules do not refer to judgment on the pleadings nor to summary judgment; *cf.* FED. R. CIV. P. 12(c), 56. Indeed, it has been stated that "Admiralty does not employ . . . the pretrial procedure, the summary judgment . . . as those proceedings are set forth in the Civil Rules." 2 BENEDICT, ADMIRALTY 47-48 (6th ed. 1940). By virtue of his admiralty jurisdiction, however, Judge Sugarman had broader authority than that conferred by Rule 56 of the civil rules: as sole trier of factual issues, he was competent not only to determine that there was no genuine issue of fact, but to resolve genuine issues of fact. *Cf.* FED. R. CIV. P. Rule 41(b); 6 MOORE, FEDERAL PRACTICE 2014-15 (2d ed. 1953).

⁴⁰ The negative implication of the passage from the majority opinion quoted in text at note 34 *supra*, is that a district judge has no jurisdiction to determine whether a cause of action under the general maritime law has been stated, if jurisdiction has been invoked by a complaint at law rather than a libel in admiralty, in the absence of a claim under the Jones Act (and in the absence of other basis for jurisdiction "at law").

⁴¹ 358 U.S. at 358, 360.

⁴² The decision is not a construction of Article III of the Constitution and is not placed on constitutional grounds. The authority of Congress to treat maritime cases as cases arising under federal law is expressly recognized. 358 U.S. at 379.

its attention to the consequences of holding that that section confers on the district courts jurisdiction of cases under the general maritime law. In two respects the Court found that such consequences would be drastic, revolutionary, and disruptive: (1) with respect to the procedure in admiralty and (2) with respect to the allocation of competence between the state and national governments in maritime matters.

The effect on procedure in admiralty cases is described as "a drastic innovation,"⁴³ "a revolutionary procedural change,"⁴⁴ a "drastic change,"⁴⁵ and as "far-reaching [and] dislocating."⁴⁶ In fact, the effect on procedure "*in admiralty*"—if one may for the occasion employ the Court's own concept of mutually exclusive jurisdiction—would be precisely nil. The exact effect of a holding that maritime causes are cognizable under Section 1331 would be to permit certain cases which are within the saving-to-suitors clause, and which may now be brought in a state court, to be brought on the "law side" of the federal court. Cases not within the saving clause, and cases which, though within the saving clause, are brought "in admiralty," would not be affected. In such cases the judge would still sit without a jury, and the Admiralty Rules would still apply. The situation would be precisely what it now is, and has been from the beginning, with respect to cases within the saving-to-suitors clause in which there is diversity of citizenship between the parties. A case which would otherwise be cognizable in the federal court only in admiralty, without a jury, is made cognizable in the same court—probably with a jury. The historic mode of trial in admiralty has not been affected at all by the fact that the district courts have jurisdiction of maritime causes under Section 1332, and it would not be affected at all if the courts had jurisdiction of such causes under Section 1331.

The Court's concern over the effect on admiralty procedure seems to have resulted from a tacit assumption which almost certainly would have been rejected if it had been made explicit: that, if cases under the general maritime law are cases "arising under the Constitution or laws of the United States," a right to trial by jury necessarily follows. But the right to jury trial extends only to cases at common law.⁴⁷ It does not extend to suits which may be, but are not, brought at common law. There is no right to jury trial in admiralty even though the action might have been brought at law under the saving clause. If the parties to a libel in personam are of diverse citizenship the defendant cannot demand a jury trial even though the jurisdictional amount is in controversy;⁴⁸ and the opinion of the Court itself refers to evidence that there are many proceedings

⁴³ 358 U.S. at 369.

⁴⁴ *Ibid.*

⁴⁶ *Ibid.*

⁴⁵ 358 U.S. at 370.

⁴⁷ See notes 16–18 *supra*.

⁴⁸ See generally 5 MOORE, FEDERAL PRACTICE 269 *et seq.* (2d ed., 1951). As to the possibility of transfer to the civil docket, see notes 265, 284, 286 *infra*.

in admiralty in which the case unquestionably arises under "the Constitution or laws of the United States" and in which there is no right to a jury trial.⁴⁹

A possible consequence of the rejected view of Section 1331—though by no means a certain one—would be a reduction in the number of causes tried "in admiralty" in the federal courts. Mr. Justice Frankfurter makes the point in interesting fashion:

If we are now to attribute such a result to Congress the sole remaining justification for the federal admiralty courts which have played such a vital role in our federal judicial system for 169 years will be to provide a federal forum for the small number of maritime claims which derive from state law, and to afford the ancient remedy of a libel *in rem* in those limited instances when an *in personam* judgment would not suffice to satisfy a claim.⁵⁰

Here is an excellent illustration of the seductive influence of thinking in dichotomous terms of the admiralty and civil jurisdictions. Just what are the "federal admiralty courts" in question? Are they not the United States district courts? And what is the grievous detriment with which they are threatened? Not that maritime cases will be withdrawn from them, but that they will be given two grounds instead of one for jurisdiction of maritime cases⁵¹—or three instead of two, if the diversity jurisdiction is taken into account. Does the Court mean to suggest that the district courts can play a vital role in the federal judicial system with respect to maritime matters only when they sit without a jury and proceed according to the Admiralty Rules—with the Silver Oar on the bench? The fact is that the ruling of the Court will have more of a tendency to reduce the number of maritime cases filed in the district courts than would the rejected interpretation of Section 1331. Leaving the Jones Act cases aside, the plaintiff who desires a jury trial in his maritime case, and who cannot get a jury in the district court because he cannot establish jurisdiction at law, may sue in a state court under the saving clause and have a jury. The rejected ruling on Section 1331 would presumably have entitled him to a jury in the district court, increasing his incentive to file there. In the typical seaman's injury case, leaving aside the effect of the Court's ruling on "pendent" jurisdiction, the plaintiff in the absence of diversity has two choices: to sue in the state court with a jury, and to

⁴⁹ See 358 U.S. at 371, n.28, referring to the Suits in Admiralty Act, 41 Stat. 525 (1920), 46 U.S.C. §§ 741-752 (1952), and the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 761-767 (1952). Proceedings under these acts are not within the saving clause.

⁵⁰ 358 U.S. at 369. The paradoxical statement that claims resting on state law would remain within the admiralty jurisdiction (as distinguished from the federal civil jurisdiction in the absence of diversity) is explained by the fact that, as the Court emphasized by another decision on the same day, there are maritime causes in which the right of action is based on state law. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). The reference to libels *in rem* is explained, of course, by the fact that such proceedings are cognizable exclusively in admiralty—or, at least, in the district courts.

⁵¹ "The provision of the Act of 1875 with which we are concerned was designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789." 358 U.S. at 368.

sue in the federal court with no assurance of jury trial on all the issues. If jurisdiction were recognized under Section 1331 he would have three choices: to sue in the federal court without a jury trial, to sue in the federal court (presumably) with a jury, or to sue in the state court with a jury. In the case before the Court, Romero was contending for the right to sue in the federal court with a jury. When this right was denied him by the district court—when his choices were limited as they were ultimately limited by the Supreme Court's decision as to Section 1331—he did not elect to sue in the federal court without a jury. He filed suit in the state court.⁵² Thus the denial of the right to jury trial in the district court led this plaintiff, as it would presumably lead others similarly situated, to take his case away from the “federal admiralty court.” Does the Court mean to suggest that, despite the “vital role” of the federal district courts in maritime matters, it is better for maritime cases not to be tried in the federal courts at all than for them to be tried on the “law side” of those courts, with a jury? Furthermore, if the Court's ruling on “pendent” jurisdiction means that the general maritime law matters may be submitted to the jury, and that the trial may proceed under the Rules of Civil Procedure, then that ruling will have precisely the same effect, so far as seamen's injury cases are concerned, on the business of the “admiralty side” as would the contrary ruling on Section 1331. Thus the net effect of the rejected ruling as to Section 1331 would be that certain actions, other than actions for seamen's injuries, which would otherwise have been triable only in a state court or in a federal court without a jury, would be triable in a federal court with a jury if the plaintiff should so elect and if the jurisdictional amount were in controversy. I find this threat to the vital function of the “federal admiralty court” less than alarming.

The rejected interpretation of Section 1331 would also, according to the Court, “have a disruptive effect on the traditional *allocation of power over maritime affairs* in our federal system.”⁵³ It would be a “disruption of principle”⁵⁴ and would “eviscerate the postulates of the saving clause.”⁵⁵ It would “disrupt traditional maritime policies and quite gratuitously disturb a complementary, historic interacting federal-state relationship.”⁵⁶ Specifically, the objections are that such an interpretation would (1) detract from the role of the state courts in maritime litigation and (2) detract from the contribution of state law to the corpus of maritime law.

Still more specifically, the first of these objections is predicated on the proposition that saving-clause actions filed in state courts which are not now removable would be removable under Section 1441 of the Judicial Code (if the ju-

⁵² Brief for Respondent Quin Lumber Co., p. 2, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). Of course, this strategy availed him little, since the nonliability of the Spanish Line and Garcia is now *res judicata*.

⁵³ 358 U.S. at 371 (emphasis supplied).

⁵⁵ *Ibid.*

⁵⁴ 358 U.S. at 372.

⁵⁶ *Id.* at 375.

risdictional amount were present).⁵⁷ In the first place, this concern for the function of state courts seems at odds with the concern previously expressed for the function of the "federal admiralty courts." Moreover, the function of the state courts is impaired, in principle, no more by removal under Sections 1331 and 1441 than by removal for diversity of citizenship. If the function of state courts is not impaired by the option of the plaintiff to proceed in a federal court in admiralty, how is it impaired by the option of the defendant to remove from the state to the federal court? The concern is not merely for "the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal . . .," but also to prevent "considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters."⁵⁸ But, as Mr. Justice Brennan pointed out in dissent, the Court had long since held that the remedies saved to suitors by the saving clause were saved "to suitors, and not to the state courts."⁵⁹ Where jurisdiction is concurrent—i.e., where the choice between the federal and state forums is within the control of one party or

⁵⁷ 358 U.S. at 371-72. The assumption that such actions are not removable was made without citation of authority. A saving-clause case is, by definition, a "civil action" (as distinguished from a suit in admiralty) and one of which "the district courts of the United States have original jurisdiction" (in admiralty). 28 U.S.C. § 1441(a). If "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought," 28 U.S.C. § 1441(b), why should not the case be removable to the "admiralty side"? A possible answer would be that Congress did not intend thus to destroy the right given the plaintiff by § 1333(1) to choose his forum (*Hill v. United Fruit Co.*, 149 F. Supp. 470 (S.D. Cal. 1957)); yet the suggested construction would do no more than qualify the right in favor of non-resident defendants. To hold saving-clause cases removable where the requirements of diversity are met is a qualification of exactly the same kind. *Cf. Ross v. Pacific S.S. Co.*, 272 Fed. 538 (D. Ore. 1921). Maritime cases arising under federal statutes (e.g., the Carriage of Goods by Sea Act) have been held removable, *Crispin Co. v. Lykes Bros. S.S. Co.*, 134 F. Supp. 704 (S.D. Tex. 1955), though within the saving-clause. Removability on the ground of original jurisdiction in admiralty has been sustained in *Davis v. Matson Navigation Co.*, 143 F. Supp. 537 (N.D. Cal. 1956), and reaffirmed by way of dictum in *Crawford v. East Asiatic Co.*, 156 F. Supp. 571 (N.D. Cal. 1957).

Mr. Justice Frankfurter said: "The policy of unremovability of maritime claims brought in the state courts was incorporated by Congress into the Jones Act. See *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952)." A somewhat less cryptic statement would be that in the Jones Act Congress incorporated the policy of unremovability of actions brought in state courts by certain employees against their employers. See S. REP. NO. 1830 (to accompany H.R. 11102), 2 U.S. CODE CONG. & AD. NEWS 3099, 3105-06 (1958). That there is a broad policy of unremovability of maritime cases, or even of seamen's claims against their employers other than under the Jones Act, seems doubtful.

Contrary to an intimation in the *Davis* case (143 F. Supp. at 538), the argument for removal on the basis of original jurisdiction in admiralty is not dependent on the 1948 revision of the Judicial Code. A maritime action brought under the saving clause is "a suit of a civil nature, at law or in equity." If it were a suit in admiralty it could not be brought in a state court. *Cf. 28 U.S.C. § 71* (1940).

⁵⁸ 358 U.S. at 371-2.

⁵⁹ U.S. at 406, quoting from *The Belfast*, 74 U.S. (7 Wall.) 624, 644 (1868) (emphasis supplied). See also *Panama R.R. v. Johnson*, 264 U.S. 375, 390 (1924): "The course of legislation . . . always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace."

the other, it is difficult to infer a national policy, relating to distribution of judicial functions, against giving his adversary also a degree of control over the choice. The weakness of the argument is most apparent when the majority opinion appeals for support to "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of the jurisdictional statutes."⁶⁰ The basis for that reluctance is stated in the Court's quotation from Mr. Justice Stone: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."⁶¹ But here there is no possibility of improper encroachment on state concerns.⁶² All maritime causes may as a matter of course be brought in a federal rather than a state court; and, while the states have a contribution to make to the development of maritime law, that subject is unquestionably one with respect to which national policy is supreme.

The argument that the rejected interpretation of Section 1331 would somehow impair the contribution of the states to the development of the corpus of maritime law is convincingly answered by Mr. Justice Brennan.⁶³ Whatever the source of the law applied in maritime cases—whether state or federal—that law is the same whether the action is tried in the state or the federal court.⁶⁴ The fact is that the only major significance of the rejected ruling as to Section 1331 so far as maritime cases are concerned would have been to allow the plaintiffs in certain cases within the saving clause to secure jury trial in a federal court where they now have only the choice between a state court with a jury and a federal court without one.⁶⁵ Practically speaking, the only "jurisdictional" issue before the Court concerned the right to jury trial (though a decision of that question was rendered unnecessary by the disposition of the issues on the merits and by the ruling on the diversity question as regards the claims against the American defendants). The Court has decided that issue for cases of a type not before it—*i.e.*, cases based purely on the general maritime law. For those cases, if diversity is not present, Section 1331 provided the only apparent basis for a claim to jury trial in the federal court. And, despite its disclaimer, the Court has probably also decided that issue, in the opposite way, for the type of case that was before it—the seaman's three-count claim against the shipowner-employer for personal injuries.

⁶⁰ 358 U.S. at 379.

⁶¹ *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

⁶² *Cf.* Brennan, J., dissenting, 358 U.S. at 408.

⁶³ "[S]uch legislative competence as they possess remains to the States regardless of what may happen to the number of maritime cases in their courts; the view that I have urged does not detract one iota from the legislative competence of the States." 358 U.S. at 410.

⁶⁴ See cases cited note 37 *supra*.

⁶⁵ For the sake of emphasis this statement omits other less significant consequences: the applicability of the Rules of Civil Procedure instead of the Admiralty Rules, and certain differences relating to appeals. See notes 80, 101, 112, 118, 137, 144, 146, and 201 *infra*.

III. THE CONFLICT BETWEEN CIRCUITS

The small number of saving-clause cases tried in the state courts, cited by Mr. Justice Brennan to minimize the effect which removability would have upon the role of the state courts in maritime cases,⁶⁶ was cited by Mr. Justice Frankfurter to negative "the pressure of any practical consideration" for construing Section 1331 as extending to cases under the general maritime law.⁶⁷ Mr. Justice Frankfurter also noted that the pressures which led to the Act of 1875, investing the district courts with federal-question jurisdiction, did not suggest, "even remotely, the inclusion of maritime claims within the scope of that statute."⁶⁸ It may be conceded that Congress, in 1875, did not enact the statute for the purpose of conferring on the district courts jurisdiction of maritime claims; they had had such jurisdiction since 1789. It is also true that there would be little point in construing Section 1331 as extending to maritime cases merely for the purpose of making them—or some of them—removable.⁶⁹ It does not follow that the support which has developed in the past decade for such a construction was mere academic theorizing, unmotivated by the pressure of any practical consideration. It developed in response to the need to find a workable and just solution to the problem of how seamen's injury cases were to be tried. This problem did not present itself until the enactment of the Jones Act in 1920, and did not become acute until experience and precedent had established that the three-count complaint was standard operating procedure. This circumstance detracts somewhat from the persuasiveness of the Appendix to the majority opinion, listing 66 treatises—all published in 1950 or earlier—which contain no mention of the possibility that maritime law cases are cognizable by virtue of the "arising under" jurisdiction.⁷⁰

The first decision by a court of appeals on the application of Section 1331 to cases based on the general maritime law was that of the Third Circuit in *Jordine v. Walling*.⁷¹ That was a seaman's three-pronged action for personal injuries brought in two counts, the Jones Act and the doctrine of unseaworthiness being invoked together in support of the damages claimed in the first count. After a mistrial the injured seaman died and his widow was substituted

⁶⁶ 358 U.S. at 409-410.

⁶⁷ 358 U.S. at 372.

⁶⁹ Cf. note 57 *supra*.

⁶⁸ 358 U.S. at 368.

⁷⁰ See 358 U.S. at 370, 385.

⁷¹ 185 F.2d 662 (3d Cir. 1950). Just four days earlier, in what Mr. Justice Frankfurter accurately characterizes as a dictum (358 U.S. at 369), the First Circuit had expressed the opinion that cases under the general maritime law were cognizable under § 1331. *Jansson v. Swedish American Line*, 185 F.2d 212, 217-18 (1st Cir. 1950). In as much as the *Jordine* case had been in litigation for many months prior to the decision of the *Jansson* case, it is not strictly accurate to say that until Judge Magruder's dictum "scholars and lawyers alike made the unquestioned assumption that the original maritime jurisdiction of the federal courts had, for all practical purposes, been left unchanged since the Act of 1789." 358 U.S. at 369. The question was left open in *Pope and Talbot, Inc. v. Hawk*, 346 U.S. 406, 410 n.4 (1953).

as administratrix.⁷² The case was tried to a jury. At the close of the plaintiff's case the judge dismissed the claim under the Jones Act, but submitted the issue of maintenance and cure to the jury and entered judgment for the plaintiff on the jury's verdict.

At the outset of his opinion Judge Maris stated the conclusions of the court of appeals: (1) Section 1331 did not confer on the district court jurisdiction of the claim for maintenance and cure; and (2) the doctrine of pendent jurisdiction did not apply to the claim for maintenance and cure even though the court had jurisdiction of the claim under the Jones Act. The concept of mutually exclusive jurisdictions dominates the discussion. One reads the opinion with bated breath, wondering whether the court can really reach the result which seems unavoidably indicated. Will the court really dismiss this action *for lack of jurisdiction*? Will it require the plaintiff to file a new action, with all the risk, delay, and expense thereby entailed—a new action in the very court to which he has already resorted, and which has been held without jurisdiction? The question, as stated by the court, was “whether the district court had jurisdiction, in the absence of diversity of citizenship, to entertain the plaintiff's cause of action for maintenance and cure in a civil action brought and tried under the Federal Rules of Civil Procedure.”⁷³ The court recognized that the district court clearly had jurisdiction of the claim under Section 1333; but “the jurisdiction thus conferred is to be [not “is traditionally,” or “should be”] exercised . . . by the district judge without a jury.”⁷⁴ With respect to pendent jurisdiction the court regarded maintenance and cure as a separate cause of action, but conceded that the unseaworthiness claim, as a merely alternative ground for the claim asserted under the Jones Act, would be within the ancillary jurisdiction.⁷⁵ Only at the very end is the reader reassured as to the claim for maintenance and cure. It would be “quite unjust and unnecessary” to order dismissal, since the court unquestionably had jurisdiction “upon its admiralty side.”⁷⁶ The court accordingly ordered transfer of the case to the admiralty docket, thus curing the “jurisdictional” defect.⁷⁷ Moreover, the court recognized that a new trial was unnecessary; the judge who had tried the case “at law” was authorized to determine the case on the evidence already presented to him. On remand Judge Bard, who had presided at the trial, entered an order pursuant to which counsel

⁷² From this point on the claim based on unseaworthiness drops out of consideration (except for the court of appeals' later reference to it, *obiter*, in connection with pendent jurisdiction). Presumably it was dropped on the theory that the remedy provided by the Jones Act precludes recovery for wrongful death resulting from unseaworthiness (see GILMORE & BLACK, *THE LAW OF ADMIRALTY*, 302-03 (1957))—a theory based on a dictum in *Lindgren v. United States*, 281 U.S. 38 (1930). See Currie, *Review of Gilmore & Black, The Law of Admiralty*, 26 U. CHI. L. REV. 686 (1959).

⁷³ 185 F.2d at 665.

⁷⁵ 185 F.2d at 670.

⁷⁴ 185 F.2d at 666.

⁷⁶ 185 F.2d at 671.

⁷⁷ Fortunately, the district to which the case was remanded—the Eastern District of Pennsylvania—maintains a separate admiralty docket.

stipulated certain facts, and an order was entered fixing the rate of maintenance at \$6 per day. Subsequently, during the summer vacation, another judge entered a consent order awarding the seaman \$2,443.50 for maintenance and cure.⁷⁸

The decision of the court of appeals meant no more than that it was error to submit the issue to the jury; it should have been decided by the judge. Why could not the court have treated the problem simply as one of procedure instead of talking in dangerously threatening terms of "jurisdiction"?

Since things like this had been going on in the courts for some years before the *Romero* case was decided, it is hardly accurate to suggest that there was no "pressure of any practical consideration" for asserting jurisdiction under Section 1331.⁷⁹ The conceptualism of the *Jordine* case must have caused serious concern to lawyers representing injured seamen. The court's leniency in permitting retention of jurisdiction on transfer to the admiralty docket might have been a plain, common-sense disposition which could be anticipated in other cases, or it might have been influenced by the fact that the court of appeals had previously held that the maintenance and cure claim could be submitted to the jury as ancillary to the Jones Act claim⁸⁰—in which case it might be that, after the overruling of the earlier decision, counsel would be expected to observe the jurisdictional compartmentalization of the district courts on pain of actual dismissal.

The question then came before the Court of Appeals for the First Circuit, which reached a contrary result in *Doucette v. Vincent*: actions under the general maritime law are cognizable under Section 1331.⁸¹ Again the case was a seaman's three-pronged action for personal injuries, the first count being "couched in such general terms that it [could] be construed as either under the general maritime law for unseaworthiness or under the Jones Act . . . for negligence."⁸² The second count was for maintenance and cure. At the close of

⁷⁸ Letter from Gilbert W. Ludwig, Esq., Clerk of the United States District Court for the Eastern District of Pennsylvania, to Brainerd Currie, June 15, 1959.

⁷⁹ See text at note 67 *supra*.

⁸⁰ *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942). In that case the jurisdictional question was raised although in the district court the trial was before a judge sitting without a jury. The only reason the court considered it was that, if the case was cognizable as a civil action instead of in admiralty, the function of the court on appeal would be "slightly different." *Id.* at 25. But the question of the scope of review has nothing to do with "jurisdiction." Under the practice approved by the court of appeals in the *Jordine* case—whereby the civil action under the Jones Act and the proceeding in admiralty for maintenance and cure are tried in a single proceeding, the judge reserving to himself decision of the admiralty claim (see 185 F.2d at 671)—similar questions as to scope of review must be encountered, and must be disposed of simply as questions of procedure.

⁸¹ 194 F.2d 834 (1st Cir. 1951). This was hardly surprising, in view of the court's earlier dictum, see note 71, *supra*. According to Judge Magruder, that dictum had been carefully considered and had been intended for the guidance of district courts and litigants in the First Circuit. 194 F.2d at 839-40. Resort to such a device for settling the law is suggestive of very considerable practical difficulties.

⁸² 194 F.2d at 836.

the evidence counsel for the plaintiff waived any claim for negligence; the jury found for the defendant with respect to unseaworthiness and made a special finding with respect to the duration of the period during which maintenance and cure was payable.⁸³ The court of appeals raised the question of "jurisdiction" on its own motion: "[The] case necessarily presents a question whether the district court had jurisdiction, sitting as a court of law with a jury, not as a court of admiralty. It is our duty to dispose of this question, though it was not raised or argued by the parties to this appeal."⁸⁴ Here is another startling instance of dichotomous thinking. It is surely true, as Judge Magruder himself recognized in his separate opinion for the court on the "jurisdictional" question, that "[t]he only important difference in trying the case on the law side under 28 U.S.C. Section 1331 is that the plaintiff gets a jury trial. . . ."⁸⁵ Appellate courts do not customarily raise on their own motion mere questions of procedure at the trial when no error is assigned by the parties. The case cited by the court for its "duty" to raise the question⁸⁶ concerned the division of authority between state and federal courts, with respect to which the federal courts are properly zealous at all stages of litigation to avoid encroachment. The *Doucette* case involved no such question, since a maritime claim is cognizable in the district court irrespective of one's views as to the proper construction of Section 1331.⁸⁷

The holding that cases under the general maritime law are cognizable under Section 1331 clearly vindicated the jurisdiction of the district court with respect to both counts, since in each the jurisdictional amount was in controversy.⁸⁸ Frequently, however, the claim for maintenance and cure is modest, especially since many injured seamen are cared for at government expense in Public Health hospitals;⁸⁹ it seems improbable that the claim, honestly stated, will often exceed the new jurisdictional amount of \$10,000.⁹⁰ How would the mode

⁸³ Apparently the court, rather than the jury, determined the amount payable for maintenance and cure. 194 F.2d at 839.

⁸⁴ 194 F.2d at 836.

⁸⁵ 194 F.2d at 846.

⁸⁶ *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

⁸⁷ The ruling in *Doucette* thus might be characterized as dictum with as much justification as was the statement in *Jansson*, note 71, *supra*; and the court's repetition of its deliberate effort to create an occasion for deciding the question suggests again that there must have been a real and practical need for settling the mode of trial.

⁸⁸ 194 F.2d at 836. See note 333 *infra*. On the theory that the case was properly triable "at law" the procedure followed in the district court may have encroached on the plaintiff's right to jury trial. In all probability the judge's action in not submitting to the jury the question of the amount recoverable as maintenance and cure was influenced by his belief that as to that claim the proceeding was in admiralty. One may readily agree that the plaintiff waived his right by not objecting to this procedure, just as the defendant waived his possible right to have the entire case tried by the court. It is interesting, however, that the court of appeals did not suggest that the district judge, purporting to function as a court of admiralty, improperly decided part of the maintenance and cure issue.

⁸⁹ See 2 NORRIS, *THE LAW OF SEAMEN* § 586 *et seq.* (1952).

⁹⁰ Act of July 25, 1958, 72 Stat. 415, 28 U.S.C. § 1331.

of trial in the First Circuit be affected if the jurisdictional amount were in controversy with respect to the major counts but not with respect to maintenance and cure?⁹¹ Judge Magruder was ready with a dictum for that situation. In a series of earlier cases the court had approved the joinder of counts under the Jones Act and for maintenance and cure. In one of them the amount claimed for maintenance and cure had been less than the jurisdictional amount. The court of appeals had not questioned jurisdiction of that count. Therefore, said Judge Magruder in a footnote, jurisdiction must have been sustainable on the basis of "pendent" jurisdiction—a doctrine "which has been given a liberal interpretation in this circuit."⁹² Thus the First Circuit differed with the Third with respect to both Section 1331 and "pendent" jurisdiction. As we have seen, the Supreme Court's decision sustains the view of the Third Circuit as to Section 1331 and that of the First as to "pendent" jurisdiction.

One other Magruder dictum is noteworthy. Where it is necessary to rely on a state statute in order to recover for a maritime death, the action cannot be brought under Section 1331 because the right is created by the state statute, such supplementation of the maritime law being "not commanded—only permitted" by the Constitution.⁹³ The practical effect of this rather metaphysical distinction as to the source of the right would be to deny jury trial in cases under the general maritime law involving the deaths of longshoremen and harbor workers, passengers, and other invitees, whose administrators cannot sue, as the administrators of seamen can, under the Jones Act. It is difficult to see why the right to jury trial should depend upon whether the injury results in death;⁹⁴ and if the court had considered the question in proper perspective as one of procedure, it might have been able to find a more satisfying solution than the one to which it felt itself compelled by its jurisdictional premises. At any rate, stating the problem in proper perspective would invite and facilitate legislative solution, whereas treating it in terms of jurisdiction, with constitutional overtones, obscures and discourages recourse to such possibility as there may be of congressional action.

The Second Circuit aligned itself with the Third in *Paduano v. Yamashita Kisen Kabushiki Kaisha*.⁹⁵ In holding that the claims based on the general maritime law were not cognizable under Section 1331 the court not only employed the dichotomous concept of jurisdiction, but carried that concept to its ruthless extreme: it actually affirmed a judgment of dismissal for want of jurisdiction because the case was filed on the "civil side," although the district court plainly had jurisdiction under Section 1333.⁹⁶ If a plaintiff files suit in the

⁹¹ See note 333 *infra*.

⁹² 194 F.2d at 840, n. 5. Again the court's determination to clean up the question of mode of trial is noteworthy.

⁹³ 194 F.2d at 843, n.7.

⁹⁴ *But cf.* The *Tungus v. Skovgaard*, 358 U.S. 588 (1959).

⁹⁵ 221 F.2d 615 (2d Cir. 1955).

⁹⁶ The consequences of dismissal are probably less drastic in maritime cases than in others, since in general there is no statute of limitations and only the doctrine of laches bars the suit

wrong district—*i.e.*, in a district in which venue is improper—the court may very easily transfer the action to a proper district.⁹⁷ Here, because the plaintiff sued on the wrong “side” of the District Court for the Eastern District of New York—*i.e.*, the side without the Silver Oar—the penalty was dismissal, though the court had before it the decision of the Third Circuit in the *Jordine* case, approving transfer to the admiralty docket.⁹⁸

For a modern student of the law it is difficult to conceive of the jurisdiction of a district court as anything but integral, however fractional the language of the grant. The tendency of the courts to think of the difference between the admiralty and the civil powers of the district courts as being jurisdictionally distinct, however, has deep roots. Chief Justice Marshall, whose views on the difference between the admiralty jurisdiction and that extending to cases arising under federal law strongly influenced the decision in the *Romero* case,⁹⁹ was guilty of the following pronouncement in *The Sarah*:

Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a Court of Chancery with a Court of common law.¹⁰⁰

for lapse of time. 3 BENEDICT, ADMIRALTY §§ 462, 463. While the analogy of the state statute of limitations applicable to similar actions is an important consideration, presumably a court would not charge against the plaintiff the time spent in litigating a substantial question of jurisdiction on the “civil side.” *Cf. Lincoln v. Cunard S.S. Co.*, 221 Fed. 622 (2d Cir. 1915). Nevertheless, in the generalized situation unnecessary dismissal may subject the plaintiff to additional expense, delay, and risk—including the risk of inability to serve process a second time.

⁹⁷ 28 U.S.C. § 1406a.

⁹⁸ There was no motion to remand for transfer to the admiralty docket. See *Bartholomew v. Universe Tankships, Inc.*, 203 F.2d 437, 443 (1959). After dismissal of the civil action, Paduano filed a libel *in personam* in the Southern District of New York. The case was settled at pre-trial. Letter from Kirlin, Campbell & Keating, of New York, counsel for defendants, to Brainerd Currie, June 18, 1959. *Cf. note 39 supra*.

This is the only one of the five cases immediately involved in the conflict among the circuits which was not a seaman's injury action. (Although the Supreme Court in *Romero* did not note the fact, the Seventh Circuit was also involved in the conflict. See *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82 (7th Cir. 1951), discussed in text at note 290 *infra*.) The injured plaintiff was a longshoreman; hence there was no claim under the Jones Act to sustain “pendent” jurisdiction of the claims under the general maritime law, which were for unseaworthiness and simple negligence. Hence, also, the problem of the mode of trial characteristic of the seaman's three-count action was not presented.

The concurring opinion of Dimock, J. (221 F.2d at 619) is unique in its suggestion that the saving clause excludes not only from the exclusiveness of the grant of admiralty jurisdiction to the district courts but from the grant itself, so that only the state courts have jurisdiction of saving-clause cases. Although that proposition might have helped sustain the majority in *Romero* in its concern to protect the function of state courts, the Supreme Court wisely ignored it. It is inconsistent with the long-recognized jurisdiction of saving-clause cases based on diversity of citizenship, as well as with the premise of the *Panama Railroad* case (note 19 *supra*) that the admiralty jurisdiction of the federal courts cannot be vested exclusively in state courts.

⁹⁹ See the discussion of *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), 358 U.S. at 364.

¹⁰⁰ *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823). For discussion of a striking instance of the distinctive concept of the admiralty court in modern times see Currie, *Review of Gilmore & Black, The Law of Admiralty*, 26 U. CHI. L. REV. 686 (1959).

Marshall's bark, however, was worse than his bite. *The Sarah* was a libel under the revenue laws against casks of wine allegedly seized on navigable waters, but it developed from the evidence that the seizure actually occurred on land. On motion of the claimant the court proceeded to trial by jury, the basis for proceeding in admiralty having failed. The jury found a verdict for the United States, and the claimant appealed. Apparently the Court would have felt little difficulty in disposing of the jurisdictional problem if the claimant had brought a writ of error; then the claimant's demand for jury trial might have been treated as a consent that the libel stand amended as an information in rem, cognizable at law. But if the case were treated as one at law the appeal would have to be dismissed, because a judgment at law was reviewable only by writ of error.¹⁰¹ The other horn of the dilemma was that if the case were treated as one in admiralty the judgment would have to be reversed with directions to dismiss the libel, since there was no jurisdiction in admiralty. Unwilling to carry his jurisdictional premises to their logical conclusion, Marshall reversed with directions that amendment of the libel be allowed, and that there should be "such farther proceedings . . . as law and justice may require."¹⁰² Probably this required a new trial, but at least dismissal was avoided. Marshall did not explain how the Court had jurisdiction thus to dispose of the case on appeal when there was no jurisdiction in admiralty, nor how the district court sitting in admiralty without jurisdiction could enter an order allowing amendment. He simply cut the Gordian knot with which the Court had bound itself.¹⁰³

After this common-sense (though somewhat tortured and confined) solution, the federal courts proceeded without much difficulty in shifting from admiralty to law by the process of amendment, thereby saving prior proceedings in which the court had acted "without jurisdiction." Thus, in a case similar to *The Sarah*, where a bond had been given in a libel in admiralty in the district court for the release of goods seized on land, the libel was amended so as to make it an information in rem, in accordance with Marshall's ruling; thereafter the circuit court, proceeding "according to the course of the exchequer," asserted its jurisdiction to enforce the bond, although if the court lacked jurisdiction at the time it was taken there was a plausible basis, at least, for contending that the bond was void.¹⁰⁴

An even more relaxed attitude toward the distinction between civil and admiralty jurisdiction emerged in 1872. An information under the revenue laws

¹⁰¹ 21 U.S. (8 Wheat.) at 395.

¹⁰² 21 U.S. (8 Wheat.) at 395-96.

¹⁰³ As early as 1796 Attorney General Lee assumed in argument before the Supreme Court that a case which had been improperly tried in the district court as an admiralty case should be remanded to the circuit court for trial by jury; but the point was not decided, because the Court held the case properly cognizable in admiralty. *La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796).

¹⁰⁴ *United States v. Four Part Pieces of Woolen Cloth*, 25 Fed. Cas. 1180 (No. 15,150) (C.C.N.D. N.Y. 1825).

was filed against whiskey seized on land in the Middle District of Alabama, and the judge struck out a claim and answer which denied the material allegations of the information. The Supreme Court reversed, holding that the claimants were entitled to jury trial.¹⁰⁵ The Court treated the question primarily as one of procedure: "Where the seizure is made on land, the claimant is entitled to a trial by jury. . . ."¹⁰⁶ Jurisdiction was discussed: "[W]here the seizure is made on navigable waters, the case belongs to the instance side of the subordinate court, but where the seizure is made on land, the suit is one at common law, and the claimant is entitled to a trial by jury."¹⁰⁷ But there was no concern with whether the information had been filed on the law side or the admiralty side,¹⁰⁸ and none with whether the record spoke the language of admiralty. No question was raised as to whether the case was properly before the Court on writ of error. The only question concerned the right to jury trial, and that turned not on the "side" of the court on which the action had been filed but on the more objectively determinable location of the property at the time of seizure. Not even an amendment of the pleadings was required to bring the appropriate "jurisdiction" into operation.

The same attitude was exhibited in the following year. A "libel of information" had been filed under the Confiscation Act against land in the District of Louisiana, and it was objected that the suit was on the admiralty, not on the law, side of the district court.¹⁰⁹ Mr. Justice Strong said:

No doubt in cases of seizure upon land, resort should be had to the common-law side of the court, and such, *in substance*, was, we think the case here. Everything necessary to a common-law proceeding *in rem* is found in the record. An information was filed (called a libel of information, it is true, but still an information), a citation as well as a monition was issued, a default was taken, and, after consideration of the evidence, condemnation was adjudged. What was lacking in this to a common-law proceeding *in rem*? The principal lack alleged is that there was no jury trial. But in courts of common law no jury is called when there is no issue of fact to be tried. An inquest is sometimes employed to assess damages; but a jury to find facts is never required where there is no traverse of those alleged, and where a defendant has defaulted.¹¹⁰

This case alone might have spared Mr. Justice Frankfurter the necessity of deciding whether the *Romero* case was cognizable under Section 1331.¹¹¹ If a

¹⁰⁵ *Garnharts v. United States*, 83 U.S. (16 Wall.) 162 (1872).

¹⁰⁶ *Id.* at 165.

¹⁰⁷ *Ibid.*

¹⁰⁸ At the present time, at least, there is in the Middle District of Alabama no separate admiralty docket and no rule that admiralty cases be captioned "In Admiralty" or otherwise identified as such.

¹⁰⁹ A separate admiralty docket is maintained at present in the Eastern District of Louisiana.

¹¹⁰ *The Confiscation Cases (Slidell's Land)*, 87 U.S. (20 Wall.) 92, 110 (1873) (emphasis in the original). Mr. Justice Clifford dissented as to this point. *Id.* at 113. No objection was made that the case was before the Court on writ of error.

¹¹¹ See text at note 34 *supra*.

district judge, sitting as a court of admiralty, can decide a case properly cognizable at law where there is no question for a jury to decide, it should follow that the same district judge, sitting as a court of law, should be able to decide a case properly cognizable in admiralty where there is no question for a jury.

In 1918 Judge Learned Hand employed the common-sense approach so thoroughly as to justify hope that there would be no further jurisdictional trouble about cases filed on the wrong "side" of the court. The *Elwell* case was, in form and language, unquestionably a libel in personam, in the Southern District of New York.¹¹² It was tried as an admiralty case, by a judge without a jury, and review was by appeal rather than writ of error.¹¹³ The court of appeals held that the district court had no jurisdiction in admiralty, the action being one to collect the penalty prescribed by the Harter Act for refusal to give a clean bill of lading. But the district court did have jurisdiction of an action *qui tam* at common law, brought by the United States pursuant to an act of Congress. Relying on *The Sarah*¹¹⁴ and *The Confiscation Cases*,¹¹⁵ Judge Hand held that the libel in admiralty could be amended, and would be treated as amended, to bring it within the law "side's" jurisdiction; there would be no dismissal. But the case had been tried without a jury. Judge Hand disposed of that point by saying that the right to jury trial was "waived in the answer by the concession of the admiralty jurisdiction of the District Court."¹¹⁶ The point was a tricky one, but Hand was able to cope: "Such a concession would not, of course, confer substantial jurisdiction upon the District Court; but where that jurisdiction existed in any event, and where, as we have seen, the cause may be disposed of as at common law, the admission of jurisdiction is not the sole source of the court's power and is an effective waiver of the right to an assessment by a jury."¹¹⁷

Still the technical barriers to the common-sense approach had not been exhausted. There was a question about excessiveness of the penalty, the district court having assessed the maximum. The court of appeals reduced the penalty, treating the district court's finding as an "admiralty award" rather than as a jury verdict, and thus exercising the broad power of review characteristic of admiralty.¹¹⁸ It did so because the parties had acquiesced in the treatment of the case as one in admiralty. When a libel in admiralty, of which the court as an

¹¹² United States *ex rel.* Pressprich v. James W. Elwell & Co., 250 Fed. 939 (2d Cir. 1918).

¹¹³ The writ of error was not abolished until 1928. Act of January 31, 1928, 45 Stat. 54.

¹¹⁴ The Sarah, *supra* note 100.

¹¹⁵ The Confiscation Cases, *supra* note 110.

¹¹⁶ 250 Fed. at 942. The court found it unnecessary to decide whether there was a right to jury trial, but cited cases tending to sustain the right. Compare the action of the court in *Doucette v. Vincent*, *supra* note 84, raising the question of "jurisdiction" on its own motion where the right to jury trial had been accorded, not withheld.

¹¹⁷ 250 Fed. at 942.

¹¹⁸ *Id.* at 942.

admiralty court has no jurisdiction, can be amended (without actually being amended) to make it an action at law, and tried by the court without a jury because the parties thought it was cognizable in admiralty, and reviewed on appeal when the review of law cases was by writ of error—and when the scope of review is that characteristic of admiralty and not of law—then the “jurisdictional” differences between the two “sides” of the district court are destroyed. And a good thing, too. Two procedural problems were before the court: (1) Should there have been a jury trial? and (2) Did the appellate court have power to modify the penalty? The court answered these questions pragmatically as questions of procedure, relying heavily on the acquiescence of the parties. To have attempted to answer them in jurisdictional terms would have confused the issues and would have deprived the court of the argument based on consent, which was decisive in reaching a satisfactory result.

Just eight months later, however, the Second Circuit fell from grace. In *Cunard S.S. Co. v. Smith*¹¹⁹ a panel including two of the judges who had decided the *Elwell* case¹²⁰—but not including Judge Hand—on its own motion raised the jurisdictional question and ordered dismissal of a longshoreman’s action for injuries sustained on board ship. There was no diversity, both of the parties being aliens.¹²¹ The fact that the court in which the action had been tried obviously had jurisdiction of the case as an admiralty court was not directly mentioned. No suggestion was made of any way in which dismissal could be avoided.¹²² The court did, however, dismiss without prejudice, and held out hope to the plaintiff that “an admiralty court of the United States,” in which he presumably was invited to start anew, might entertain his action notwithstanding the doctrine of *forum non conveniens*.¹²³

Shortly after this lapse, Judge Learned Hand revived the procedural ap-

¹¹⁹ 255 Fed. 846 (2d Cir. 1918). It should be noted that this was prior to the Jones Act (1920) and prior to the Supreme Court’s holding that longshoremen were seamen, *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). No claim of unseaworthiness was made, the case being tried on the theory of simple negligence.

¹²⁰ Hough and Rogers, JJ.

¹²¹ No mention was made of any possibility of jurisdiction on the theory that the case was one arising under federal law.

¹²² At the very least, the court might have directed a transfer to the admiralty docket and a new trial without a jury. But if the defendant’s failure to challenge the admiralty jurisdiction (see the *Elwell* case, *supra* note 112) is a waiver of his right to jury trial, is not his failure to challenge the civil jurisdiction a waiver of his right to have a trial by the court? There is no good reason why the judgment of the district court should not have been affirmed, unless the court felt that there should be judgment for the defendant notwithstanding the verdict because of assumption of risk. See note 123 *infra*.

¹²³ 255 Fed. at 848–49. Yet—having not only dismissed for want of jurisdiction but having held out to the plaintiff some hope of recovery if he refiled on the proper “side”—the court proceeded to hold on the merits that the plaintiff had assumed the risk. *Id.* at 849. But for the fact that the dismissal was expressly without prejudice, an argument might be made that, in view of the admiralty jurisdiction of the district court and the jurisdiction of the court of appeals on writ of error, this holding was a bar to another action.

proach in the district court. In a libel in personam to recover prepaid freight on the theory that the voyage had not been completed, he observed that whether the action was for breach of the maritime contract of carriage or for unjust enrichment¹²⁴ might have been a material consideration if the parties had raised the question of jurisdiction. But the decision of the court of appeals in the *Elwell* case,¹²⁵ in which he had written the opinion, rendered the question of jurisdiction unimportant "where there is independent jurisdiction over the subject-matter and the parties are content to allow the cause to proceed."¹²⁶ Since the parties were citizens of different states and the jurisdictional amount was in controversy, and since no objection had been raised to the use of admiralty procedures, it was not necessary to determine the basis of jurisdiction. The same panel of circuit judges which had dismissed the action in the *Smith* case¹²⁷ for lack of jurisdiction affirmed on the merits¹²⁸

IV. THE CONCEPT OF "DISTINCT JURISDICTIONS" IN GENERAL

Such was the state of affairs when the Jones Act became law in 1920. While Marshall had stated the principle of compartmentalization in formidable terms, neither he nor the federal judiciary after him applied the principle rigorously. The differences between jurisdiction at law and in admiralty were treated as merely procedural, notably in the Second Circuit; the single exception appears to have been a temporary lapse on the part of the court which had assumed leadership in reducing jurisdictional barriers.

The problem of the mode of trial in seaman's injury cases, as we know it today, did not arise for some time after the passage of the Jones Act.¹²⁹ It developed slowly, while other problems concerning the distinction between the law and admiralty jurisdictions continued to come before the courts. The procedure here will be to examine first the general problems, and then the problems concerning trial of the several claims involved in the seaman's injury action. In both stages the discussion will in general follow the developments chronologically circuit by circuit. This is the way in which the law developed; in the absence

¹²⁴ Until *Archawski v. Hanioti*, 350 U.S. 532 (1956), there was doubt as to whether admiralty jurisdiction extended to quasi-contractual claims arising out of maritime transactions. See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 25, n.94 (1957).

¹²⁵ *Supra* note 112.

¹²⁶ *Owens v. Breitung*, 270 Fed. 190, 193 (S.D.N.Y. 1920).

¹²⁷ *Supra* note 119.

¹²⁸ *Owens v. Breitung*, 270 Fed. 190 (2d Cir. 1920) (Ward, Rogers, and Hough, JJ.).

¹²⁹ For an account of the gradual settlement of problems of validity and interpretation raised by the act see GILMORE & BLACK, *THE LAW OF ADMIRALTY* 282 *et seq.* (1957). For present purposes it should be noted especially that the full importance of the remedy based on unseaworthiness was not appreciated until the mid-forties (*Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); GILMORE & BLACK, *op. cit.*, *supra* at 315 *et seq.*), and that it was not until 1949 that the seaman had substantial authority for suing both under the Jones Act and for unseaworthiness. *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3d Cir. 1949).

of a clear directive from the Supreme Court, the leading maritime circuits tended to follow their own precedents, and the development was not uniform.

The Second Circuit, under the leadership of Judge Learned Hand and later Judge Clark, continued its procedural approach to the problem of jurisdictional differences. A libel for cargo damage included a claim for conversion which, having occurred on land, was not within the admiralty jurisdiction. Judge Hand, noting that the record disclosed the bases for diversity jurisdiction, simply found on the merits that there was no conversion.¹³⁰ An agent engaged by the United States to perform services in connection with a government-owned vessel, having successfully defended an action for cargo damage in which it had been impleaded, brought a libel against the United States under the Suits in Admiralty Act¹³¹ for reimbursement of expenses. It was doubtful whether such a claim was within the admiralty jurisdiction; the agent's function was apparently the procurement, rather than the performance, of maritime services, and in any event the claim arose not directly from those services but from subsequent litigation. Judge Swan found it unnecessary to decide the question since, if the court lacked jurisdiction in admiralty, it had jurisdiction under the Tucker Act.¹³²

[W]e see no difficulty in sustaining the suit as one upon a contract with the United States over which the District Court is given jurisdiction concurrent with the Court of Claims by the Tucker Act. Such a suit is not tried to a jury, and the libel will serve as a petition. . . . The mistake results only in formal differences. The pleading has been called a libel instead of a petition, and contains allegations of admiralty jurisdiction, which are surplusage.¹³³

A carrier brought a libel against a shipper to recover the difference between the amount of freight billed and paid and the amount required by the filed conference tariff, relying in part on provisions of the Shipping Act which forbade secret rate concessions.¹³⁴ In part the carrier's theory was that it had contracted for reasonable rates, which were those set out in the tariff; on this theory the suit was on a maritime contract. So far as the right to recover depended on the illegality of the preferences granted, however, the cause of action was one specially created by statute and jurisdiction in admiralty was doubted. The court of appeals, Judge Hand writing the opinion, raised the question of jurisdiction on its own motion; but the record disclosed the bases for diversity jurisdiction. That was enough:

¹³⁰ *Louis-Dreyfus v. Paterson Steamships Ltd.*, 43 F.2d 824, 828 (2d Cir. 1930). The libel had been dismissed by the district court.

¹³¹ 41 Stat. 525 (1920), 46 U.S.C. § 741 *et seq.*

¹³² *Cory Bros. & Co. v. United States*, 51 F.2d 1010 (2d Cir. 1931).

¹³³ *Id.* at 1013.

¹³⁴ *Prince Line v. American Paper Exports*, 55 F.2d 1053 (2d Cir. 1932).

When a cause of action is within the substantive jurisdiction of the District Court for any reason, it does not mar that jurisdiction that the suitor proceeds as libellant in the admiralty rather than as plaintiff at law.¹³⁵

The only question open was whether the respondent had lost any substantial rights by being brought into the admiralty side. The differences, said Judge Hand, were all formal except the right to jury trial, and that was waived by respondent, who, though he had traversed the allegations of admiralty jurisdiction, had not followed up that first step by making any further effort to secure a jury.¹³⁶

In another case, arising prior to the fusion of law and equity in 1938, Judge Hand applied the procedural approach with admirable ingenuity to a rather complex situation involving not only admiralty and law but equity as well.¹³⁷ The United States had contracted with Atlantic to operate a government-owned vessel; Atlantic contracted with Admiral to act as husbanding agent. The vessel was lost and the cargo owners had sued Atlantic and Admiral, who defended successfully. Two cases were before the court, presenting three jurisdictional problems: (1) Admiral sought to recover its litigation expenses from Atlantic, and Atlantic sought to implead the United States under the Admiralty Rules; (2) Atlantic sought to recover its own litigation expenses from the United States. The cases were not cognizable in admiralty, where they had been filed.¹³⁸ But the second action (Atlantic against the United States) could stand as an action at law under the Tucker Act; the first action (Admiral against Atlantic) could stand because of diversity of citizenship; and the effort in that action by Atlantic to implead the United States, though it had lost its foundation in the Admiralty Rules, could stand as an original suit against the United States under the Tucker Act. This last device was not without its difficulties. Atlantic in the proposed third-party proceeding was seeking protection against a liability which it had not yet incurred. That would be premature at law, but permissible in equity. Could the United States be sued in equity under the Tucker Act? Generally, perhaps not; but "if the bill sound in contract, and call only for the payment of money, the relief may be granted though only a court of equity would give it."¹³⁹ Thus two libels in admiralty of which the court had

¹³⁵ *Id.* at 1056.

¹³⁶ *Id.* at 1056-57. The court said that the traverse might have laid the foundation for a motion to transfer to the law side, which the court assumed would have been granted if the case were not cognizable in admiralty. *Id.* at 1057. This is one of the earliest mentions of transfer between sides, or dockets, as a method of curing jurisdictional defects. It is also interesting to note that Judge Hand left open the question whether the court would have had jurisdiction because the case was one arising under federal law. *Ibid.* But this does not appear to be a true anticipation of Judge Magruder's dictum in the *Jansson* case, *supra* note 71, since Judge Hand apparently meant no more than that the claim before him was asserted under a federal statute.

¹³⁷ *Admiral Orient Line v. United States*, 86 F.2d 201 (2d Cir. 1936).

¹³⁸ *Id.* at 203; *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854).

¹³⁹ 86 F.2d at 204.

no jurisdiction were retained to be tried as two actions at law and one suit in equity.¹⁴⁰

The United States filed a libel in rem against a vessel, and a libel in personam against its owner, for damage to a submarine cable.¹⁴¹ This was prior to the Amphibious Torts Act,¹⁴² and the claim was nonmaritime. The libel in rem, not being within the saving clause, had to be dismissed; indeed, there was no point in pursuing a libel in rem in any court, there being no maritime lien. But the court, Judge Augustus Hand writing the opinion, affirmed the decree in personam against the owner, since the district court had jurisdiction under Section 41(1) of the old Judicial Code.¹⁴³ The only right which the respondent might have lost by having the case treated in retrospect as one at law was the right of jury trial; but he waived that right by not making a timely demand in accordance with Rule 38 of the Federal Rules of *Civil Procedure*.¹⁴⁴

Judge Clark, a long-time foe of the compartmentalization of law and equity, was delighted to carry on the assault against the wall of separation between the civil side and the admiralty side. A shipper sued a carrier for damage to wheat which, when it could not be unloaded according to plan, remained stored aboard at reduced demurrage rates.¹⁴⁵ The contention was made that, in so far as the claim was for damage and shortage occurring during the period of storage, it was nonmaritime. It would have been difficult to allocate the items of loss and damage between the periods of transportation and storage. The court considered this storage, in the circumstances, an incident of the transportation, so that the entire claim was within the admiralty jurisdiction; but if the result were otherwise, there was still jurisdiction because of diversity of citizenship. Acceptance of the respondent's contention as to the separateness of law and admiralty would require the libellant to divide his claims for damage with the possible result that he could not prove his case in either court:

¹⁴⁰ In *Moran Towing Co. v. Navigazione Libera Triestina, S.A.*, 92 F.2d 37, 39 (2d Cir. 1937), there was jurisdiction in admiralty; but the court noted that if this were doubted there was nevertheless jurisdiction based on diversity.

¹⁴¹ *United States v. The John R. Williams*, 144 F.2d 451 (2d Cir. 1944).

¹⁴² 62 Stat. 496 (1948), 46 U.S.C. § 740 (1952).

¹⁴³ 28 U.S.C. § 41(1) (1940). That section covered both suits in which the United States is a party and cases arising under federal law. It is probable that the court had in mind the former ground of jurisdiction, especially since the jurisdictional amount seems not to have been in controversy. Cf. note 71 *supra*.

¹⁴⁴ 144 F.2d at 454. A similar case decided shortly afterwards reveals another procedural complication arising from transfer. An appeal from an order transferring the case from the admiralty to the civil "side" was dismissed because the order was not final. An appeal from the final judgment was filed within 71 days. The time for appeal in admiralty was 90 days; in civil cases, 60 days. Held: The transfer was proper since the tort, committed prior to the Amphibious Torts Act, note 142 *supra*, was nonmaritime; but in any event the court had power to order transfer; upon transfer the case became a civil action, and the 60-day rule applied. *United States v. Isthmian S.S. Co.*, 187 F.2d 662 (2d Cir. 1951).

¹⁴⁵ *James Richardson & Sons v. Connors Marine Co.*, 141 F.2d 226 (2d Cir. 1944).

Such compartmentalizing of litigation, to the mystification of lay observers, and waste in time and expense of litigants, is no longer tolerated as between jurisdiction in equity and law, and should not be encouraged as between admiralty and law.¹⁴⁶

The next case is of special interest because it is the first since the Second Circuit's temporary lapse into conceptualist thinking in the *Smith* case¹⁴⁷ to involve a suit brought at law but cognizable in admiralty; all the other cases in this series involve libels not sustainable in admiralty but sustained at law or in equity by virtue of non-admiralty jurisdiction. A longshoreman sued the owner of a vessel for personal injuries sustained when he fell from a defective Jacob's ladder. He charged negligence and unseaworthiness, and won a jury verdict which the district court set aside. The basis for assuming jurisdiction at law does not appear. There is nothing to indicate that there was diversity of citizenship. The court of appeals found no evidence of negligence, but ruled that the owner, who was in possession under an operating contract after chartering to the United States on a bare-boat basis, would be liable for the unseaworthy condition if, but only if, the ladder was defective at the time the owner-demisor gave possession to the United States under the charter.¹⁴⁸ Thus, "upon a new trial the plaintiff may have his damages assessed by a jury, if he can satisfy them that the unseaworthy rung was on the ship, and in the same condition, when the defendant delivered her to the United States."¹⁴⁹ Recognizing the difficulty of such a burden of proof, the court, speaking through Judge Learned Hand, made an abortive effort to be helpful: even if the unseaworthy condition arose after transfer to the United States, a lien attached to the vessel commensurate with the liability of the United States as owner *pro hac vice*, and that lien could be foreclosed in admiralty. The plaintiff could move "to change the action to bar into such a suit."¹⁵⁰ True, he would then have to arrest the ship, and proceed before a judge; but he would avoid the difficulty of proving the time when the unseaworthy condition came into existence. On rehearing the court withdrew its suggestion, realizing that the Supreme Court's decision in *The Western Maid*¹⁵¹ prevented the creation of a lien against a vessel on demise to the United States.¹⁵² The significant fact remains that the court of appeals had endorsed the conversion of an action at law into a suit in admiralty—and even into a libel *in rem*, in which new process would have to issue. "We have repeatedly held that, when the district court has jurisdiction over a cause of

¹⁴⁶ *Id.* at 229. The case points up another procedural difference between law and admiralty. As Judge Clark noted, the consequence of holding the case not cognizable in admiralty would have been first of all dismissal of the appeal, which, being from an interlocutory decree, was permissible only in admiralty. On dismissal the action could continue at law with the commissioner, appointed in admiralty, treated as a master under Fed. R. Civ. P. Rule 53(a).

¹⁴⁷ Note 119 *supra*.

¹⁴⁸ *Cannella v. Lykes Bros. S.S. Co.*, 174 F.2d 794 (2d Cir. 1949).

¹⁴⁹ *Id.* at 797.

¹⁵¹ 257 U.S. 419 (1922).

¹⁵⁰ *Id.* at 797.

¹⁵² 174 F.2d at 798.

action both at law and in the admiralty, a suit upon it may be transferred from the law side to the admiralty side, and vice versa, without starting anew."¹⁵³ This statement is notable in two respects. First, it speaks of free transferability from law to admiralty *and vice versa*, thus tending to dispel any possible notion that this may be a one-way street; second, it states in a restrictive way the principle followed by the court in its earlier decisions, perhaps modifying the plenary character of transferability. The qualifying clause is "when the district court has jurisdiction over a cause of action *both* at law and in admiralty." In previous cases the holding had been that, even if there were no jurisdiction in admiralty, the case would be sustained as an action at law if diversity or other non-admiralty grounds of jurisdiction were present.

It may be that this seemingly qualifying clause was used only because the court assumed that in the case at bar there were grounds for jurisdiction both at law and in admiralty, and that is perhaps the most interesting feature of the case. Why was jurisdiction at law, with the right of jury trial, assumed?¹⁵⁴ It may be that there was diversity of citizenship; but where that was so in previous cases, Judge Hand and his brethren had always been careful to point out the fact. It is not unreasonable to suggest that Judge Hand was assuming that this action for a maritime tort, based in part upon a claim of unseaworthiness, was one cognizable under what is now Section 1331.¹⁵⁵ Some support for such a suggestion is found in the court's discussion of the question whether, in the light of the *Jensen* case,¹⁵⁶ state law or the general maritime law should govern. The court concluded that it should follow the rationale of the *Sieracki* case¹⁵⁷ and apply the federal maritime law.¹⁵⁸ In *Sieracki*, a similar longshoreman's action for unseaworthiness, there was no diversity of citizenship;¹⁵⁹ the question of jurisdiction was never raised. Yet the action was regarded as "a civil action, on the law side," and was tried to a jury until, near the end of the testimony, the damages were stipulated and the question of liability was submitted to the judge.¹⁶⁰ After the withdrawal of the case from the jury the question whether the district court was exercising jurisdiction at law or in admiralty became aca-

¹⁵³ *Id.* at 797.

¹⁵⁴ The court did not say, as it might have said by analogy to its prior decisions concerning law claims tried in admiralty, that the proceedings below could be treated as in admiralty, the defendant having waived his right to trial to the court without a jury. It clearly assumed that there were grounds for jurisdiction at law.

¹⁵⁵ See note 71 *supra*.

¹⁵⁶ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

¹⁵⁷ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

¹⁵⁸ *Cf.* 174 F.2d 794, 798 (2d Cir. 1949).

¹⁵⁹ We know this because of Judge Wyzanski's industrious search of the record in the case. See Transcript of Record 12, 116, 134; *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947), discussed at note 215 *infra*.

¹⁶⁰ *Sieracki v. Seas Shipping Co.*, 57 F. Supp. 724, 725 (E.D. Pa. 1944).

demic. It may be that the question of jurisdiction was simply overlooked; it may be that jurisdiction was not questioned because the case was obviously cognizable in admiralty;¹⁶¹ it may also be that jurisdiction on the civil side was assumed on the ground that the case was one arising under federal law.

In the Southern District of New York, before the *Paduano* decision¹⁶² ruled the contrary, Judge Irving Kaufman¹⁶³ and Judge Weinfeld¹⁶⁴ elected to follow the First Circuit instead of the Third, and ruled that actions on marine insurance contracts brought in state courts were removable under Section 1441 as cases arising under federal law, the jurisdictional amount being present, irrespective of diversity. The same court surmounted jurisdictional obstacles to achieve a sensible procedural result in two novel situations. In a Jones Act case the defendant sought to implead the United States as a third party whose negligence caused the injury. The Government's liability could be asserted only under the Suits in Admiralty Act,¹⁶⁵ but Judge Irving Kaufman said that the problem was "plainly one of practice and pleading,"¹⁶⁶ and, by analogy to the practice respecting equitable issues, held that the third-party complaint could be amended so as to constitute a petition under Admiralty Rule 56, the issue to be determined by the court.¹⁶⁷ In another Jones Act case the defendant pleaded a counterclaim, not arising out of the same transaction, based on the general maritime law. Although the *Paduano* case had by this time excluded the possibility of jurisdiction at law under Section 1331, the court found no difficulty in entertaining the counterclaim by virtue of its admiralty jurisdiction, so long as procedural differences were observed. The court reserved to itself the issues under the counterclaim.¹⁶⁸

In the Third Circuit a district court took an uncompromising view of the distinction between jurisdiction at law and in admiralty. A number of longshoremen brought actions at law against their employer for injuries, some of which were maritime and some not. In some cases the bases for diversity jurisdiction

¹⁶¹ Cf. *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888, 890 (D. Mass. 1947).

¹⁶² *Supra* note 95.

¹⁶³ *Compania Maritima Ador, S.A. v. New Hampshire Fire Ins. Co.*, 120 F. Supp. 577 (S.D. N.Y. 1944).

¹⁶⁴ *Wunderlich v. Netherlands Ins. Co.*, 125 F. Supp. 877 (S.D. N.Y. 1954).

¹⁶⁵ See *Prudential S.S. Corp. v. United States*, 220 F.2d 655 (2d Cir. 1955). Superficially, that case would seem to be a lapse into treating the law and admiralty jurisdictions as mutually exclusive; but a substantial difference between the Tucker Act and the Suits in Admiralty Act is that the periods of limitation are different. Cf. *Johnson v. Fleet Corp.*, 280 U.S. 320 (1930), discussed in text at note 219 *infra*.

¹⁶⁶ *Canale v. American Export Lines*, 17 F.R.D. 269, 271 (S.D. N.Y. 1955).

¹⁶⁷ To the same effect is *Skupski v. Western Nav. Corp.*, 113 F. Supp. 726 (S.D. N.Y. 1953).

¹⁶⁸ *Fraser v. Astra S.S. Corp.*, 18 F.R.D. 240 (S.D. N.Y. 1955). Cf. *United States v. Isthmian S.S. Co.*, 359 U.S. 314 (1959) (counterclaim arising out of separate and unrelated transaction not permitted in admiralty).

were alleged. The court dismissed the cases, maritime or not, in which diversity did not appear.¹⁶⁹ "[W]hen a suitor elects to pursue his common-law remedy, he takes the cause out of the class, to which it might otherwise belong, of causes maritime, and it must be treated for jurisdictional purposes as other common-law actions are treated."¹⁷⁰ There was no mention of the possibility of amendment or transfer.¹⁷¹

In the Fifth Circuit a district court took a position flatly inconsistent with the spirit of Marshall's disposition of *The Sarah*.¹⁷² The United States brought a libel *in rem* against the *Dixie* for damage to a government-owned bridge, under the authority of the Rivers and Harbors Act.¹⁷³ Holding that the case was not cognizable in admiralty, the court dismissed and later denied a motion to transfer: "In the absence of a Statute, I think this Court as a Court of Admiralty is without power to transfer the Case to a Court of Law or Equity."¹⁷⁴

In the Ninth Circuit we begin with an interesting district court decision holding nonremovable a longshoreman's action for maritime tort in which, though there was diversity of citizenship, the jurisdictional amount was not in controversy.¹⁷⁵ Removability under the predecessor of Section 1441 on the ground that the case was one of which the district court would have had original jurisdiction in admiralty was not considered; but the court's remark that the jurisdictional amount was a prerequisite "where the removal is based upon a

¹⁶⁹ *Stamp v. Union Stevedoring Co.*, 11 F.2d 172 (E.D. Pa. 1925).

¹⁷⁰ *Id.* at 174.

¹⁷¹ With this decision it is interesting to compare a recent case in the District of Columbia, where there is no separate admiralty docket. The plaintiff's pleading in an action for collision damages was called a complaint, and the case was on the civil non-jury calendar. The court simply observed that the case was within the admiralty jurisdiction, that the complaint would be treated as a libel in personam, and that the case was properly on the civil non-jury calendar because that was the place for all non-jury cases. *Smoot Sand & Gravel Corp. v. Baltimore Steam Packet Co.*, 148 F. Supp. 269 (D.D.C. 1957).

¹⁷² Note 100 *supra*.

¹⁷³ 30 Stat. 1153 (1899), 33 U.S.C. § 412 (1958).

¹⁷⁴ The *Dixie*, 30 F. Supp. 215, 216 (S.D. Tex. 1939). This decision is "explained" by the judge who rendered it in *Nilsson v. American Oil Co.*, 118 F. Supp. 482 (S.D. Tex. 1954), discussed in text at note 287 *infra*. In *The Panoil*, 266 U.S. 433 (1925), the Supreme Court had affirmed dismissal of a similar libel, without discussion of amendment or transfer, although the court clearly had jurisdiction at law since the United States was a party. In *The Gansfjord*, 17 F.2d 613 (E.D. La. 1927), a similar libel was sustained on the apparent ground that the Rivers and Harbors Act, *supra* note 173, amounted to an extension of the admiralty jurisdiction (*cf.* the later Amphibious Torts Act, note 142 *supra*). At a later stage the same case appears as an action at law, though no mention is made of transfer, and the proceeding is treated as *sui generis*: Congress has power, if it chooses to do so, to confuse law and admiralty jurisdictions and procedures. Jury trial was expressly waived. *The Gansfjord*, 25 F.2d 736 (E.D. La. 1928). The court of appeals affirmed: "The libel did not purport to be one in admiralty, being filed on the law side of the court, and a jury being waived by written agreement of the parties." *Aktieselskabet Dampskib Gansfjord v. United States*, 32 F.2d 236, 237 (5th Cir. 1929).

¹⁷⁵ *Ross v. Pacific S.S. Co.*, 272 Fed. 538 (D. Ore. 1921).

federal question as well as upon diversity of citizenship.¹⁷⁶ seems to be an anticipation of Judge Magruder's dictum in the *Jansson* case.¹⁷⁷

A proceeding to set aside an order of a deputy commissioner denying a claim under the Longshoremen's and Harborworkers' Compensation Act was brought by petition as a suit in equity. The court of appeals held on the merits that the petition should have been dismissed.¹⁷⁸ It also held that jurisdiction of this statutory proceeding was in admiralty, and that the plaintiff should have proceeded by libel on the admiralty side. Instead of affirming, therefore, it vacated the decree below and remanded with instructions to transfer to the admiralty docket, treat the petition as a libel, treat the motion to dismiss as an exception to its sufficiency, and enter a decree (in admiralty) dismissing the libel. What possible purpose might be served by all this paperwork does not appear, yet Judge Mathews wrote a concurring opinion solely to emphasize its importance. "The exceptions were well founded, but, as a court of equity, the District Court was not empowered to sustain them. Attempting to do so, it erred."¹⁷⁹ Judge Mathews could have used a Silver Oar—as a paddle.

In two district court cases involving maritime torts the judges elected to follow the rule of the *Jordine* case,¹⁸⁰ and held that in the absence of diversity of citizenship there was no jurisdiction at law. In the first¹⁸¹ the action was simply dismissed, with consequences which do not appear. In the second¹⁸² the case was transferred to the admiralty side with an order preserving proceedings theretofore had under the Federal Rules of Civil Procedure.

Two cases involving the Death on the High Seas Act fairly bristle with problems, most of which are beyond the scope of this paper. In *Higa*,¹⁸³ a citizen of the Territory of Hawaii died when the land-based plane on which he was a passenger crashed into the Pacific Ocean. The administrator, apparently also a citizen of Hawaii, brought the action for wrongful death in the District Court for the District of Hawaii. The defendant was a California corporation. Although the court assumed that the bases for diversity jurisdiction were pres-

¹⁷⁶ *Id.* at 540.

¹⁷⁷ See note 71 *supra*.

¹⁷⁸ *Kobilkin v. Pillsbury*, 103 F.2d 667 (9th Cir. 1939).

¹⁷⁹ *Id.* at 671. To the same effect is *Twin Harbor Stevedoring Co. v. Marshall*, 103 F.2d (9th Cir. 1939).

In a similar case the district court on its own motion transferred to the admiralty docket. No harm seems to have resulted except that the lawyers suddenly found themselves proctors, expected to proceed under the Admiralty Rules. *Todd Shipyards Corp. v. Pillsbury*, 136 F. Supp. 846, 850 (S.D. Cal. 1955).

¹⁸⁰ Note 71 *supra*.

¹⁸¹ *Zapfen v. Koninklijke Rotterdamsche Lloyd*, 130 F. Supp. 453 (N.D. Cal. 1953).

¹⁸² *Ratto v. Pacific Transport Lines, Inc.*, 131 F. Supp. 117 (N.D. Cal. 1955).

¹⁸³ *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1955).

ent,¹⁸⁴ it affirmed a judgment of dismissal because the Death on the High Seas Act provides for a suit in admiralty as the exclusive remedy for cases within its coverage. On petition for rehearing the court denied a motion to vacate the order of dismissal and remand to the admiralty docket, although the period of limitation had expired.¹⁸⁵

The decision is brutally unjust. First, even if it be assumed that the action was on no theory cognizable except by virtue of the admiralty jurisdiction, it was, without any question whatever, filed in the admiralty court. The fact that it was "brought as a common law civil suit," with a demand for jury trial,¹⁸⁶ is wholly immaterial. The act provides that the representative "may maintain a suit for damages in the district courts of the United States, in admiralty. . . ."¹⁸⁷ This may mean that the exclusive remedy is according to admiralty procedures, without a jury;¹⁸⁸ it certainly does not mean that an action filed in a district court is filed in the wrong court. In the majority of districts, where there is no separate admiralty docket and no rule requiring identification of the proceeding as a civil action or a suit in admiralty, reasoning of this sort could make jurisdiction, and the bar of the statute of limitations, depend upon whether the plaintiff demands a jury trial. Second, the case was within the jurisdiction of the "law side" of the district court because it was one arising under the laws of the United States, cognizable under Section 1331 of the Judicial Code. Not even *Romero* denies that a maritime cause of action based upon federal statute is so cognizable;¹⁸⁹ the ruling of that case relates to actions under the general maritime law. True, the act of Congress provides for a proceeding in admiralty; but it creates the right of action, which did not exist under the general maritime law, and the case presented a substantial question relating to the construction and application of the act.¹⁹⁰ In 1947 Judge Learned Hand

¹⁸⁴ Since the action was brought in Hawaii the conclusion that there was jurisdiction under § 1332(d) is probably free from the complexities which surround the significance of *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), for cases involving territorial citizenship. While a majority of the Court in that case rejected the proposition that the validity of the jurisdictional grant could be rested on Article I, their position was that "Article III courts *in the several states* cannot be vested, by virtue of other provisions of the Constitution, with powers specifically denied them by the terms of Article III." Rutledge, J., 337 U.S. at 607 (concurring opinion) (emphasis supplied).

¹⁸⁵ 230 F.2d at 786. *Cf.* *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 680 (2d Cir. 1957).

¹⁸⁶ See 230 F.2d at 781.

¹⁸⁷ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

¹⁸⁸ But see *Bugden v. Trawler Cambridge, Inc.*, 319 Mass. 315, 65 N.E.2d 533 (1946).

¹⁸⁹ The Jones Act itself furnishes the most obvious example.

¹⁹⁰ In the same way, the Jones Act created rights unknown to the general maritime law, and provided that the action might be brought either at law, with a right to jury trial, or in admiralty. If a seaman injured on land (*cf.* *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943)), were to bring a libel *in personam* in admiralty, would the libel be dismissed or

held—in an off-hand way, it is true, but with sure instinct—that a suit under the Death on the High Seas Act was cognizable as a case arising under the laws of the United States.¹⁹¹ Third, though the case was not within the saving clause and there was no right to jury trial, and though the Rules of Civil Procedure were inapplicable, the district court had jurisdiction because of diversity. Fourth, the court found that its disposition of the case on jurisdictional grounds “makes unnecessary the determination whether the High Seas Act applies to airplanes which are not in any way water navigating vessels.”¹⁹² But if the suit was not within the purview of the act, then the remedy provided by that act was not the exclusive remedy, and there was no warrant whatever for dismissing for want of jurisdiction. The act provides: “The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.”¹⁹³ If the court had jurisdiction because of diversity, or because the plaintiff invoked an act of Congress and presented a substantial question relating to its interpretation, surely, even though the remedy afforded by the act be held unavailable, jurisdiction should be retained to allow the plaintiff to assert the right to recover under state law.¹⁹⁴

*Kunkel*¹⁹⁵ was an action under the Federal Tort Claims Act for a death on the high seas. Judge Mathes dismissed the complaint because it was “at law,” holding that, so far as death on the high seas is concerned, the United States has consented to be sued only in admiralty. He refused to transfer the case to the admiralty docket because the widow was named as plaintiff in her personal, as well as her representative, capacity.¹⁹⁶ In substance, the criticisms directed against *Higa* apply here: the action was filed in the district court; that court had jurisdiction not only by virtue of its admiralty power but because the case was one arising under two federal statutes; the statutory reference to admiralty should be taken as at most a regulation of procedure, and not as designating, as the only appropriate forum, an invisible compartment of the court having impenetrable walls.¹⁹⁷ Judge Mathes, however, was unmoved by appeals based on such considerations:

would it be treated simply as a waiver of the right to jury trial? The tort being nonmaritime, at least by older standards, there would be no jurisdiction in admiralty; but there would certainly be jurisdiction under § 1331.

¹⁹¹ *O'Neill v. Cunard White Star*, 160 F.2d 446, 447 (2d Cir. 1947), discussed at note 234 *infra*.

¹⁹² 230 F.2d at 786.

¹⁹³ 46 U.S.C. § 767.

¹⁹⁴ *Hurn v. Oursler*, 289 U.S. 238 (1933); *Bell v. Hood*, 327 U.S. 678, 686 (1946) (dissenting opinion).

¹⁹⁵ *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal. 1956).

¹⁹⁶ The limitation period of the Death on the High Seas Act is two years. 46 U.S.C. § 763. As to the effect of the Tort Claims Act see *Moran v. United States*, 102 F. Supp. 275 (D. Conn. 1951).

¹⁹⁷ *Cf. Moran v. United States*, *supra* n. 198, 102 F. Supp. at 278.

Against the contention that the difference between the "law side" and the "admiralty side" of the court is of no material consequence, that the difference between an action at law and a suit in admiralty is but a mere technicality, stands the rejoinder of the venerated law professor that the distinction may be so considered "if one can consider the difference between a boy and a girl to be a mere technicality."

There is indeed much to be said for keeping the distinction true, in order that all may know when the maritime law is to rule decision,¹⁹⁸ when admiralty procedure is to rule the course of the cause through the court. . . .

Inescapable truth compels recognition that the inherent and fundamental difference between actions at law and suits in admiralty can never be ignored; and no legislative fiat or judicial indecision can wipe the distinction out.

The problem brings to mind timeless comments by Dean Ames on the so-called fusion of law and equity: "The advantages of vesting a court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate court, it is all the more important not to lose sight of the fundamental distinction between law and equity,—a distinction as eternal as the difference between rights *in rem* and rights *in personam*."¹⁹⁹

In *Rupert v. Todd Shipyards*²⁰⁰ the court of appeals held that, upon transfer to the admiralty docket of a proceeding to review an award under the Longshoremen's and Harborworkers' Compensation Act, the case became one in admiralty and the ninety-day period for appeal was applicable.²⁰¹

The First Circuit has been left until last because the significant decision in that circuit prior to the *Jansson*²⁰² and *Doucette*²⁰³ cases provides a bridge between the general problem of the law and admiralty jurisdictions and the specific problem of the mode of trial in the typical seaman's injury case. The administratrix of a seaman killed on board sued his employer under the Jones Act and joined the builders of the lampstand which fell upon him. So far as the builders were concerned the claim was for simple maritime tort, cognizable in admiralty. All parties were citizens of Massachusetts. The complaint, "as [was] indicated by its docket number and by its specific claim of a jury trial, was

¹⁹⁸ See note 37 *supra*.

¹⁹⁹ 140 F. Supp. at 594-95. While we are on the subject of professorial whimsy in support of the perpetuation of jurisdictional antiquities, it is just as well to recall Professor Hinton's contribution: "I might say on the subject of the fusion of law and equity that it always makes me think of the fusion of the cat and the canary. When the fusion is complete it is all cat. Personally I think our equity canary will and does function better in his proper cage than he does in the stomach of the cat." HINTON, ILLINOIS CIVIL PRACTICE ACT 125 (1934).

No effort will be made here to exhaust the authorities on the jurisdictional questions associated with the Death on the High Seas Act. See *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952); *Bugden v. Trawler Cambridge, Inc.*, *supra* note 188.

²⁰⁰ 236 F.2d 559 (9th Cir. 1956).

²⁰¹ The Second Circuit had applied the same principle in the converse situation. See note 144 *supra*.

²⁰² *Supra* note 71.

²⁰³ *Supra* note 81.

filed at law and not in admiralty.”²⁰⁴ The builders moved to dismiss for want of jurisdiction and improper joinder. Judge Wyzanski granted the motion. He was well aware that “the vital question”²⁰⁵ was not one of jurisdiction, but simply whether, with respect to the claim against the builders, of which the court had jurisdiction only because of its maritime character, the plaintiff was entitled to jury trial. He held that the claim against the builders, being against a different defendant and involving issues different from those in the Jones Act claim, could not be considered ancillary.²⁰⁶ He held very specifically that, if the plaintiff meant to suggest that the claim against the builders was within the jurisdiction conferred by Section 41(1)(a) of the old Judicial Code (now Section 1331) as a case arising under the laws of the United States, the suggestion was “without merit.”²⁰⁷ “Her complaint presents no question of the construction or effect of a federal statute. That . . . is essential if the jurisdiction of this Court is to be sustained on the theory suggested.”²⁰⁸ Here, then, is a very definite anticipation of the idea expressed in Judge Magruder’s dictum in the *Jansson* case,²⁰⁹ although Judge Wyzanski suggested the idea only to reject it. The complaint as to the builders was, therefore, defective. “And the defect cannot be cured because she invites a hybrid trial,—a jury trial at law so far as the corporate defendants [shipowners] are concerned; a non-jury trial in admiralty so far as the individual defendants [builders] are concerned.”²¹⁰ Judge Wyzanski considered whether it would be proper to treat as correct the joinder of the law and admiralty cases, trying them simultaneously with the issues in the admiralty case reserved to the court. Rejecting the analogy of Rule 18(a) of the Rules of Civil Procedure, dealing with the related problem of differences between law and equity,²¹¹ he preferred to allow the plaintiff to file a new suit in admiralty, after which she might move to consolidate the two cases for trial. This course was preferred especially because the plaintiff might wish to refile both claims in the state court, where she could be reasonably sure of a jury trial on both. Judge Wyzanski did not consider amendment or transfer to the admiralty docket as an alternative to dismissal; he did not cite *The Sarah* nor any of the Second Circuit cases ameliorating the stringency of jurisdictional distinctions. Perhaps this was because there was no critical problem of time limitation.²¹²

²⁰⁴ *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888, 889 (D. Mass. 1947).

²⁰⁵ *Id.* at 890.

²⁰⁶ *Id.* at 892. Except for *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942) (note 274 *infra*), to which Judge Wyzanski did not refer, this appears to be the first reference to “pendent” jurisdiction in the context of seamen’s personal injury claims.

²⁰⁷ *Id.* at 892.

²⁰⁸ *Id.* at 892–93.

²⁰⁹ See note 71 *supra*. This was a strange case in which to raise the point since, as the court indirectly recognized (*id.* at 890–91), the plaintiff necessarily had to rely on the Massachusetts wrongful death statute in her action against the builders. *Cf.* note 93 *supra*.

²¹⁰ 71 F. Supp. at 890.

²¹¹ “But I know of no basis for such a hybrid combination of admiralty and law.” *Id.* at 892.

²¹² See note 96 *supra*.

V. THE CONCEPT OF "DISTINCT JURISDICTIONS"
IN SEAMEN'S INJURY CASES

The story of the problem concerning the mode of trial of seamen's injury cases, prior to the *Romero* decision, begins and ends with Judge Wyzanski.²¹³ In 1947, in the *McDonald* case,²¹⁴ he undertook a soul-searching review of the practice of the district courts in the First Circuit, providing the first comprehensive discussion of the problem. Ten years later, in *Jenkins v. Roderick*,²¹⁵ he made a much less helpful contribution to the discussion—one which may have been partly responsible for the distressingly incomplete fashion in which the Supreme Court dealt with the problem in *Romero*. Let us consider this aspect of *McDonald* first and, after reviewing developments concerning the mode of trial circuit by circuit, come back to *Jenkins v. Roderick*.

Judge Wyzanski noted that it was common practice for a seaman to join in one action counts for negligence under the Jones Act and for maintenance and cure.²¹⁶ The first of these was properly brought as an action at law, with the right to jury trial; the second was, in the absence of diversity, cognizable only by virtue of the admiralty jurisdiction. The district courts had "often" tried these two causes of action together in one lawsuit, submitting them together to the jury. The result, as a practical matter, had been satisfactory. The procedure avoided two lengthy trials; it avoided (or minimized) the risk of overlapping recoveries, since a single trier of facts would be unlikely to duplicate items, such as medical expenses, recoverable under either count. Complete separation of the claims was impracticable in any event, since a negligent failure to provide medical care could itself be made the basis of a Jones Act claim; submitting both claims to the jury as a matter of course avoided the confusion which such a Jones Act claim would have injected into the effort to keep them separate. Yet it seemed to Judge Wyzanski that he and his brother judges had probably been acting erroneously. They could not honestly avoid their error by saying that they had treated the jury verdict with respect to maintenance and cure as advisory only. The truth was that they simply had not sufficiently considered the legal basis for their practice. The maintenance and cure claim was not cognizable at law in the absence of diversity. It was not cognizable as a case arising under federal law; it was not cognizable at law at all—"unless perchance there is some as yet unexpressed theory of pendent jurisdiction such as

²¹³ A certain literary license is involved in this statement, since just prior to the *Romero* decision the Court of Appeals for the Second Circuit rendered a significant decision in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), discussed in text at note 269 *infra*. But we are discussing the *Romero* case, and *Bartholomew* was decided too late (January 9, 1959) to be cited in *Romero* (argued March 13, reargued October 22-23, 1958; decided February 24, 1959).

²¹⁴ *Supra* note 204.

²¹⁵ 156 F. Supp. 299 (D. Mass. 1957), discussed *infra* at note 301.

²¹⁶ 71 F. Supp. at 891. Note that at this date the third claim, based on unseaworthiness, seems not to have been common.

is applied in copyright and trademark cases. . . . That is, there may be some notion that where the facts supporting the count for maintenance and cure and one for negligence are substantially the same then, to save time, expense and double litigation, the law side of the federal court has jurisdiction over both counts.²¹⁷

The impact which this review of the situation would have upon Judge Wyzanski's future practice in trying typical seamen's injury cases is not made clear by the opinion. He did say that he was "quite unprepared to proceed" on the basis of earlier court of appeals decisions impliedly approving the practice; but he held only that the theory of pendent jurisdiction, which alone could justify the practice, would not in any event extend to the plaintiff's claim against the builders in the case before him. Except that there is no reference to the possibility of trying the two claims simultaneously with the issues under the maintenance and cure claim being reserved to the court, this opinion contains all the ingredients which have gone into discussion of the problem.

A most unfortunate decision by the Supreme Court in 1930 provided an unwholesome context for the development of the law regarding jurisdictional distinctions in seamen's injury cases. A seaman injured aboard a merchant vessel owned by the United States brought an action "at law" alleging (1) negligent failure to provide a safe place to work and (2) negligent failure to provide medical treatment. The trial court dismissed the first count and submitted the second to a jury, which returned a verdict for the plaintiff. The Court of Appeals for the Second Circuit affirmed.²¹⁸ The Supreme Court reversed, holding that the libel in personam specified by the Suits in Admiralty Act was the exclusive remedy—and ordered dismissal for lack of jurisdiction.²¹⁹ Quite apart from the fact that the case arguably arose under any one of three acts of Congress—the Jones Act, the Tucker Act, and the Suits in Admiralty Act—the important consideration is that the action was filed in a United States district court, which is a court of admiralty, and which unquestionably had jurisdiction as such. If the court meant that the issue should not have been tried by a jury, it should at most have reversed and remanded for a new trial under proper conditions. It should not have ordered dismissal for lack of jurisdiction.²²⁰

As early as 1933 the Court of Appeals for the First Circuit approved joinder of the count for maintenance and cure with the Jones Act count where the

²¹⁷ 71 F. Supp. at 891.

²¹⁸ *Lustgarten v. Fleet Corp.*, 28 F.2d 1014 (2d Cir. 1928) (memorandum opinion).

²¹⁹ *Johnson v. Fleet Corp.*, 280 U.S. 320 (1930).

²²⁰ The Court observed in *Fleet Corp. v. Rosenberg Bros.*, 276 U.S. 202, 213 (1928), that the Suits in Admiralty Act furnishes a complete system of administration "by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation. . . ." All of these special provisions can be held applicable to suits within the coverage of the act, and any deviation from them can be corrected, simply on the basis of a holding that the act provides the exclusive remedy, without dismissing an action for no other reason than that it was filed on the wrong "side" of the court.

action under the Jones Act was brought at law, and assumed without discussion that it was proper to submit the maintenance and cure count to the jury.²²¹ In *Nolan v. General Seafoods Corp.*,²²² the court went farther. The seaman sued (1) for negligence under the Jones Act and (2) for maintenance and cure.²²³ The trial court directed a verdict for the defendant on the first count and the jury found for the plaintiff on the second. The court of appeals reversed as to the first count and affirmed as to the second. Thus the submission of the maintenance and cure count to the jury was specifically approved although, after the directed verdict on the Jones Act count, none of the practical reasons for that procedure remained. But perhaps the most interesting aspect of the opinion is the following passage:

No question was raised in this case as to the right of the plaintiff under the general maritime law to recover indemnity for injuries resulting from failure of the shipowner to furnish a seaworthy ship, including safe and suitable appliances. . . . Whether such a suit can be maintained on the law side of a federal district court in the absence of diversity of citizenship, instead of by libel in admiralty, need not be determined. Compare 28 U.S.C. §41(1)(a). . . .²²⁴

Section 41(1)(a) of the old Judicial Code invested the district courts with jurisdiction of cases "aris[ing] under the Constitution or laws of the United States. . . ." Thus we have here, ten years before Judge Magruder's dictum in the *Jansson* case,²²⁵ a positive anticipation of the suggestion that actions under the general maritime law might be cognizable as cases arising under federal law.²²⁶

Again in 1946 the First Circuit approved joinder of the maintenance and cure count with a Jones Act action at law. While not discussing the rationale of jury trial on the maritime law count, it affirmed the verdict of the jury on both counts.²²⁷ After the Court of Appeals decided *Doucette v. Vincent*²²⁸ in 1952 the

²²¹ *Stevens v. R. O'Brien & Co.*, 62 F.2d 632, 634 (1st Cir. 1933). In *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938), an appeal from the Third Circuit, the Supreme Court tacitly approved joinder where the Jones Act claim was in admiralty. It may be that at that time, in that circuit, it was believed that a single trial could be had only if the plaintiff elected to proceed in admiralty.

²²² 112 F.2d 515 (1st Cir. 1940).

²²³ There was no claim for unseaworthiness under the general maritime law. The plaintiff had "elected" to sue under the Jones Act. *Id.* at 517.

²²⁴ *Id.* at 516-17.

²²⁵ See note 71 *supra*.

²²⁶ There can be no doubt that the question left open was the same one that the Magruder dictum answered in the affirmative. In addition to § 41(1)(a) of the Judicial Code the court cited *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920), which contains this language: "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law. . . ." It cited *Philadelphia & Reading R.R. v. Berg*, 274 Fed. 534, 538-39 (3d Cir. 1921), and *Stamp v. Union Stevedoring Corp.*, *supra* note 169, as implying a negative answer (maritime cause maintainable at law only where jurisdictional requisites of citizenship and amount are present).

²²⁷ *Bay State Dredging & Contracting Co. v. Porter*, 153 F.2d 827 (1st Cir. 1946).

²²⁸ Note 81 *supra*.

District Court for Massachusetts entertained an action at law for maintenance and cure alone, the jurisdictional amount apparently being in controversy.²²⁹ The seaman's injury had been caused by the automobile of a third party while he was returning from shore leave. He had settled his claim against the third party. The claim for maintenance and cure was submitted to the jury although the practical reasons for that procedure, cited by Judge Wyzanski,²³⁰ were not present (of course the decision in *Doucette* supplied the rationale). The amount due for maintenance and cure to the time of trial was stipulated; all the jury had to do was deduct from the stipulated figure items already recovered from the third party, and add an amount for future maintenance and cure. The jury botched this assignment, necessitating a new trial. The case strongly suggests (1) that it is difficult for one trier of fact to determine the claim for maintenance and cure when the claim for indemnity has been otherwise determined, and (2) that where such a determination must be made, as in the case before the court, it would be better made by the court than by the jury. Indeed, there is further evidence that the *Doucette* decision injected difficulties into a procedure which had theretofore been operating satisfactorily. In a seaman's action for unseaworthiness and maintenance and cure the judge, contrary to the earlier practice described by Judge Wyzanski, withheld the maintenance and cure count from the jury because the amount claimed therein was less than \$3,000.²³¹ The jury's verdict was for little more than the plaintiff was clearly entitled to for lost wages, although there was evidence of pain and suffering. There was evidence of contributory negligence, and the jury had been instructed to scale down the damages in proportion; this they had presumably done not only with respect to the item for pain and suffering but also with respect to lost wages. This was probably correct procedure on the jury's part; but under the count for maintenance and cure the seaman was entitled to recover wages without deduction for contributory negligence. Judge Aldrich knew, then, that the jury had awarded the plaintiff some of his wages, but did not know how much. He awarded a sum for medical bills and for maintenance, but nothing for wages, which means that he cast upon the plaintiff the unsustainable burden of showing the amount which the jury had awarded for wages.²³² If both counts had been submitted to the jury with proper instructions, it seems less likely that the plaintiff would

²²⁹ *Gomes v. Eastern Gas & Fuel Associates*, 127 F. Supp. 435 (D. Mass. 1954), *motion for summary judgment denied*, 132 F. Supp. 29 (D. Mass. 1955).

²³⁰ *Supra* note 215.

²³¹ *Stendze v. The Boat Neptune, Inc.*, 135 F. Supp. 801, n. 1. (D. Mass. 1955). In so doing he overlooked the dictum in *Doucette* concerning "pendent" jurisdiction (note 92 *supra*)—which is hardly surprising in view of the principal rationale of that case. The district courts probably concluded that one basis of jurisdiction at law over claims arising under the general maritime law was enough. And *cf.* note 333 *infra*.

²³² In terms, the burden was cast upon the defendant of showing what portion of the wages had been paid by inclusion in the jury's verdict; but this is contradicted by the omission of any award for wages.

have been deprived of part of the modest protection afforded him by the principle of maintenance and cure.

The Second Circuit adhered in the seamen's injury cases to its procedural approach to "jurisdictional" questions, though in the first case to be discussed it did so in a confused and unsatisfactory context. The administratrix of a British seaman, domiciled in the United States, sued his employer for his death on a British vessel at sea. The district court dismissed for lack of diversity, but gave leave to move for transfer to the admiralty.²³³ The motion to transfer was denied on forum non conveniens grounds.²³⁴ The plaintiff then filed a libel in personam in admiralty, invoking the Jones Act and the Death on the High Seas Act. This proceeding, so far as the Jones Act was concerned, was barred by the statute of limitations unless the plaintiff could somehow rely on having filed the action at law in time. This question the district court did not resolve, deciding that, in any event, jurisdiction in admiralty should be declined on forum non conveniens grounds. The appeal was not from this dismissal of the libel but from the order of the district court refusing to transfer the original action at law to the admiralty docket. Judge Learned Hand held that the refusal to transfer was erroneous: "We held long ago that any ground of substantive jurisdiction will serve to support an action, regardless of the formal amendments which may be necessary to make it triable on one side or the other of the Court."²³⁵ Since the claim was based on the Jones Act and the Death on the High Seas Act it was a case arising under federal law.²³⁶ *Cunard S.S. Co. v. Smith*,²³⁷ the one instance in which the court had dismissed a maritime claim because there was no jurisdiction at law, was "distinguished." There, said Judge Hand, the plaintiff stevedore had "no right of action" under the predecessor of the Jones Act;²³⁸

²³³ *O'Neill v. Cunard White Star*, 69 F. Supp. 943 (S.D.N.Y. 1946). It does not appear what law was invoked by the original complaint. In the court of appeals, *O'Neill v. Cunard White Star*, 160 F.2d 446 (2d Cir. 1947), Judge Hand assumed that the complaint was based upon the Jones Act and the Death on the High Seas Act, but he was thinking of the later libel in admiralty. His statement of the procedure below is inaccurate. Cf. the opinion of the district court, *supra*. The likeliest possibility seems to be that the complaint was inartistically drawn and did not make clear the legal basis for the claim.

²³⁴ 69 F. Supp. at 944.

²³⁵ 160 F.2d at 447. Actually, this point was not necessary to the decision. The district court had refused transfer not because diversity was lacking but because of its discretionary power to decline jurisdiction of an action between aliens for a foreign tort.

²³⁶ See note 233 *supra*. If the original complaint was based on the Jones Act the circumstance that it was therefore a case arising under federal law was a reason for retaining jurisdiction, not for transfer; the reason for transfer—lack of jurisdiction at law—would in that event disappear.

²³⁷ 255 Fed. 846 (2d Cir. 1918), discussed at note 119 *supra*.

²³⁸ 160 F.2d at 447, citing § 20 of the Seamen's Act of 1915, 38 Stat. 1185, and *Chelentis v. Luchenbach S.S. Co.*, 247 U.S. 372 (1918). No mention was made of the act in the *Smith* case. The act referred to seamen, not to stevedores; not until 1926 did the Supreme Court hold that stevedores were seamen for purposes of the Jones Act. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). If *Smith's* action be viewed in retrospect as one brought under the Jones Act's predecessor on the theory that stevedores were seamen, surely it was then a case arising under federal statute, and should not have been dismissed.

it followed that "there was nothing we could do but dismiss the complaint, as soon as it appeared that the necessary diversity did not exist."²³⁹ This is no distinction at all; it is merely destructive of the position which Judge Hand had labored for years to establish. He seems to be saying that there must be some non-admiralty basis for jurisdiction, such as diversity or federal question, before a maritime case filed on the law side can be transferred to admiralty. That is not what he had said before, and it is not what he had said earlier in the same paragraph. If there is a non-admiralty ground for jurisdiction the typical occasion for transfer, as an alternative to dismissal, does not exist. It is regrettable that Judge Hand did not simply disapprove the *Smith* case as one in which the admiralty jurisdiction of the court should have prevented dismissal although there was no jurisdiction "at law."²⁴⁰

The court then proceeded to hold that the case was not one for discretionary dismissal on forum non conveniens grounds, but that, on the merits, the Jones Act should not be applied to a case having such foreign aspects.²⁴¹

In the following year the Second Circuit affirmed a judgment based on a jury verdict in an action under the Jones Act and for maintenance and cure, but without discussing the propriety of submitting the latter claim to the jury.²⁴² In 1950 it aligned itself with the Third Circuit in holding that no election was required between the Jones Act and the claim of unseaworthiness under the general maritime law, approving, without discussion, the submission of both counts to the jury.²⁴³ In 1951, reviewing the judgment in a three-pronged action in which all the issues had been submitted to the jury, Judge Clark observed in a footnote that the practice of submitting the maintenance and cure count to the jury, followed in the Southern District of New York, had been held "invalid" in the Third Circuit,²⁴⁴ but was vigorously supported by Professor Moore.²⁴⁵ The court did not commit itself on the matter—presumably because the verdict as to maintenance and cure was not involved in the appeal, although substantially the same problem existed with reference to the claim for unseaworthiness.

²³⁹ 160 F.2d at 447.

²⁴⁰ Perhaps the case can be read as tacitly disapproving the *Smith* case since it does not appear that the original complaint at law invoked any federal statute. Yet Judge Hand, with the subsequent libel in mind, assumed that it did.

²⁴¹ The district court had held that the Death on the High Seas Act gave no more comfort to the plaintiff than the Jones Act, and that recovery under the British wrongful death statute was barred by the British statute of limitations. The court of appeals did not discuss these matters further than to say that the case was one for application of the law of the flag.

²⁴² *McAllister v. Cosmopolitan Shipping Co.*, 169 F.2d 4 (2d Cir. 1948), *rev'd on other grounds*, 337 U.S. 783 (1949).

²⁴³ *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943 (2d Cir. 1950).

²⁴⁴ *Id.* at 480 n.1.

²⁴⁵ 5 MOORE, *FEDERAL PRACTICE* 281-85 (2d ed. 1951). Professor Moore's support for the practice is based largely on pragmatic and non-technical grounds, but leans toward the theory of "pendent" jurisdiction.

At this stage Judge Irving Kaufman in the Southern District of New York, prompted by Judge Wyzanski's opinion in *McDonald*,²⁴⁶ undertook some soul-searching of his own. The case before him was that of a British seaman against a British shipowner under the Jones Act and for maintenance and cure. Because of the foreign aspects the court held that there was "no jurisdiction" under the Jones Act (meaning, of course, that there was no cause of action on the merits); as to the count for maintenance and cure, that might be dismissed for want of jurisdiction on the law side, but such a disposition would be "superficial."²⁴⁷ "In denying civil jurisdiction, it ignores the admiralty jurisdiction of the court. It also evades a nascent jurisdictional problem in this circuit already grown more robust elsewhere."²⁴⁸ In the absence of diversity the count for maintenance and cure, deprived of whatever support it might have enjoyed by virtue of joinder with the dismissed claim under the Jones Act, was not within the jurisdiction of the court sitting at law:

We thus avoid a problem which may yet churn the placid waters of Jones Act litigation in this circuit. Perhaps too casually, we have allowed causes for maintenance and cure and causes under the Jones Act to be tried jointly at law without sufficient probe into the court's jurisdiction of the separate causes. Now elsewhere, this practice has been sharply challenged. The propriety of combining the actions, at law, where no diversity exists has been denied in several nearby circuits. The rationale of pendent jurisdiction justifying merger of the actions has been expressly rejected. . . . One district judge bravely confesses error and intimates that his brethren are partners in the error. . . . If he is correct, I cannot say that others of us have not erred. If the case at bar involved two New York residents the normal procedure in this court certainly would be to try both causes before a jury. . . . Yet in the Third Circuit this is error. Possibly in the First Circuit it also is. For the moment, we must tread on unsure ground.²⁴⁹

Judge Kaufman did not commit the error of dismissing because there was no jurisdiction at law; he recognized the propriety of transfer to admiralty, and denied that relief only because it would be futile: as an admiralty judge, he would decline jurisdiction on forum non conveniens grounds.

Two years later the Court of Appeals again approved, without discussion, submission of the maintenance and cure count to the jury along with the Jones Act count.²⁵⁰ In 1954 it reaffirmed its policy of "free interchange between admiralty and law" in an unusual situation.²⁵¹ An action for the death of a seaman, begun as a civil action under the Jones Act, was on motion of the plaintiff, and over the objection of the defendant, transferred to the admiralty docket and a

²⁴⁶ *Supra* note 204.

²⁴⁷ *Catherall v. Cunard S.S. Co.*, 101 F. Supp. 230, 233 (S.D.N.Y. 1951).

²⁴⁸ *Ibid.*

²⁴⁹ *Id.* at 233-34.

²⁵⁰ *Rosenquist v. Isthmian S.S. Co.*, 205 F.2d 486 (2d Cir. 1953).

²⁵¹ *Civil v. Waterman S.S. Corp.*, 217 F.2d 94, 97 (2d Cir. 1954).

count under the Death on the High Seas Act was added.²⁵² After an award to the plaintiff the defendant objected that the election to proceed at law under the Jones Act was irrevocable. The Court of Appeals disagreed, holding that the substantial question was whether there should be jury trial or not, and that the choice was given to the plaintiff.

Not until 1956 did the Court of Appeals for the Second Circuit address its attention to the mode of trial, and then it did so in a devious and inconclusive fashion. The case was a typical three-pronged seaman's action, in which the Jones Act and unseaworthiness claims were submitted to the jury "in accordance with the customary practice in this Circuit."²⁵³ The maintenance and cure claim was decided by the judge.²⁵⁴ The propriety of this customary practice was mooted by the court on its own motion because the question was "jurisdictional," although "the only significance it has is with respect to the mode of trial, since there is always jurisdiction in admiralty over an unseaworthiness claim."²⁵⁵ Judge Learned Hand, had he been sitting, would probably have said simply that the defendant's failure to object to jury trial of the unseaworthiness count was a waiver of his right, if any, to have it tried by the court. This gratuitous raising of the "jurisdictional" issue is all the more strange since the court construed the charge to the jury as directing a verdict for the defendant on the claim for unseaworthiness.²⁵⁶ Moreover, the court recognized that "a suit begun 'at law' may, under some circumstances, be deemed to have been brought in admiralty, and vice versa."²⁵⁷ Perhaps a second reason given by the court offers a better explanation of the excursus: recent decisions in the Second and other circuits had focused attention on the jurisdictional bases for jury trial of maritime claims,²⁵⁸ and the problem was one that ought to be clarified. If that was the purpose, it was not achieved. The court's disposition of the case contributed nothing that was not already clear. *Paduano* had established that the claim for unseaworthiness was not cognizable as one arising under federal law. The theory of "pendent" jurisdiction was discussed noncommittally. Submission of the unseaworthiness claim to the jury was approved because a search of the record disclosed that the plaintiff "lived" in New York, that the defendant was an Indiana corporation, and that the jurisdictional amount was

²⁵² The reasons for the plaintiff's unusual motion are interesting but not material here.

²⁵³ *Troupe v. Chicago, D. & G. B. Transit Co.*, 234 F.2d 253, 256 (2d Cir. 1956).

²⁵⁴ Although this is the first mention in the Second Circuit of this Third-Circuit treatment of maintenance and cure, the court did not comment on the practice, presumably because the maintenance and cure count was not involved in the appeal.

²⁵⁵ 234 F.2d at 257.

²⁵⁶ *Id.* at 256. The question was not entirely irrelevant since the court ultimately held on the merits that the plaintiff was entitled to a new trial on both claims, so that the mode of procedure on remand was clarified. That hardly seems a reason, however, for the court's raising the question sua sponte as one of jurisdiction.

²⁵⁷ *Id.* at 257 n.5.

²⁵⁸ *Id.* at 257.

in controversy.²⁵⁹ The court also thought it "probable" that jury trial was justified by the Great Lakes Act,²⁶⁰ although the detailed facts needed to bring that act into operation were apparently not alleged. Thus, having strained to raise the question, the court strained to avoid answering it. That a jury trial was proper for saving-clause cases where jurisdiction could be predicated on diversity had been known, or assumed, all along. The decision contributed nothing to solution of the problem concerning the mode of trial of saving-clause cases in the absence of diversity.

In *Weiss v. Central R.R. of New Jersey*²⁶¹ the court affirmed a judgment in a case in which the Jones Act claim had been submitted to the jury and the maintenance and cure claim had been adjudicated by the judge. Thus there was explicit confirmation of the practice borrowed from the Third Circuit; still, however, the legal basis for the practice is not discussed. Judge Clark observed in a footnote²⁶² that the procedure below differed from the prevailing practice in the Second Circuit of submitting both issues to the jury. He did not criticize the lower court's departure from local custom in favor of the Third Circuit's. Instead he observed that "obviously" the simultaneous trial of the two claims—one to the judge sitting in admiralty and the other to the jury—was convenient and proper. Apparently this was a warning to the district courts that they should abandon their older practice. It is indeed obvious that a single trial with two triers of fact is better than two separate actions; but on the basis of experience, particularly in the First Circuit, it is far from obvious that dividing the function of decision is more convenient than submitting the entire case to the jury.²⁶³

In *McAfoos v. Canadian Pacific Steamships, Ltd.*,²⁶⁴ the plaintiff, a magician's assistant employed aboard a passenger vessel and arguably a "seaman," began by filing a libel in rem and in personam in the district court, alleging negligence, unseaworthiness, and the right to maintenance and cure. This unusual procedure was followed, apparently, because of doubts as to whether the plaintiff could qualify as a seaman, or otherwise as one entitled to the distinctive benefits of the causes of action asserted. By suing in admiralty she assured herself at least of a trial by the court on a claim for simple maritime tort. A month later she filed a substantially identical action at law, with a demand for jury trial, specifically invoking the Jones Act. This action the district court dismissed as vexatious and because the plaintiff was deemed to have made an irrevocable election to proceed in admiralty. The court of appeals, speaking through Judge Clark, reversed, treating the fundamental question as one concerning the right to jury trial. The right was not waived by the "election" to sue

²⁵⁹ *Id.* at 258.

²⁶⁰ 28 U.S.C. § 1873. See 234 F.2d at 258 n.7. *Cf.* note 14 *supra*.

²⁶¹ 235 F.2d 309 (2d Cir. 1956).

²⁶³ See note 316 *infra*.

²⁶² *Id.* at 310 n.1.

²⁶⁴ 243 F.2d 270 (2d Cir. 1957).

under the Jones Act in admiralty; the time for demanding jury trial should be regulated by Rule 38 of the Federal Rules of Civil Procedure. Transfer to the civil docket might have been better than filing a new action:

The *in rem* claims and any *in personam* theories not cognizable at law would not be lost by such a transfer, of course, but would be preserved in admiralty; and both sets of claims could be pressed simultaneously at the trial.²⁶⁵

When the civil aspects of a libel in admiralty can be transferred to the civil side while preserving the maritime aspects in admiralty, and when the whole case can then be tried as one, the jurisdictional barriers are reduced to a minimum. Moreover, Judge Clark reiterated the policy of free interchange between the two jurisdictions in a way which should dispel any lingering influence of the old *Smith*²⁶⁶ decision:

A long line of decisions has established the propriety of treating cases begun by libels as actions "at law"—or presently "civil actions"—where there is federal jurisdiction to sustain the suit on the civil side. . . . And we have similarly treated an action begun by a civil complaint as a suit in admiralty. . . . This power to shift a case from one "side" of the court to another is not limited to situations where one side has jurisdiction and the other has not . . . ; nor does the district court have unlimited discretion to deny transfer between sides. . . .²⁶⁷

The question of the mode of trial upon remand was even more complex than usual on account of the plaintiff's ambiguous status; but the plaintiff spoiled any hope the court may have entertained for an opportunity to settle that problem. She indicated that she would amend her complaint to allege diversity of citizenship. Judge Clark had to content himself with a seemingly less significant procedural achievement:

We point out only the obvious convenience of a consolidation of the admiralty and civil actions, so that the *in personam* claims may be tried to a jury at the same time that the *in rem* claims are tried to the court.²⁶⁸

Finally, in 1959, the Second Circuit attacked the problem of the mode of trial in a forthright and practical, though limited, way. In a typical three-count

²⁶⁵ *Id.* at 272.

²⁶⁶ Note 119 *supra*.

²⁶⁷ 243 F.2d at 272.

²⁶⁸ 243 F.2d at 274. Such a procedure would seem to involve complications of its own, despite Judge Clark's somewhat obscure optimism: "Of course the final rationale for a judgment is for the court, so that there need never be an 'election' between legal theories. . . . The court, in arriving at its ultimate judgment, will make the choice, dictated naturally only by the principles of substantive law which govern the relief sought." Diversity of citizenship (assuming that the jurisdictional amount is present) would mean that all the *in personam* claims could be submitted to the jury. But all the claims except that under the Jones Act were assertible, and asserted, *in rem*. Does the court mean that only the Jones Act claim is to be submitted to the jury, despite diversity, or that all the claims will be so submitted? If the latter, what is the function of the judge, sitting as an admiralty court, other than to enter a decree *in rem* on the basis of the jury's verdict respecting the claims not based on the Jones Act? It is conceivable that this dictum may be the harbinger of a new era, in which the seaman will not only be able to try all three of his claims before a jury in a single action but will have the benefit of a decree *in rem* as well to the extent that he can establish maritime liens. Cf. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 458 (2d Cir. 1959) (*concurring opinion*).

action, the judge submitted both the claim under the Jones Act and the claim for unseaworthiness to the jury, reserving to himself the decision as to maintenance and cure. In *Bartholomew v. Universe Tankships, Inc.*,²⁶⁹ the court of appeals affirmed. Judge Medina's opinion for the majority justified the submission of the unseaworthiness count to the jury by "pendent" jurisdiction, but made it clear that this was only a peg on which to hang a result dictated by procedural convenience:

We wish to make plain, however, what undue emphasis on the *Hurn v. Oursler* test may obscure, namely, that the fundamental desideratum is that all litigation should be decided in the manner most conducive to the just, speedy and inexpensive disposition of the business of the courts untrammelled by unnecessary technicalities and possible dilatory maneuvers.²⁷⁰

Judge Lumbard, concurring, objected to framing the issue in jurisdictional terms, and argued that the same result could be reached by construction of the Jones Act²⁷¹ or by permitting the district court in its discretion to submit both claims to the jury although the unseaworthiness claim is cognizable solely by virtue of the admiralty jurisdiction.²⁷² Unfortunately, reservation of the maintenance and cure count was impliedly approved although in substance the arguments (with the exception of Judge Lumbard's argument as to the construction of the Jones Act) would justify submission of that issue to the jury also.

In the Third Circuit the earliest case in this period merely sustained the right of a seaman to sue at law for maritime tort under the saving clause where diversity was present.²⁷³ In 1942, in *Lindquist v. Dilkes*, the court of appeals approved joinder of a claim for maintenance and cure with a claim under the Jones Act and became, so far as is known, the first court to rely on the "pendent" theory to justify jurisdiction "at law" of a maritime claim. The right to jury trial was not involved, the defendant having raised the jurisdictional question in a strictly captious spirit.²⁷⁴ In 1949 the *McCarthy* case²⁷⁵ was decided. The seaman brought two actions, one at law for unseaworthiness and under the Jones Act, and a separate libel in admiralty for maintenance and cure. The defendant urged that the Jones Act required an election between the remedy created by the act and the old maritime remedy based on unseaworthiness. The court, which had previously rejected this contention,²⁷⁶ did so again, and affirmed the jury verdict for the plaintiff. The practical difficulties of separating the maintenance and cure claim for trial by the court are suggested in mild

²⁶⁹ 263 F.2d 437 (2d Cir. 1959).

²⁷¹ *Id.* at 449.

²⁷⁰ *Id.* at 446.

²⁷² *Id.* at 454.

²⁷³ *Philadelphia & Reading R. R. v. Berg*, 274 Fed. 534 (3d Cir. 1921), *cert. denied* 257 U. S. 638 (1921).

²⁷⁴ 127 F.2d 21 (3d Cir. 1942). This decision was, of course, overruled in *Jordine* (*supra* note 70). The *Romero* decision vindicates this pioneering abstraction in a suitably abstract way.

²⁷⁵ *McCarthy v. American E. Corp.*, 175 F.2d 724; *id.* at 727 (3d Cir. 1949).

²⁷⁶ *German v. Carnegie-Ill. Steel Corp.*, 156 F.2d 977 (3d Cir. 1946).

form by the appeal from the decree in the maintenance and cure case. In the lawsuit the plaintiff had proved as an item of damages his lost earnings, past and future, and the value of the board and lodging he would have received had he been able to remain aboard ship. No medical expenses were claimed. The court approved the district court's ruling that the plaintiff had been fully compensated by the damage verdict for all that he was entitled to under maintenance and cure, board and lodging aboard ship being the equivalent of maintenance ashore. Probably substantial justice was thus achieved; but a similarly satisfactory result is not to be anticipated in cases in which the amounts presumably awarded by the jury for wages, medical expenses, and board and lodging are not congruent with what would be recoverable as maintenance and cure; and the court was fortunate in having before it a case in which it did not have to contend with the possibility that the jury had scaled down the recovery for such items because of contributory negligence.²⁷⁷

After the decision in *Jordine v. Walling* expressly approved the practice of reserving the maintenance and cure issues for the court, the difficulties of that procedure were again suggested by *Lipscomb v. Groves*.²⁷⁸ In *McCarthy*²⁷⁹ it had been considered important not to mention to the jury the liability for maintenance and cure. In *Lipscomb* that liability came to the jury's attention in two ways: (1) in a charge which the court held erroneous, the jury was told that the seaman had a duty to disclose aspects of his medical history material to the risk of absolute liability for maintenance and cure which the shipowner assumed; (2) one of the grounds of negligence alleged was that the defendant had failed to furnish proper medical care. There was also some difficulty concerning recovery of wages.²⁸⁰

In *Yates v. Dann*,²⁸¹ the jury returned an unconscionably small verdict, awarding only lost wages although the injury was severe.²⁸² The judge granted a motion for new trial limited to the issue of damages. Then, on motion of the plaintiff, he transferred the case to admiralty, wherein he assessed substantial damages, though allowing for contributory negligence, and made an award for maintenance and cure. The court of appeals reversed, holding that this procedure deprived the defendants of the right to jury trial. The plaintiff, having

²⁷⁷ 175 F.2d at 728, n.1. Cf. note 231 *supra*.

²⁷⁸ 187 F.2d 40 (3d Cir. 1951).

²⁷⁹ *Supra* note 275, 175 F.2d at 728.

²⁸⁰ 187 F.2d at 42. Although the verdict of the jury was for the defendant, the judge on rehearing eliminated wages from the maintenance and cure award. This award, which was affirmed, necessarily had an effect upon the trial of the other claims on remand. Cf. note 282 *infra*.

In *McLeod v. Union Barge Line Co.*, 189 F.2d 610 (3d Cir. 1951), the court affirmed submission to the jury of both the Jones Act claim and the claim for unseaworthiness.

²⁸¹ 223 F.2d 64 (3d Cir. 1955), *reversing* *Yates v. Dann*, 124 F. Supp. 125 (D. Del. 1954).

²⁸² *Yates v. Dann*, 11 F.R.D. 386, 388 (D. Del. 1951).

elected to sue at law with a jury, could not after verdict withdraw that election. At the very least, the plaintiff was not entitled to a jury trial on the issue of liability and a bench trial on the issues of contributory negligence and damages. Since the award for maintenance and cure had been framed in the light of items covered in the damage award, it could not be affirmed but had to be vacated and remanded so that it could be properly related to the ultimate jury verdict.²⁸³

In the Fourth Circuit a district court adopted the Second Circuit's principle of free transferability. After filing a libel in admiralty in Baltimore, a seaman filed his action at law in New York and moved to dismiss the Baltimore libel so that the New York action could proceed. Treating the motion to dismiss as the equivalent of a motion to transfer to the New York district, the court denied it, but allowed a motion to transfer to the civil docket although more than ten days had elapsed since the joinder of issue.²⁸⁴ In other words, while the plaintiff's original election to proceed in admiralty was not held to preclude jury trial, it did preclude jury trial in New York, where juries were thought to be more generous.

The Fifth Circuit at a relatively early date approved without discussion the practice of submitting the maintenance and cure claim to the jury along with the Jones Act claim.²⁸⁵ The court of appeals reversed on the Jones Act claim, remanding for a new trial, but affirmed the judgment as to maintenance and cure. The case suggests that even the procedure of submitting all claims to the jury is not free from complexities pertaining to possible duplication or neglect of items of recovery. The prior adjudication of the maintenance and cure claim must affect to some degree the instructions to the jury concerning damages recoverable on the new trial.

A district court in the Fifth Circuit wrote an opinion which may at first appear to be an enthusiastic espousal of the free transferability principle of the Second Circuit, but which actually imposes a highly conceptualistic limitation upon that principle. A seaman, having filed a libel in admiralty under the Jones Act and for maintenance and cure, moved for transfer to the civil docket. The motion was apparently timely and was unopposed. Diversity was alleged and the amount in controversy in each count exceeded the jurisdictional amount. Judge Kennerley allowed the transfer "[s]ince this Court has jurisdiction of this case in admiralty and would have jurisdiction thereof if it be transferred to the civil action docket."²⁸⁶ He distinguished his earlier holding in *The Dixie*²⁸⁷ on the ground that there the court had no jurisdiction in admiralty, and so could

²⁸³ Cf. note 280 *supra*.

²⁸⁴ *Jackson v. Ore Navigation Corp.*, 159 F. Supp. 935 (D. Md. 1958). Cf. the *McAfoos* case, *supra* note 264.

²⁸⁵ *Lykes Bros. S.S. Co. v. Grubaugh*, 128 F.2d 387 (5th Cir. 1942), *modified on rehearing*, 130 F.2d 25 (5th Cir. 1942).

²⁸⁶ *Nilsson v. American Oil Co.*, 118 F. Supp. 482 (S.D. Tex. 1954).

²⁸⁷ Note 174 *supra*.

not transfer to law. Such a limitation on the principle of free transferability is most unfortunate and would destroy the prime utility of the principle.²⁸⁸ It should not be material whether the court has jurisdiction on the "side" on which the action is filed; it should be sufficient if there is jurisdiction on the side to which transfer is sought. More directly, a case should not be dismissed for lack of jurisdiction if it is sustainable on any basis.

Although the fact was not noted in *Romero*, the Seventh Circuit was involved in the conflict as to jurisdiction of maritime claims under Section 1331. In 1948 it approved the joinder of a count under the Jones Act with one for maintenance and cure, and impliedly, at least, approved the submission of both to the jury.²⁸⁹ On a subsequent appeal in the same case the court adhered to the intervening holding of the Third Circuit in *Jordine*, and held that it was error to submit the maintenance and cure count to the jury.²⁹⁰ Like the Third Circuit, however, the Seventh concluded that a new trial was unnecessary; upon remand, the claim for maintenance and cure could be transferred to the admiralty docket and the same judge who had presided at the trial could enter findings of fact and conclusions of law.²⁹¹ Thereafter the practice in this circuit appears to have been to submit the claims for negligence under the Jones Act and for unseaworthiness to the jury, reserving the claim for maintenance and cure for determination by the court.²⁹²

In the Ninth Circuit a district court held at an early date that a claim for maintenance and cure was properly joined with an action at law under the

²⁸⁸ Such a limitation, however, is exactly what is suggested by Judge Learned Hand's ill-advised attempt to distinguish the *Smith* case. See note 236 *supra*.

²⁸⁹ *Mullen v. Fitz Simons & Connell Dredge and Dock Co.*, 172 F.2d 601, 604 (7th Cir. 1948). It may be noted in passing that it was assumed that the plaintiff was required to elect between a claim for negligence under the Jones Act and a claim for unseaworthiness, and that in so far as unseaworthiness figured in the case after the election to proceed under the Jones Act it was only failure to use due care to provide a seaworthy vessel that was thought to be involved.

²⁹⁰ *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82 (7th Cir. 1951).

²⁹¹ Despite the fact that there is no separate admiralty docket in the District Court for the Northern District of Illinois, this procedure was followed in substance on remand. Judge Sullivan, who had presided at the trial, entered findings of fact and conclusions of law. Letter from Judge Edwin A. Robson to Professor Philip B. Kurland, June 26, 1959.

The Great Lakes Act (note 14 *supra*) was not considered in this litigation. It was not until the following year that the court held that a claim for maintenance and cure was not a matter of "contract or tort" within the provisions of that act. *Miller v. Standard Oil Co.*, 199 F.2d 457 (7th Cir. 1952). Presumably the court intended to embrace the Third Circuit's holding that claims under the general maritime law are not cognizable under § 1331, though the specific holding seems to be only that the doctrine of pendent jurisdiction does not apply to the claim for maintenance and cure. The claim for unseaworthiness was not involved, having been abandoned by the plaintiff's "election" to proceed under the Jones Act. 191 F.2d at 84.

²⁹² See *McDonald v. Sinclair Ref. Co.*, 1955 A.M.C. 1415 (N.D. Ill. 1955). This memorandum opinion reveals no reliance on the Great Lakes Act and no rationale for submission of the unseaworthiness count to the jury. Presumably the Third Circuit's view of "pendent" jurisdiction of the unseaworthiness claim was being accepted.

Jones Act.²⁹³ In 1942 the court of appeals affirmed a judgment dismissing a claim under the Jones Act on the merits and transferring the appended claim for maintenance and cure to the admiralty docket.²⁹⁴ A district court consolidated for trial an action at law under the Jones Act and a libel for maintenance and cure, with no indication whether the latter claim would be submitted to the jury.²⁹⁵ In 1956 the Court of Appeals affirmed a judgment in a three-pronged action in which, without objection from plaintiff's counsel, the court reserved to itself decision on both the unseaworthiness and the maintenance and cure claims.²⁹⁶ Thus the question of jurisdiction of the maritime law claims under Section 1331, or by virtue of their being ancillary to the Jones Act claim, was not reached;²⁹⁷ yet the court indicated a strong disposition to hold that those claims were not cognizable "at law" on either ground.²⁹⁸ In 1957 a district court held positively that neither the claim for unseaworthiness nor that for maintenance and cure was cognizable at law; Section 1331 did not apply, and neither claim was cognizable by virtue of being ancillary to a Jones Act claim.²⁹⁹ While the court denied a motion to dismiss the maritime law claims for lack of jurisdiction, it did transfer them to the admiralty docket, and indicated an intention of proceeding with two *separate trials* because the Rules of Civil Procedure are inapplicable to suits in admiralty.³⁰⁰

We return, now, to Judge Wyzanski's opinion in *Jenkins v. Roderick*.³⁰¹ The decision has special importance because of its citation in the *Romero* case.³⁰² This was a seaman's three-count action in which, according to Judge Wyzanski, the question presented concerned the propriety of allowing jury trial not only on the Jones Act claim but also on the claims for unseaworthiness and maintenance and cure, where the amount involved in the maintenance and cure claim was less than \$3,000. Judge Wyzanski answered the question by allowing jury trial on all three counts. A basis for doing so had been provided by *Doucette v.*

²⁹³ *Kongs v. Oceanic & Oriental Nav. Co.*, 47 F.2d 650 (N.D. Cal. 1931).

²⁹⁴ *Modin v. Matson Nav. Co.*, 128 F.2d 194 (9th Cir. 1942). There was no diversity of citizenship and the claim was for less than the jurisdictional amount. There was no discussion either of § 1331 or of pendent jurisdiction.

²⁹⁵ *Moss v. Joshua Hendy Corp.*, 1955 A.M.C. 360 (N.D. Cal. 1955).

²⁹⁶ *Jesonis v. Oliver J. Olsen & Co.*, 238 F.2d 307 (9th Cir. 1956).

²⁹⁷ *Cf.* 238 F.2d at 309, n.3.

²⁹⁸ *Id.* at 308.

²⁹⁹ *Melleck v. Oliver J. Olsen & Co.*, 149 F. Supp. 481 (S.D. Cal. 1957).

³⁰⁰ *Ibid.* It is interesting to note (1) that the court allowed the plaintiff to proceed in the admiralty cases without prepayment of costs under 28 U.S.C. § 1916 (referring to seamen's suits for "the enforcement of laws enacted for their health or safety"), and (2) that the plaintiff was required to "serve and file" an amended complaint, stating only the Jones Act claim, and a libel in admiralty stating the claims under the general maritime law. *Id.* at 484.

³⁰¹ 156 F. Supp. 299 (D. Mass. 1957). See note 215 *supra*.

³⁰² 358 U.S. at 360, 378 (1959).

Vincent:³⁰³ the claims under the general maritime law were cognizable under Section 1331, and, though the jurisdictional amount was not in controversy as to maintenance and cure, that count was covered by "pendent" jurisdiction. Judge Wyzanski, instead of relying on the authority of *Doucette*, undertook to analyze the problem afresh. Reviewing the theories upon which an unseaworthiness count joined with a Jones Act count had been submitted to the jury, he rejected the theory that this must be done to avoid trouble from the doctrine of *res judicata*. His view that the rule of *Baltimore S.S. Co. v. Phillips*³⁰⁴ operates in one direction only is supported by no citation of authority, but only by an unpersuasive argument; that, however, need not detain us here.³⁰⁵ The theory that the count for unseaworthiness should be entertained as pendent to the Jones Act claim he favored because of its practical advantages. As to the theory that the claim was cognizable under Section 1331, while he conceded that the words of the jurisdictional grant "fit like a glove,"³⁰⁶ he was troubled by the facts, later to be emphasized by Mr. Justice Frankfurter, that there was no reason why Congress in 1875 should have been interested in conferring on the district courts jurisdiction, which they already had, over maritime causes, and that Section 1331 had not been so construed until *Doucette* was decided in 1951. He did not, however, specifically charge the court of appeals with error on this score. Instead he maintained that, in assuming that a right to jury trial was a consequence of holding the claim cognizable under Section 1331, Judge Magruder had indulged in an "erroneous assumption."³⁰⁷

In the entire history of the effort by the courts to deal with the problem of the mode of trial in seamen's injury cases, no more confusing and unsettling suggestion has been made. It is ironical that it should have been made by the judge who in other respects has dealt more thoughtfully and constructively with the problem than has any other.

By way of preliminary, let it be acknowledged that it is unfortunate that the mode of trial has historically been considered in jurisdictional terms.³⁰⁸ Let it be added that, even if cases under the general maritime law are cognizable under Section 1331, a constitutional right to jury trial does not necessarily follow. It may even be conceded that there is room for disagreement as to whether there is a statutory right to jury trial in the federal courts in saving-clause cases, though the plaintiff seeks only a common-law remedy which the common law is competent to give.³⁰⁹ The fact remains that this belated suggestion, that

³⁰³ Note 80 *supra*.

³⁰⁴ 274 U.S. 316 (1927). See note 11 *supra*.

³⁰⁵ The question is settled by *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224-25 (1958); *but cf.* *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 444 (2d Cir. 1959).

³⁰⁶ 156 F. Supp. at 301.

³⁰⁷ 156 F. Supp. at 303.

³⁰⁸ See text at note 20 *supra*.

³⁰⁹ See notes 16 through 18 *supra*, and related text.

the problem as to mode of trial is not settled by a finding that there is a non-admiralty basis for jurisdiction, is disruptive. The suggestion would equally mean (though this was not noted by Judge Wyzanski) that, contrary to the assumption of many years' standing, there is no right to jury trial in saving-clause cases where there is diversity of citizenship and the jurisdictional amount is in controversy. The suggestion is based upon a clear misconception of the saving clause. "In an unseaworthiness count plaintiff does not seek a common law remedy; he seeks a federal maritime remedy."³¹⁰ The fact that federal maritime law provides the basis for a claim does not exclude the action from the saving clause; the typical saving-clause case is one which is founded on federal maritime law, but in which the plaintiff seeks some common-law remedy, such as a simple money judgment, as distinguished from the distinctively admiralty remedy of a decree in rem.³¹¹ The argument proves too much. If an action for unseaworthiness is not one in which the common law is competent to provide a remedy,³¹² then it follows not only that there is no right to jury trial but that the case is not within the saving clause at all; the federal courts, sitting in admiralty, have exclusive jurisdiction. This much should have been made clear by the very case relied on by Judge Wyzanski—*Pope & Talbot v. Hawn*.³¹³ The holding of that case, that federal maritime law rather than state common law was controlling in an action for unseaworthiness based upon diversity of citizenship, was not coupled with any suggestion that the case was cognizable only in admiralty, or that there was no right to jury trial. On the contrary, the Court affirmed the judgment which had been rendered upon a jury verdict.

By way of climax—or anticlimax—for this dissertation, Judge Wyzanski held that, while the plaintiff was not entitled to jury trial by virtue of Section 1331, he was entitled to jury trial by virtue of the fact that his unseaworthiness claim was "pendent" to the Jones Act claim.³¹⁴ No explanation was offered. We are left to wonder why jury trial, though not a consequence of jurisdiction at law under Section 1331, is a consequence of jurisdiction at law by virtue of "pendent" jurisdiction.

Turning to the count for maintenance and cure, with respect to which the jurisdictional amount was not in controversy, Judge Wyzanski found himself on firmer ground. He relied to some extent on Judge Magruder's "considered dictum" in *Doucette*³¹⁵ to the effect that this claim might be considered pend-

³¹⁰ 156 F. Supp. at 303.

³¹¹ *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); GILMORE & BLACK, *THE LAW OF ADMIRALTY* 33-36 (1957).

³¹² *Cf.* 156 F. Supp. at 303.

³¹³ 346 U.S. 406 (1953). See also *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 453 n.15 (2d Cir. 1959) (concurring opinion).

³¹⁴ 156 F. Supp. at 304.

³¹⁵ *Doucette v. Vincent*, 194 F.2d 834, 840 n.5 (1st Cir. 1951).

ent to the claim under the Jones Act; primarily, however, he supported his decision to submit all three counts to the jury by a careful exposition of the practical difficulties involved in the procedure whereby the judge attempts to reserve to himself the issues on maintenance and cure while submitting the other two counts to the jury. There is no point in repeating his detailed analysis here. It is sufficient to note that this careful examination of the problem³¹⁶ by an experienced and thoughtful district judge leaves no doubt that the fairest and most efficient procedure is not to reserve the maintenance and cure count but to submit it to the jury along with the major counts for damages.

VI. SUMMATION

A completely intellectual attitude toward law should lead one to welcome any critical examination of the rational bases for judicial behavior. I must confess, however, to a feeling almost of regret that Judge Wyzanski did not let sleeping dogs lie in 1947. Prior to his opinion in *McDonald*,³¹⁷ when a seaman sued his employer for personal injuries under the Jones Act the entire case, including claims based on the general maritime law, was submitted to the jury. This was the practice at least in the First,³¹⁸ Second,³¹⁹ Third,³²⁰ Fifth,³²¹ and Seventh³²² circuits. As a practical matter the procedure was satisfactory.³²³ Now, thanks to the Supreme Court's decision in *Romero*, the federal courts will probably return to that procedure. In the meantime, Judge Wyzanski's intellectual curiosity has provided us with a decade of uncertainty and conflict as to the mode of trial in seaman's injury cases; questions have been raised as to federal jurisdiction which have implications transcending the question of seamen's injuries, or even of maritime cases in general; and the Supreme Court has dealt with the issues involved in a way which should be, but is not, definitive.

Without a trace of either apology or facetiousness one may regret that, in raising the question as to the propriety of the mode of trial in seamen's injury cases, Judge Wyzanski did so in jurisdictional terms. There has never, at any time, been any room for doubt that a United States district court, by virtue of its admiralty powers, has jurisdiction of a seaman's claim, based upon the gen-

³¹⁶ See 156 F. Supp. at 304-06.

³¹⁷ *Supra* note 204.

³¹⁸ *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888 (D. Mass. 1947). See notes 216, 221, 222 & 227 *supra*.

³¹⁹ *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943 (2d Cir. 1950). See notes 242, 244, 246, 250, & 253 *supra*.

³²⁰ *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1942). See note 274 *supra*.

³²¹ *Lykes Bros. S.S. Co. v. Grubaugh*, 128 F.2d 387 (5th Cir. 1942), *modified on rehearing*, 130 F.2d 25 (1942). See note 285 *supra*.

³²² *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 172 F.2d 601 (7th Cir. 1948). See note 286 *supra*.

³²³ *McDonald v. Cape Cod Trawling Corp.*, 71 F. Supp. 888, 891 (D. Mass. 1947).

eral maritime law, for personal injuries. The question has been one of procedure: whether joinder of the several claims is proper, whether there is a right to jury trial, whether jury trial on all the issues is more convenient and just than separating some of them for trial by the court, and how to handle certain differences between admiralty and civil rules at trial and on appeal. These questions could easily be resolved by a simple bit of congressional legislation. In the absence of such legislation they could be resolved by the courts simply and directly as procedural problems. Resolving them in this way would be no more an intrusion on the legislative function than the effort to resolve them in jurisdictional terms, and would be far more satisfactory. Dealing with them in jurisdictional terms is a makeshift technique which creates new problems while inadequately treating the one to which it is addressed, and which encourages the kind of thinking which led to the indefensible result of the *Higa* case,³²⁴ among others.

No one has ever suggested that a claim under the general maritime law is cognizable by virtue of Section 1331, or that the doctrine of "pendent" jurisdiction applies to maritime claims, except in the context of the problem of procedure in seamen's injury cases.³²⁵ A solution of that problem on the basis that cases predicated upon the general maritime law are cases arising under federal law within Section 1331, as contended by Mr. Justice Brennan in *Romero*,³²⁶ would have been certainly too broad and perhaps too narrow. That solution, or at least the version of its rationale embraced by Mr. Justice Brennan, would have implied that any claim based upon federal decisional law is cognizable by virtue of Section 1331.³²⁷ With the soundness or unsoundness of such a result I am not here concerned.³²⁸ The point is that there was no occasion for the Court

³²⁴ *Supra* note 183.

³²⁵ The sole possible exception relates to § 1331 and consists of an obscure intimation of the idea by a district court in a removal case. *Ross v. Pacific S.S. Co.*, 272 Fed. 538 (D. Ore. 1921). See note 175 *supra*. After the First Circuit had held, in the context of the jury problem, that § 1331 applied to maritime cases, other courts held that removability followed. See notes 163, 164 *supra*. See also note 80 *supra*.

³²⁶ 358 U.S. at 389 (1959).

³²⁷ According to one view, Judge Magruder's ruling was based on the position that maritime cases were cases arising under the Constitution, because the Constitution itself adopted the maritime law, whereas Mr. Justice Brennan's position was that federal common law was embraced within the "arising under" jurisdiction equally with statutes. See Kurland, *The Romero Case and Some Questions of Federal Jurisdiction*, 73 HARV. L. REV. 000 (1960); cf. *Paduano v. Yamashita*, 221 F.2d 615, 617 (2d Cir. 1955). According to that view, the ruling would have implications for nonmaritime cases only if the Brennan rationale, rather than that of Magruder, were the official one. I am not persuaded that the apparent difference between Magruder and Brennan is significant. It seems possible to read the two opinions as making the same point in somewhat different language. Judge Magruder's reference to the Constitution was a rhetorical device which facilitated his argument by analogy to cases reviewable by the Supreme Court under 28 U.S.C. § 1257(3), the relevant portion of which does not use the term "laws" but speaks of "the Constitution, treaties or statutes of . . . the United States."

³²⁸ See Kurland, *supra* note 327.

to make so consequential a decision in the *Romero* case. Historically and practically, the problems which have given rise to the contention for jurisdiction under Section 1331 related solely to the trial of seamen's injury cases; there was no apparent pressure to resolve the question whether cases based on federal decisional law in general were cognizable under that section. At the very least, the result urged by Mr. Justice Brennan would have implied that any case arising under federal maritime law (with the exception of cases brought under statutes providing for admiralty procedures) could, given the jurisdictional amount, be brought as a civil action and tried under the Rules of Civil Procedure, presumably with a jury. There is no indication whatever of any practical pressure for such a result. By and large, people seem content to bring their actions concerning marine insurance, salvage, charter parties, general average, and collision damages as suits in admiralty, without a jury, or occasionally to bring them in state courts.³²⁹ Mr. Justice Brennan's solution of the problem might also have resulted in the removability of saving-clause cases not now removable.³³⁰ Again the question is not as to the soundness or unsoundness of such a result, nor even as to its significance. The point is that the Court would have been well advised to leave that question unresolved until it should be presented in a removal case. Certainly there was no practical pressure for a ruling which would make saving-clause cases removable.³³¹

In addition to having extensive collateral consequences, Mr. Justice Brennan's position would have provided a poor solution for the real problem. While advocating jurisdiction under Section 1331, he apparently rejected the idea of pendent jurisdiction.³³² In view of the strange conceptions which have plagued the treatment of this subject, there is room to doubt that this would have provided a solution for the case of a maintenance and cure claim, in less than the jurisdictional amount, joined with a claim under the Jones Act; this was the case which presented the problem in its most troublesome form.³³³ A broader

³²⁹ The evidence in maritime collision cases is of such a character that one cannot contemplate with equanimity the trial of such cases before a common-law jury. See MOSCOW, COLLISION COURSE (1959). The fact that few collision cases are brought in state courts suggests that the prudence of shipowners would deter them from demanding jury trial in such cases even if it were available in the federal courts.

³³⁰ Cf. note 57, *supra*.

³³¹ The Brennan solution would also have entailed the venue complication pointed out by Mr. Justice Frankfurter. See note 31 *supra*.

³³² 358 U.S. at 412-13.

³³³ The rule that a single plaintiff, suing a single defendant, may aggregate his claims to make up the jurisdictional amount, *Pearson v. National Soc. of Public Accountants*, 200 F.2d 897 (5th Cir. 1953), has never played any part in the disposition of these cases. Clearly, if the claim for maintenance and cure is one arising under federal law within § 1331, this rule would solve the "jurisdictional" problem by allowing the plaintiff to add the amount claimed under the Jones Act to that claimed for maintenance and cure to satisfy the amount requirement. Yet Judge Magruder, though holding that the claim arose under § 1331, clearly assumed that if the jurisdictional amount were not claimed in the maintenance and cure count

objection is that there appears to be no reason whatever why the right to jury trial should depend upon the amount in controversy.³³⁴

Mr. Justice Frankfurter's solution—assuming that it is a solution at all—seems a neater and less troublesome one, if the solution must be in jurisdictional terms.³³⁵ It is true that this employment of the concept of pendent jurisdiction is somewhat anomalous. That concept, troublesome even in its original setting, was devised to expand the jurisdiction of federal courts at the expense

itself the theory of pendent jurisdiction was necessary. *Doucette v. Vincent*, 194 F.2d 834, 840 n.5 (1st Cir. 1951). In the same circuit, after the *Doucette* decision, Judge Aldrich withheld the maintenance and cure claim from the jury because it did not involve the jurisdictional amount (note 231 *supra*)—overlooking not only the propriety of cumulating the amounts claimed in the two counts but also the theory of pendent jurisdiction. As late as 1957 Judge Wyzanski was still concerned over the specific problem of what to do with a seaman's action in which the claim for maintenance and cure itself did not involve the requisite amount, and ended by relying on the theory of pendent jurisdiction without mentioning the possibility of aggregating the claims. *Jenkins v. Roderick*, *supra* note 298. Even where the parties were taken to be of diverse citizenship the Second Circuit assumed the propriety of withholding the maintenance and cure claim from the jury, not noticing the possibility of aggregation. *Troupe v. Chicago, D. & G. B. Transit Co.*, *supra* note 253.

The failure of the courts to utilize the aggregation principle is no doubt attributable to the fact that what they were seeking was jurisdiction "at law," and merely satisfying the amount requirement does not seem to make a maritime case cognizable "at law." But suppose that a plaintiff has two nonmaritime claims against a single defendant, neither involving the jurisdictional amount. Although both claims may arise under federal law, and although there may be diversity of citizenship, the court has jurisdiction of neither. If the claims are joined and the amounts aggregated, the court acquires jurisdiction. If a plaintiff has a claim under the Jones Act for more than the jurisdictional amount and a claim for maintenance and cure for less, the district court has jurisdiction of each—of the Jones Act claim by virtue of § 1331, and of the maintenance and cure claim by virtue of its admiralty power. If the amount in controversy is important, why not allow aggregation where the court has jurisdiction of both claims as well as where it has jurisdiction of neither? One answer to this question might well be that such a solution does not go to the merits of the question whether there should be jury trial; but neither do any of the other jurisdictional solutions.

³³⁴ This observation seems valid notwithstanding the fact that the Seventh Amendment itself guarantees the right to jury trial only "where the value in controversy shall exceed twenty dollars." That limitation served to exclude trivial cases from the guarantee. The function of the amount requirement in the jurisdictional statutes is to reduce the caseload of the federal courts; the amount has been fixed with that function in mind (see 2 U.S. CODE CONG. & AD. NEWS 3099 *et seq.* (1958)) and has no relevance to whether there should be jury trial in a case which is within the admiralty jurisdiction irrespective of the amount involved.

There is no reason, either, why the right to jury trial should depend upon whether the parties are of diverse citizenship. And certainly the right should not turn on the fortuitous factors which bring the Great Lakes Act (*supra* note 14) into operation. That Act, and most of the conditions in it, are the result of Congress's mistaken belief that it could extend the jurisdiction of the federal courts to the Great Lakes only by virtue of its powers over commerce. It is also incongruous that the right to jury trial should depend upon whether a maritime injury results in death. *Cf.* 358 U.S. at 401 with *The Tungus v. Skovgaard*, 358 U.S. 588, 597 (1959). Such considerations rather strongly suggest the desirability of legislative attention to the question of jury trial in maritime personal injury and death cases.

³³⁵ This is ironical, since both Mr. Justice Brennan and Mr. Justice Black, in dissent, recognized as the majority did not that the basic problem was one of judicial administration and of relatively limited scope.

of state jurisdiction; in its new context it serves merely to enlarge the jurisdiction of the "law side" of the court at the expense of the "admiralty side." It is possible that this use of the concept may give rise to difficulties in cases involving the respective powers of state and federal courts.³³⁶ It seems much less likely to be productive of collateral complications, however, than the rejected solution employing Section 1331. It may have limited significance for removal jurisdiction in seamen's injury cases; but, if so, it would seem to strengthen the existing view that such cases are not removable.³³⁷ If it is limited to claims of which the court has jurisdiction independently of the "pendent" theory—such as maritime claims—it is difficult to see how it can do a great deal of harm. Indeed, if it is limited, as it may well be, to the generalized features of the case before the Court, it will serve simply as a solution to the problem of procedure in the typical seaman's injury case, without collateral consequences.

The question remains whether the *Romero* case can be regarded as providing any solution for the real problem—the right to jury trial on all the issues in the typical seaman's injury action against his employer. The Court expressly left the question open.³³⁸ Since the principal claims which could be pendent to the Jones Act claims were dismissed on the merits, there was no occasion for the Court to decide the question as to jury trial. But then, there was no real occasion for the Court to decide the question whether the district court had jurisdiction under Section 1331, or on the pendent theory, at all. It did so, in terms, only to sustain the jurisdiction of the district judge to determine whether a cause of action was stated. The admiralty jurisdiction of the court was ample to sustain that determination. Yet the Court undertook a plenary consideration of the question of jurisdiction at law, using the terms and concepts which the lower courts had employed to attack the jury problem. It would be strange and unfortunate if this labor should turn out to have been a mere academic exercise. At the very least, the Court has struck down one of the principal supports for the practice of submitting the maritime claims to the jury: jurisdiction under Section 1331.³³⁹ To that extent the question as to the right to jury trial has been answered in the negative. At the same time, the Court has adopted the theory of "pendent" jurisdiction, which, in its maritime version, was invented and employed almost exclusively for the purpose of justifying the submission of mari-

³³⁶ For example, the Court's holding that the claim for maintenance and cure is pendent to the Jones Act claim, without discussion of the considerations which led the Third Circuit in *Jordine* to hold the contrary, may be relied on as relaxing the requirement concerning similarity of issues.

³³⁷ See *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952); GILMORE & BLACK, *THE LAW OF ADMIRALTY* 300-01 (1957).

³³⁸ 358 U.S. at 381. It seems possible that the Court's care to limit its holding may have been motivated in part by doubts suggested by Judge Wyzanski as to the logical relation between jurisdiction at law and jury trial. See note 307 *supra*.

³³⁹ See *Aho v. Jacobsen*, 359 U.S. 25 (1959).

time claims to the jury.³⁴⁰ It is difficult to believe that the affirmative implications of this holding for the jury question can be without significance.

It must be remembered that even the Third Circuit, in its pioneering *Jordine* decision,³⁴¹ did not deny the right to jury trial on the unseaworthiness claim, but justified the submission of that claim on the "pendent" theory.³⁴² Only by a district court in the Ninth Circuit has that claim been withheld from the jury on jurisdictional grounds.³⁴³ Whenever submission of the maintenance and cure count to the jury has been justified it has been on the basis of pendent jurisdiction. The jury question ought not to be decided in jurisdictional terms; but when the Court injects itself into the unfortunate business of trying to find a basis for jurisdiction "at law" of maritime claims, and when it adopts a concept which the lower courts have developed and employed primarily for the purpose of rationalizing jury trial, its action should have some significance for the jury question, especially since the Court had undertaken to resolve a conflict between the circuits which was primarily a conflict over that question.

When a Jones Act claim is submitted to the jury, the appended claims for unseaworthiness and maintenance and cure ought also to be submitted. This solution could be achieved simply as a matter of construction of the Jones Act. The superimposition of that statutory remedy on the maritime law raised questions which had to be resolved by the judicial process: whether the plaintiff must elect between the new remedy and the old; whether the several claims could be joined in one action; whether a judgment on one of the claims was *res judicata* in an action on another; and whether the claims under the maritime law could be tried to the jury. The first three of these four questions were disposed of simply as questions of statutory construction and common law, without jurisdictional theorizing; the fourth could be disposed of in the same way, simply as a matter of determining what is the reasonable, convenient, and just mode of procedure in the light of the Congressional policy embodied in the Jones Act. It is perfectly clear that this could be done to the extent of holding that the claim for unseaworthiness should go to the jury along with the Jones Act claim. Judicial decision has established that the plaintiff need not elect between these remedies, that they may be joined in a single complaint, and that they are so closely interrelated that a state may not impose a limitation period on the unseaworthiness claim shorter than the limitation period of the Jones Act.³⁴⁴ The Court, "with an eye to the practicalities of admiralty personal injury litigation,"³⁴⁵ has recognized that "full utilization of [the seaman's] remedies for personal injury"³⁴⁶ can be "accomplished only in a single proceeding."³⁴⁷ A state could not impair the opportunity of full utilization of remedies

³⁴⁰ Cf. notes 206 and 274 *supra*.

³⁴² See note 75 *supra*.

³⁴¹ Note 71 *supra*.

³⁴³ See note 299 and cf. note 298 *supra*.

³⁴⁴ *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

³⁴⁵ 357 U.S. at 224.

³⁴⁶ 357 U.S. at 225.

³⁴⁷ *Ibid*.

in a single proceeding by imposing a shorter limitation period upon the unseaworthiness claim. It is but a step from that holding to a holding that the claim for unseaworthiness may also be submitted to the jury; and the propriety of also submitting the maintenance and cure count, in the interest of convenience and efficiency as well as of securing to the seaman the full utilization of his remedies in a single proceeding, would follow unobstructed but for the Third Circuit's conceptualism regarding causes of action.³⁴⁸

The Supreme Court's adoption of the "pendent" jurisdiction theory in *Romero* should at least put to rest that conceptualism. The theory was applied to both unseaworthiness and maintenance and cure without distinction as to the nature of the causes of action. If such distinctions do not obstruct "jurisdiction" for the purpose of determining whether a cause of action has been stated, they should not be an obstacle to "jurisdiction" for purposes of jury trial. With that obstacle out of the way, there is no reason why all three counts should not be submitted to the jury, irrespective of the amount involved in the maintenance and cure count itself. That result can be reached with or without the "pendent" jurisdiction theory of the *Romero* case. It would be better if it were reached without resort to jurisdictional conceptions, but the paramount consideration is that it be reached. It is to be hoped that the disposition of the problem foreshadowed by the *Romero* case will in time materialize.³⁴⁹

The fact remains that it is unfortunate that the Court dealt with the problem in jurisdictional terms. That approach lends dangerous encouragement to the assumptions of mutually exclusive jurisdiction which lead to dismissal of civil actions simply because the Silver Oar is on the bench and of suits in admiralty because it is not. It is reasonable to hope that the Supreme Court would not, today, be guilty of any such extreme application of the jurisdictional concepts which color the majority opinion. In fact, immediately after *Romero* was de-

³⁴⁸ *Jordine v. Walling*, 185 F.2d 662, 670-71 (3rd Cir. 1950). Cf. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). See also *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 446, 454 (2d Cir. 1959).

³⁴⁹ The core problem concerns only submission of the maritime law counts to the jury along with the Jones Act count in the typical seaman's action. The pendent jurisdiction theory neatly solves the problem in this form. But the problem has larger proportions. What is to be done with the maritime law counts when the Jones Act claim is for some reason not submitted to the jury? The *Romero* case itself, by invoking the theory of pendent jurisdiction in a situation in which convenience and economy did not demand unitary procedure, suggests that jurisdiction at law may entail the right to jury trial although the practical arguments for unitary procedure are absent. A better solution might take into account the stage of the trial at which the Jones Act claim is eliminated from consideration. Thus, if it is dismissed at the outset, there is no compelling reason for empanelling a jury at all; on the other hand, if a jury has attended to the evidence in a long trial, the fact that the judge at the conclusion of the evidence decides to direct a verdict on the Jones Act count should not necessarily result in the jury's discharge. The *Romero* solution would not cover the case in which the seaman joins a claim under the general maritime law against a defendant other than his employer. Nor would it lend encouragement to any desire which there may be for jury trial in maritime personal injury cases other than those involving seamen. Such very broad aspects of the problem are probably best left to Congress.

cided, the Court had occasion to review a maritime tort case from the First Circuit which had been tried to a jury apparently on that circuit's theory of Section 1331 jurisdiction.³⁵⁰ The Court of Appeals had erred in determining the standard of care owed by the shipowner to visitors on board,³⁵¹ and for this reason the Court reversed. At the same time it cited *Romero*, presumably to indicate that the action was not cognizable at law; but, instead of dismissing, it remanded for "retrial on the admiralty side." There is comfort to be drawn from the fact that the action was not dismissed for lack of jurisdiction, but a degree of jurisdictional thinking is still suggested. The Court's order transferring the case to the admiralty side amounts to a holding, *sua sponte*, that there was no jurisdiction "at law." Yet no more was involved than the fact that the case had been tried to a jury. Why did not the Court leave it to the defendant upon remand to move for transfer to the admiralty docket if he should be so advised? A conceivable answer might be that it is the policy of the Court to stamp out jury trials in the federal courts where there is no right to have them, even though one party may negligently or collusively fail effectively to oppose the other's demand. But a likelier explanation in view of the history of this subject is that the Court acted on its own motion because it conceived of the matter as jurisdictional.

The Silver Oar which the Southern District of New York is fortunate to have had restored to it is a beautiful piece of craftsmanship and a relic of rare historical interest; the antiquarian spirit is not to be begrudged its delight in such an artifact. A different kind of antiquarian spirit should not be permitted, however, to perpetuate the separatism of which the Silver Oar is a symbol, thereby dividing a single district court into two separate courts. Appreciation of such a treasure should be limited to artistic and historical grounds; its symbolism should never interfere with the unitary character of the district court, nor with the just, convenient, and efficient conduct of judicial business, nor, indeed, with the long overdue unification of all heads of federal jurisdiction under a single set of rules of procedure.³⁵²

VII. EPILOGUE: CONFLICT OF LAWS

The only appropriate way to begin discussion of the conflict-of-laws aspect of the *Romero* case is with a word of fervent thanksgiving for the Court's adherence to the basic methodology of *Lauritzen v. Larsen*.³⁵³ As in *Lauritzen*, there is no mechanical approach to the question of the applicability of American law. There is no preclusive "characterization" of the case as one of contract or of tort; there is no slavish submission to the law of the place of contracting, nor of the place of injury, nor of the flag. There is no territorialist dogma. In

³⁵⁰ *Aho v. Jacobsen*, 359 U.S. 25 (1959), *vacating judgment in* 249 F.2d 809 (1st Cir. 1957).

³⁵¹ *Ibid.*; see also *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

³⁵² See 5 MOORE, *FEDERAL PRACTICE* 65 *et seq.* (2d ed. 1951).

³⁵³ 345 U.S. 571 (1953).

Lauritzen there was only a construction of the Jones Act, made necessary by the "literal catholicity of its terminology"³⁵⁴—a characteristic which the Jones Act shares with most legislation.³⁵⁵ The Act was construed in a spirit of "reconciling our own with foreign interests and . . . accommodating the reach of our own laws to those of other maritime nations."³⁵⁶ *Romero* extended this approach to the nonstatutory maritime law.³⁵⁷ A prime advantage of this approach over traditional conflict-of-laws methodology is that, while inquiring specifically into the governmental policies and interests involved, it explicitly recognizes the power of the legislative branch to determine what domestic policy is and when domestic interests require the application of that policy, so that legislative rectification of any interpretation which does not serve the public interest is positively invited.³⁵⁸ The traditional method not only obscures, or treats as unimportant, governmental policies and interests, but tends to discourage legislative modification of judicial precedent by its pretense that the results which it produces are, in the nature of things, limitations on sovereign power.

The method employed by the Court in these two cases was thus admirably constructive. In *Lauritzen* it produced a result to which no exception can be taken; there appears to be no reason whatever why this country had any interest, in that case, in applying its law to compensate the injured seaman. In *Romero*, however, it may be respectfully suggested that legitimately applicable American policy was given insufficient consideration.

In *Lauritzen* the injury occurred in Havana, Cuba; in *Romero* it occurred in Hoboken, New Jersey. According to the majority of the Court, "This difference does not call for a difference in result."³⁵⁹ The place of injury was regarded as a "wholly fortuitous circumstance"³⁶⁰ (which it sometimes is),³⁶¹ and the desirability of allowing a foreign vessel to operate under a single law, with a uniformity of liability unmarred by such fortuities, was treated as the paramount consideration. The imposition of liability under American law would disrupt international commerce "without basis in the expressed policies of this country."³⁶²

So far as the claims for indemnity are concerned this is a commendable position. Providing compensation for the injured seaman and regulating the

³⁵⁴ 345 U.S. at 576.

³⁵⁵ See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 230-31 (1958); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952).

³⁵⁶ 345 U.S. at 577.

³⁵⁷ 358 U.S. at 382.

³⁵⁹ 358 U.S. at 383.

³⁵⁸ Cf. 358 U.S. at 382-83; 345 U.S. at 578.

³⁶⁰ 358 U.S. at 384.

³⁶¹ Cf. Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

³⁶² 358 U.S. at 384.

liability of the shipowner are the concern of the state of their common nationality, and this country has no interest in intruding its own policies into that relationship. The point was persuasively made by the briefs filed by the United Kingdom, Denmark, the Norwegian Shipping Federation, and the Swedish Shipowner's Association as amici curiae. Thus Denmark, pointing out that standards of income and compensation differ greatly, said:

What might seem a relatively minor extra burden to the United States could be a major disaster to Danish shipping and hence to Denmark's entire economy. A decision which would have the effect of imposing American law and American standards of compensation on Danish shipowners for injuries received by Danish seamen on Danish ships could be gravely deleterious to the economic health . . . of Denmark.³⁶³

The British brief emphasized the inequalities among foreign seamen if those who happened to be injured in American ports were compensated according to liberal American standards:

The verdict of a New York City jury assessing the damages of an injured Japanese seaman might well exceed the award of a Japanese court by 10 to 1. Obviously, the interests of justice would not be served if one Japanese seaman who had been injured on a vessel of his country's flag while fortuitously in an American port were given this great advantage over a fellow Japanese seaman performing the same services who had been injured in Osaka.³⁶⁴

In short, a typical jury verdict under the Jones Act would have imposed a severe burden on the Spanish Line, enabling Romero to live in ducal splendor in his home country. The United States had no interest in producing such a result.

But the record in *Romero* shows that the injured seaman had incurred in this country heavy medical and related expenses which remained unpaid. The unpaid bill of the hospital was \$3,750.60; that of the supplier of the artificial leg was \$195; that for burial of the severed leg was \$25.³⁶⁵ The bare possibility that local suppliers of medical services may not be reimbursed by an indigent victim has been held by the Supreme Court to justify a state's application of its own law, even though that law may permit recovery of more than enough to pay any such creditors.³⁶⁶ In dealing with the problem in that context, however, the Court is bound, within limits, by the state court's determination of state policy and of the circumstances which justify the application of that policy; even if the state court has not made those matters explicit, the Court may, in deference to state authority, uphold the application of the law of the forum on the ground that the state's interest might reasonably be so interpreted. In dealing with federal rather than state law the Court has no such authoritative determination

³⁶³ Brief of the Government of Denmark, Amicus Curiae, p. 4.

³⁶⁴ Brief of the Government of the United Kingdom, Amicus Curiae, p. 5.

³⁶⁵ Record, vol. 1, pp. 107a, 116a.

³⁶⁶ *Carroll v. Lanza*, 349 U.S. 408 (1955). Cf. *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939). See Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 23 (1958).

before it, and no reason for assuming that the purpose of Congress is to press a policy to the outermost limits of reasonableness; it has to determine for itself what the national policy is and where the national interest lies.

The case affords an excellent opportunity for consideration of the judicial function in conflict-of-laws cases in the light of the governmental-interest analysis. A court's first task is to ascertain and declare the governmental policy as it has been expressed in statutes and judicial decisions, and as it may be interpreted in the light of all the relevant considerations accessible to the court. The process is one of construction and interpretation, and is essentially the same as that employed in a purely domestic case; as in a domestic case, the process may be dynamic and creative. What is clear is that the court cannot of its own mere wish and motion determine governmental policy. There must be some existing culture which, however dormant, can be stimulated into growth and nurtured and developed by the numerous arts of the judicial process. Principles found in past decisions and statutes can be projected and adapted; past errors can be rectified; changed social conditions can be taken into account, and the competing interests of individuals and groups within the state can be appraised. The powerfully creative instrument of analogy is always at hand. By these and kindred methods new policies can be brought into being. In some such way it came to be national policy that seamen should be indemnified by their employers for injuries caused by unseaworthiness even in the absence of negligence.³⁶⁷ On the other hand, when counsel in *Lauritzen v. Larsen* made a "candid and brash appeal" for the application of the Jones Act to the case before the Court for the purpose of helping seamen generally and in order to enhance the cost of foreign ship operation for the benefit of our competing industry, the Court administered a deserved rebuke. "The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of the Court in maritime matters could not have intended it for us."³⁶⁸ In substance the argument proposed that the Court manufacture a policy tending to bring the cost of foreign shipping to the level of our own. Such a policy was so collateral to the obvious policy of the Jones Act—to provide indemnity for seamen injured by the negligence of their employers—and so predatory that no grounds existed for inferring it, even if the Court had been so inclined.³⁶⁹

³⁶⁷ Cf. GILMORE & BLACK, *THE LAW OF ADMIRALTY* 315 *et seq.* (1957).

³⁶⁸ 345 U.S. at 593. In a note (*id.* at 593, n.29) the Court added the following quotation from *The Peterhof*, 72 U.S. (5 Wall.) 28, 57 (1866): "In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

³⁶⁹ Though a clearly expressed Congressional policy may be predatory and collateral to the principal reasons adduced in its support it will be respected by the courts within constitutional limits. Cf. 38 Stat. 1164, 1165 (1915), as amended, 46 U.S.C. § 597 (1944); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920); *ZEIS, AMERICAN SHIPPING POLICY* 70 (1938). But there seems no reason why the restraint imposed by due process upon a state's application of its policy to matters not within its legitimate sphere of concern should not apply also to the national government. Cf. Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9 (1958).

The second task of the court is to determine in what circumstances there is a reasonable basis for the application of the governmental policy: *i.e.*, whether there is a domestic *interest* in the application of our law. In *Lauritzen* there was no question about the general policy embodied in the Jones Act of providing indemnity for negligently injured seamen; the question related to the interest in applying that policy; and the Court found no basis, in the light of all the circumstances of the case, for an interest on the part of the United States.

At this point there is involved an aspect of the process of construction which is peculiar to the conflict-of-laws situation. In a purely domestic case the court may have to decide whether a determined policy applies to a peripheral state of facts: as, for example, whether the policy allowing limitation of the liability of the owner of a vessel applies to a marginal maritime structure.³⁷⁰ The problem of determining whether a given policy applies to a case having foreign aspects is essentially similar, but presents a consideration not presented by a purely domestic case: another state may have a different policy and an interest in its application. It is altogether fitting and proper that the existence of such a foreign interest should be a factor in the court's determination of whether a conflicting American interest exists. Such conflicts ought not to be created lightly and unnecessarily, and I take it that this is what Mr. Justice Jackson meant when he spoke of "reconciling our own with foreign interests and . . . accommodating the reach of our laws to those of other maritime nations."³⁷¹ Even if our lack of responsibility to the injured Danish seaman in *Lauritzen* had been less clear than it was, the conflict with Danish interests which would have resulted from an application of the Jones Act on the facts of that case would have been a material consideration which might have led the Court to define American interests with moderation and restraint.

In *Romero* the Court was required to concern itself first of all with the policy of the act. The fact that the injury had occurred in an American port could not, indeed, alter the fact that, in so far as the policy is concerned with the welfare of the seaman, it has no application to alien seamen employed on foreign vessels. But the occurrence of the injury in this country entailed consequences not only to the alien seaman but to American citizens. Such consequences can be predicted in the generalized case, and it actually happened that Americans who went to the aid of the victim were left unpaid. These circumstances properly presented to the Court a question which it did not discuss directly: Can the Jones Act be interpreted as expressing a policy, not only for the protection of an injured seaman, but also for the protection of those who come to his assistance? With some reason, the Court might have answered this question in the affirmative. In the domestic situation the seaman's recovery from the wrongdoer provides a fund from which the claims of such creditors may be satisfied. When an injury such as *Romero's* occurs in an American port, Ameri-

³⁷⁰ *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926).

³⁷¹ Note 356 *supra*.

can life-saving machinery goes into action as a matter of course, but not without cost. In addition to medical services, the victim is in need of legal services. Even if his only recourse is to apply to the Spanish consul for compensation, he needs that legal advice; and the alien seaman, injured though he is, has problems with the immigration authorities.³⁷² To protect the stranger within our gates to the extent of encouraging our residents to furnish these necessary services, as well as to secure their reimbursement from the wrongdoer, would be a reasonable national policy,³⁷³ and one which might with some effort be attributed to the Jones Act.

The trouble is that the Jones Act and the remedy for unseaworthiness are not even roughly proportioned to such a policy. They allow recovery not only for medical (and legal) expenses but also for loss of earning power and pain and suffering, and these major elements of recovery have nothing immediately to do with legitimate American concerns. Even so, it might conceivably be the policy of Congress to give the injured seaman, who is in a better position than his creditors to prove his case, an incentive to prosecute the action and thereby produce a fund from which they can be repaid. To this end the policy might be to provide for recovery sufficient not only to cover the claims of American creditors but to give substantial compensation to the seaman as well.

There is little basis for attributing any such policy to Congress. In the domestic situation, on which legislative attention is typically focused, there is no need to particularize the policies involved; a provision that the victim may recover plenary damages will incidentally protect his domestic creditors; the question whether, if we have no interest in compensating the seaman himself, we are nevertheless interested in protecting him for the benefit of his local creditors, is not likely to be considered. All we can say is that Congress might reasonably have formulated such a policy if it had directed its attention to the possibility that a case like *Romero's* might arise.

Here, in the determination of what the governmental policy is, as in the determination of whether there is governmental interest in the application of that policy, the Court must reckon with the fact that an immoderate and provincial determination may lead to serious conflict with the policies and interests of a foreign state. To have allowed *Romero* to recover full indemnity would have imposed a heavy burden on a Spanish enterprise, contrary to the policy formulated by Spain in reconciling the interests of its seamen and shipowners, for the purpose of incidentally securing reimbursement of relatively minor expenses incurred by American citizens. The international implications of such a policy are sufficiently serious to warrant the Court's reluctance to attribute it to Congress on the basis of mere speculation.

The Court left no doubt, however, that such a policy, if declared by Congress, would be respected and enforced. There would be no room for "weighing" the

³⁷² 8 U.S.C. § 1281 *et seq.*

³⁷³ *Cf.* 8 U.S.C. § 1283, imposing directly on the vessel liability for treatment of alien seamen afflicted with certain diseases and disabilities.

respective policies and interests of the United States and Spain. There would be no room for a judgment that the interests of American creditors, and of the United States in protecting them, are less significant than the interests of Spanish shipowners, and of Spain in protecting them. There would be no room for talk about facilitating international commerce by so arranging matters that vessels may operate throughout the world under a uniform law. There would be no room, certainly, for a doctrinaire pronouncement that such matters are governed by the law of the flag, or the law of the place of contracting, or the law of the place with the greatest number of "contacts" with the transaction. And the same would be true if the Court were, without explicit clarification from Congress, to reach the conclusion that the Jones Act expresses a policy for the protection of the creditors of the victim. The national policy being clear, it is the duty of the courts to apply it, not to subordinate it to considerations which may seem to the courts more important. If congressional policy unwisely creates international complications, that is a matter for rectification by Congress, not by the courts.

Assuming that such a policy for the protection of American creditors had been found, in what situations would there be a reasonable basis for—a domestic interest in—its application? In view of its more moderate interpretation of national policy, the Court did not reach this question, which is of the same type as that decided by the Court in *Lauritzen*. Clearly the policy would be applicable where, as in *Romero*, the victim is indigent, services are actually rendered by Americans, and no payment has been made. Perhaps, in the absence of a clear indication to the contrary from Congress, the hypothetical policy should be applied only under these conditions; the Court might be influenced so to hold by the unnecessary conflict with Spanish interests entailed by an unnecessarily broad application. On the other hand, as we have observed, a state may constitutionally employ for the effectuation of policy a tool which cuts a wider swath than is absolutely necessary to accomplish the stated purpose, if there are reasonable grounds for so doing;³⁷⁴ so may Congress, and the federal courts may infer such a congressional design. Hence it might reasonably be determined that the mere occurrence of the injury here warrants application of our law, in view of the probability that the injury will entail consequences of concern to us.³⁷⁵

³⁷⁴ See note 366 *supra*.

³⁷⁵ If *Romero* had died of his injuries—as he nearly did—his American creditors would not be aided even by the interpretation of the Jones Act discussed in the text. Logically, we should be concerned as much to protect the American creditors when the victim dies as when he survives. The reasonable basis for the application of such a protective policy is there; but the policy is not. The death and survival provisions of the Federal Employers' Liability Act, incorporated in the Jones Act, are construed like Lord Campbell's Act: the proceeds belong to the statutory beneficiaries, and are not subject to the claims of creditors. 45 U.S.C. §§ 51, 59; *In re Scheller's Estate*, 87 N.Y.S. 2d 550 (1949); *cf.* *St. Louis, I.M. & S. Ry.*, 237 U.S. 648, 656 (1915); *Hogan v. New York Cent. R.R.*, 223 Fed. 890 (2d Cir. 1915). The absence of a policy for the protection of creditors where death ensues may be an argument for not inferring such a policy where the victim survives. And *cf.* note 364 *supra*.

The difficult problem here is not one of "conflict of laws." The duty of a judge when he knows that the law (the policy and interest) of his own country is in conflict with that of another seems perfectly clear. The problem arises from the imprecision of our laws relating to personal injury. These may express various policies: compensation for the victim or his dependents, protection of local creditors, deterrence of wrongful conduct, and so on. Not only are the precise policies seldom made explicit, but the amounts recoverable are not nicely adjusted to various policies which might otherwise be attributed to the legislature. The real problem is not what to do when there is a "conflict of laws" but whether domestic policies and governmental interests give rise to such a conflict.

It is not indispensable, of course, that domestic law be applied in order to protect local creditors. If the foreign law provides for sufficient recovery, a judgment under that law will no doubt serve the purpose. But this requires a judgment in our courts; and the courts did not award recovery to Romero under Spanish law. On the basis of the doctrine of *forum non conveniens* the district court declined to adjudicate the claim against the Spanish Line even in admiralty; and, while the plaintiff may have invited or even acquiesced in this disposition, preferring to proceed otherwise, there are often obstacles to the application of foreign law, or reasons why that law would inadequately protect domestic interests.³⁷⁶ Moreover, the application of foreign law to effectuate our own policies is anomalous; its application to protect the interests of American creditors, if we have no domestic policy for their protection, is even more so. If it is domestic policy to protect American creditors, American law should be applied.

Mr. Justice Frankfurter said: "[T]he similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes."³⁷⁷ To the extent that this means that the methodology of the *Lauritzen* case is equally appropriate when the general maritime law, as distinguished

³⁷⁶ See notes 27 and 28 *supra*. In *O'Neill v. Cunard White Star*, 160 F.2d 446 (2d Cir. 1947) (note 234 *supra*), the action was for the death at sea of a British seaman employed on a British vessel. The deceased, although a British subject, had resided here for some twenty years and had declared his intention of becoming a citizen; his widow, who had resided here for almost as long, had also declared her intention to be naturalized; their four children were native-born citizens. The Jones Act clearly declares a policy of compensating the dependents of seamen killed through the negligence of their employers; there was no reason to suppose that Congress did not wish to assert its obvious interest in protecting its own domiciliaries and citizens. On the very ground that the widow and children were domiciled here, the court refused to dismiss on *forum non conveniens* grounds. Yet, in a singularly unperceptive opinion, Judge Learned Hand held the Jones Act inapplicable. The British law was not applied because Lord Campbell's Act contains its own one-year limitation period. See *s.c.* below, 69 F. Supp. 943, 946 (S.D.N.Y. 1946). The court should have held American law applicable (*cf.* *Ganbera v. Bergoty*, 132 F.2d 414 (2d Cir. 1942)); at the very least it might have respected the American policy of allowing a longer time to sue.

³⁷⁷ 358 U.S. at 382.

from acts of Congress, is under consideration, this is an unexceptionable statement. The statement overlooks, however, a possible solution which would have given some protection to American interests while not entailing the serious international consequences which would have followed an application of the Jones Act or the remedy for unseaworthiness. Might not the Court, by a discriminating analysis of the right to maintenance and cure, have held that modest remedy available? Under it the seaman would recover only medical expenses during convalescence, wages to the end of the voyage, and board and lodging. It is reasonable to assume that the foreign interests on whose behalf amicus briefs were filed would not have objected to such a recovery; their concern was with a judgment for full indemnity, which would be a gratuitous interference with the standards of compensation to which they were accustomed. They could hardly object with good reason to a judgment which would do little, if anything, more than compensate American citizens for the cost of caring for the alien seamen injured here in the service of the foreign ship.³⁷⁸

That national policy as interpreted in the *Romero* case poorly serves private American interests in connection with domestic injuries to foreign seamen is underscored by the fact that, while the claims against the Spanish Line were dismissed, those against the three American defendants were remanded for possible trial—presumably before a jury, there being diversity of citizenship. These claims for simple maritime tort might well result in full indemnity to the same extent as if the employer had been liable under the Jones Act. The factual basis for the claims was slender: against the American stevedoring contractor, for example, the charge was, essentially, that its employees looked on in a hostile manner as the crew prepared the ship's tackle for taking on the cargo, the longshoremen believing that this was work within their jurisdiction; their attitude made everybody nervous, and so contributed to the injury. But a New York jury could be quite generous to a seaman in such circumstances, the more logical defendant—the shipowner—being no longer in the case.

Conflict-of-laws theory has here produced an incredible jumbling of values. American policy calls on the injured seaman's employer to pay his medical expenses even if the employer is free from fault. Yet, because of "our self-regarding respect for the relevant interests of foreign nations,"³⁷⁹ the foreign employer is allowed to escape any responsibility whatever for those expenses, while American enterprises which supplied materials and services are left to bear the cost of their humanity. If an *American* tortfeasor can be found, however, they may be relieved of that burden—and, moreover, the foreign seaman may get the handsome recovery which was denied him under the Jones Act on the ground that it would disproportionately enrich him and unduly burden

³⁷⁸ Indeed, there is indication that under Spanish law the plaintiff was entitled to the equivalent of maintenance and cure in addition to a pension. Brief of Respondent Compania Trasatlantica on the Merits 18.

³⁷⁹ 358 U.S. at 383.

foreign shipping enterprise. Presumably we prefer burdening the American economy with generous verdicts for foreign seamen to imposing the burden of such verdicts on foreign enterprise.

Obviously, what we need is a national policy intelligently related to private American interests. I do not suggest that we should, as we might selfishly do, restrict the liability of American tortfeasors so that it does not benefit foreigners injured here. We have a selfish interest in providing some protection for the victim in such circumstances; moreover, we can probably afford the luxury of not discriminating against aliens when they sue domestic defendants for wrongful conduct here. I do suggest that we need a policy which takes account of the burden imposed on the community when a foreign seaman is injured here, and which, if it generously gives a seaman a handsome verdict against an American which it denies him against a foreigner, is at least deliberately generous. It is by no means clear to me that it is American policy, or intelligent American policy, to provide a ducal standard of living for Romero in his home country at the expense of American, but not Spanish, business enterprise.

If Congress and the federal courts do not improve this situation, a state like New Jersey or New York may be tempted to intervene.³⁸⁰ Such a state might reasonably be concerned about unpaid local creditors, and about the plight of the domestic tortfeasor who is held liable for full indemnity while the foreign employer goes free. It seems perfectly clear, however, that the rule of the *Romero* case on the inapplicability of American maritime law would be binding on the state courts if the seaman's action were brought there under the saving clause. For this proposition there is no need to seek an authority establishing the converse of the ruling in *Klaxon Co. v. Stentor Elec. Mfg. Co.*³⁸¹ The Supreme Court has made it perfectly clear that its ruling in *Romero* is an interpretation of national policy having important implications for international relations. Indeed, so far as the Jones Act is concerned, the ruling is not simply a "choice-of-law" rule, concerning which there might be some disputation as to the freedom of the state to go its own way, but a construction of the Act itself in the light of the presumed intention of Congress. So far as the general maritime law is concerned, the ruling is equally an adjudication of its scope and meaning. The conclusion

³⁸⁰ The United States does not even alleviate the situation to the extent of making freely available the facilities of the Public Health Hospitals, which are open without charge to seamen on American vessels. When "suitable accommodations" are available seamen of foreign-flag vessels may be treated "on application of the master, owner, or agent of the vessel," in accordance with regulations. The vessel may not be granted clearance until the expenses are paid or guaranteed. 62 Stat. 1017 (1948), 42 U.S.C. § 249. In the *Romero* case the trial judge asked: "And he never went to the Public Health Service?" Counsel for the plaintiff replied: "No, they wouldn't accept him unless the company would guarantee it, in the case of a foreign country." Record, vol. 1, p. 89a, *Romero v. International Operating Co.*, 358 U.S. 354 (1959). This may mean either that no application was made by the master or agent, or that the application was refused. The latter interpretation seems unlikely in view of the power to deny clearance to the vessel until payment is secured.

³⁸¹ 313 U.S. 487 (1941).

THE MACE OF THE VICE-ADMIRALTY COURT
OF THE PROVINCE OF NEW YORK

This mace, in the form of a silver oar, symbolized the royal authority in the Vice-Admiralty Court of the Province of New York and is now employed as a symbol of the admiralty jurisdiction of the United States District Court for the Southern District of New York. See Appendix, page 75 *infra*.

is inescapable that if the federal courts cannot apply federal law to such a situation, neither can the state courts. And unless the *Jensen*³⁸² line of cases is to be overruled it is equally clear that the state cannot fashion laws of its own to cover injuries to seamen.³⁸³ We thus find ourselves in the unhappy predicament that while Congress, and the courts in their application of conflict-of-laws theory, are careless of American interests, the states are powerless to protect them.

APPENDIX*

GIFT

of

SILVER OAR

to

UNITED STATES DISTRICT COURT

for the

SOUTHERN DISTRICT OF NEW YORK

COURT IN BANC, ROOM 506

February 14, 1941, 10:30 A.M.

JUDGE KNOX: The Court takes pleasure in recognizing Mr. Burlingham.

MR. BURLINGHAM: May it please the Court: We are here today to present to the Court the Silver Oar, well known to the admiralty bar but rarely seen. I doubt whether there is anyone in this room who has seen it until this year, unless perhaps Mr. Gilchrist if, as I hope, he is here.

The Silver Oar was the mace of the Vice-Admiralty Court of the Province of New York until the court was dissolved in 1775 by the Revolution. The marshal of the court at that time was Thomas Ludlow, Jr., who took the oar into his own possession, doubtless for safekeeping, which, as we know, is eleven points of the law. Gradually his de-

³⁸² *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 333 *et seq.* (1957).

³⁸³ On the trial of the Romero case there was mention of liens claimed by medical creditors. Record, vol. 1, p. 116a, *Romero v. International Operating Co.*, 358 U.S. 354 (1959). Statutes in both New York and New Jersey provide for such liens; see, *e.g.*, for hospital liens, N.Y. LIEN LAW § 189; 2A N.J. STAT. ANN. ch. 2A §§ 44-35 *et seq.* (1952). The New York statute by its terms appears to be inapplicable, since it applies to hospitals "in the state" and to actions "in any court of this state." The New Jersey statute purportedly applies to "any and all" rights of action which the injured patient may have against a negligent tortfeasor. There remains room for some doubt whether New Jersey law would be permitted to interfere with the rights of a seaman asserted in the United States District Court in New York; at all events, the lien is useless if the court denies liability under federal law.

* This Appendix, consisting of Document 259, February, 1941, from the court's records, was made available through the courtesy of Herbert A. Charlson, Esq., Clerk of the United States District Court for the Southern District of New York. Mr. Charlson's letter of March 10, 1959, states that the original silver oar is, pursuant to order of the judges of the court, on loan to the Museum of the City of New York for public exhibition; the oar in use by the court is a replica of the original and is made of brass, silver plated.

scendants came to regard the oar as their private property; but about two years ago one of the latest Ludlows put the oar up as collateral for a loan from a National Bank of this District and it was sold last October to a silversmith whose public spirit and artistic sensibility led him to sell it to us without profit to himself.

Many efforts had been made to persuade the Ludlow family to give the oar to this court, but in vain. Mr. Gilchrist informs me that about fifty years ago it was exhibited to Judge Addison Brown, then the sole judge of this court. Those who knew him and remember his battered old beaver hat know that he was not a man likely to encourage unnecessary expenditure for the purchase of a small oar, only twenty-two inches long and weighing only twelve ounces and seventeen pennyweight.

Later, about thirty years ago, an artificer suggested to the court that he could make a copy of the oar, and a copy was made. When I learned this from Mr. Gilchrist, I hurried up to court to see the object, fearing that it was a replica and that, as I had already begun to try to get the original, I might find my labors vain; but the copy proved to be made of lead weighing forty ounces. So I contentedly continued my efforts.

You may be interested to know how we came to obtain the oar. Professor Julius Goebel, Jr., of the Columbia School of Law, a distinguished student of the history of the law, wrote me that the oar was for sale at Mr. Robert Ensko's, a well known silversmith of New York. I conferred with my dear friend, Judge Thacher, and we concluded that we must have that oar. Unfortunately, there was another bidder, Judge Thacher's alma mater. Yale University, which has the finest collection of silver in this country, given it by Francis P. Garvan, was eager to get the oar because it was made by Charles LeRoux, one of the best and most famous of American silversmiths. He was the official silversmith of the City Council, and he made the gold box which contained the seal attached to the certificate of the freedom of the city granted to Andrew Hamilton of Philadelphia, who defended John Peter Zenger in the famous trial here in New York which determined the freedom of the press. I secured an option on the oar, and the money flowed in from our friends who are here today. I appealed to the admiralty lawyers first, and other members of the bar of this court joined us; I should say also that The Maritime Law Association of the United States contributed generously.

If the Court please, I present in behalf of the Bar this small but beautiful and rare piece of artistry. Inscribed on it are the Royal coat-of-arms, the title of the Vice-Admiralty Court and the anchor and the crown on the obverse. There are also inscribed the initials CLR, Charles LeRoux. We have no hallmarks in America. American silver of this quality is very rare. I present it to the Court in full confidence that they will preserve and cherish it.

JUDGE KNOX: Mr. Burlingham, on behalf of my colleagues and myself, I wish to express our deep appreciation of this generous act upon the part of the Bar. It seems appropriate to me upon this occasion that the response to the gracious words of Mr. Burlingham should be made by our brother, Judge Woolsey, who came to us from the Admiralty Bar.

JUDGE WOOLSEY: Judge Knox, Mr. Burlingham, Gentlemen of the Committee of Donors and Gentlemen of the Bar:

This gracious gift, involving as it does the recapture of the ancient mace of our predecessor Court, is an occasion which cannot be passed by the Court *in silentio*.

It deserves comment, and you, Judge Knox, have been good enough—because of

my association for years with the Admiralty Bar of this Court—to ask me to accept this oar in behalf of the Court, and to embroider my acceptance with what I might regard as appropriate comments. You little knew, sir, I fancy, that you were in effect mounting me on one of my hobbies—a dangerous indulgence to give to an antiquarian, who has, when his means would permit, allowed himself to venture into the alluring field of the collection of old silver. But I promise to ride my hobby on a curb, and after a very short canter to rein him back on his haunches, and bring him to a sudden stop.

I have the following remarks to make which I hope may prove of interest.

A silver oar was, throughout the British Empire from the early part of the eighteenth century, the mace of the Vice-Admiralty Courts, of which there was one in each of the principal ports of that Empire. The size and design of the maces were identic.

The Vice-Admiralty Courts were commissioned under the Great Seal of the High Court of Admiralty in England and dealt with questions not only of Forfeiture for Customs Violations, but also with Prize causes, an important jurisdiction, because, until the last World War, the proceeds of the sales of captured vessels and cargoes found their way to a large extent into the pockets of their captors.

Although there were many Vice-Admiralty Courts in this hemisphere, we find still extant, so far as I can discover, the maces of only three; that of Bermuda, mentioned by Judge Hough, the greatest student of our Court history, in the preface to his invaluable book on “Cases in Vice-Admiralty and Admiralty, New York 1715 to 1788”; that of Boston, discovered, I think, since Judge Hough’s book was written; and that of New York, which is being given to us today. We have known about the latter for many years and this Court has had a replica of it in base metal since the latter days of Judge Addison Brown, who was the only Judge of this Court from 1881 to 1901, when—before its merger with the old Circuit Court in 1911—it was predominantly an Admiralty Court.

There has been a Court with Admiralty jurisdiction in New York City almost continuously since October 5, 1678, when Sir Edmund Ambrose, the then Governor General, appointed Stephen Van Cortlandt, then Mayor of New York, to be Judge of the Court of Admiralty of the Province of New York.

The Colonial Court of Vice-Admiralty came to an end on December 19, 1775. Its last official act was, I understand, the taxation of a bill of costs!

This Vice-Admiralty Court was in due course succeeded by the Admiralty Court of the State of New York, which lasted until after the adoption of the United States Constitution. Then in 1789—the first Court to be formed under the United States Constitution, as Mr. Thacher told us on the occasion of our One Hundred and Fiftieth Anniversary last year—came our present District Court as a Court of Admiralty.

The silver oar of the Vice-Admiralty Court was the outward and visible sign of the authority which the Court derived from the Crown to arrest persons and vessels, and it was carried, inserted in the top of a staff, before the Judge when he went into Court and was laid on the Bench in front of the Judge whilst he was sitting.

The two silver oars still extant in the United States were made *circa* 1725. We cannot be more precise as to the date, because the marks of American silversmiths do not contain date letters.

The Boston oar was made by Jacob Hurd, one of the most celebrated colonial silversmiths of that city and is now owned by the Massachusetts Historical Society.

The Boston oar and the oar which is being given to us today are of about the same

size and weight. Both of them are engraved in the style of lettering used in the first quarter of the eighteenth century. The New York oar has the inscription "Court of Vice-Admiralty New York" with the British Coat of Arms on one side and the Crowned Anchor, which was the seal of the Admiralty Court of Great Britain, on the other.

This oar which is being given to us today was made by Charles LeRoux, who was born in 1689, and who died in 1745. It bears his mark "C.L.R." LeRoux was a noted colonial silversmith, and for a long period he served as the official silversmith of New York City. As such he was employed to make many gold and silver boxes to contain the seals attached to certificates granting the freedom of the City to illustrious visitors and citizens, and he engraved the plates for bills of credit issued at various times between 1715 and 1737. He was commissioned by the Common Council on one occasion to prepare a gold box to enclose the Seal of the City of New York to be presented to George Clinton on September 28, 1743.

Charles LeRoux himself received the Freedom of the City of New York on February 16, 1724, and the same year he was appointed Deacon of the New York School, whatever that may mean, and *inter alia*, he held the office of Assistant Alderman of the East Ward from 1735 to 1738.

The gift which is being made to the Court today, therefore, has not only the greatest association value by reason of the fact that it was the mace of a Court which was, so to speak, our direct juridical ancestor, but also very great intrinsic value because it is an exquisite example—more than 200 years old—of early colonial craftsmanship.

Mr. Burlingham and Gentlemen of the Donor Committee, this Court with the deepest appreciation accepts as its mace the oar which you are now tendering to it.

As this oar has again found its proper *venue* after one hundred and sixty-six years, the Court hopes that it will be preserved under the Court's control in safety through the years to come in such manner as may be deemed advisable.

JUDGE KNOX: Once again, gentlemen, the Court expresses its thanks and appreciation and gives the assurance that we shall treasure and preserve this historic relic, and draw inspiration from its symbolism. I am sure that those who follow us will do no less.