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LIABILITY IN COLLISIONS BETWEEN VESSELS

GOVERNMENT

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HEARINGS BEFORE THE MERCHANT MARINE AND FISHERIES SUBCOMMITTEE

OF THE COMMITTEE ON COMMERCE UNITED STATES SENATE EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2313

TO UNIFY APPORTIONMENT OF LIABILITY IN CASES
OF COLLISION BETWEEN VESSELS, AND
RELATED CASUALTIES

AND

S. 2314

TO LIMIT THE LIABILITY OF SHIPOWNERS, AND FOR
OTHER PURPOSES

MARCH 1 AND 2, 1962

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CONTENTS

Statement of—

Boal, Arthur M., representing the Maritime Law Association of the United States, Boal, McQuade and Fitzpatrick, 116 John Street, New York, N.Y.	Page 30
Burke, Terence G., insurance manager, Moore McCormack Lines, Inc., 2 Broadway, New York, N.Y.	238
Colby, Leavenworth, Chief, Admiralty and Shipping Section, Department of Justice, Washington, D.C.	16
Deutsch, Eberhard P., representing Admiralty and Maritime Law, American Bar Association, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans 12, La.	24
Elder, Scott H., representing Lake Carriers Association, Johnson, Branand & Jaeger, Cleveland, Ohio.	78
Freedman, Abraham E., representing AFL-CIO Maritime Committee, Freedman, Landy & Lorry, 1415 Walnut Street, Philadelphia, Pa.	97
Green, Raymond T., Fowler, White, Gillen, Humkey & Trenam, Industrial National Bank Building, Miami, Fla.	242
Haight, Charles S., Haight, Gardner, Poor & Havens, 80 Broadway, New York, N.Y.	49, 83
Matteson, Leonard J., Bigham, Englar, Jones & Huston, 99 John Street, New York, N.Y.	150
Rault, Joseph M., representing Lykes Bros. Steamship Co., Inc., Mississippi Shipping Co., Inc., and Gulf & South American Steamship, Co., Inc., Terriberry, Rault, Carroll, Martinez & Yancey, Whitney Building, New Orleans, La.	90
Shapiro, Alvin, vice president, American Merchant Marine Institute, 919 18th Street, Washington, D.C.	149
Singman, Julian H., Deputy Maritime Administrator, General Accounting Office Building, Washington, D.C., accompanied by Percy R. Peck, Office of General Counsel, Federal Maritime Administration.	6
Tiege, Peter N., representing the Pacific American Steamship Association and the American Merchant Marine Institute, Inc., vice-president and general counsel, American President Lines, Ltd., 601 California Street, San Francisco, Calif.	23

Statements submitted by—

Freedman, Abraham E., representing AFL-CIO Maritime Committee, Freedman, Landy & Lorry, 1415 Walnut Street, Philadelphia, Pa.	265
Matteson, Leonard J., Bigham, Englar, Jones & Huston, 99 John Street, New York, N.Y.	231

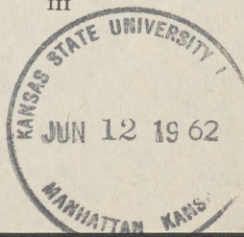
Letters submitted by—

Dewey, Ralph B., Pacific American Steamship Association, San Francisco, Calif., dated February 26, 1962	77
---	----

Reports from—

Department of State, February 28, 1962	259
Department of Commerce, March 2, 1962	261, 262
Department of Justice, February 16, 1962	74, 77
Department of the Treasury, February 6 and 7, 1962	75, 76
Department of the Comptroller, August 9, 1961	76
Federal Maritime Commission, March 13, 1962	265

III



Miscellaneous:

Woolsey, John M., prepared report before elevation to the Federal bench giving reasons for recommending that the Brussels Convention remain unratified by the United States. February 14, 1928--	Page 251
Comparative analysis S. 2313 and substitute proposals. February 26, 1962-----	250
A report of the Department of State for the Press, No. 577, October 15, 1957-----	68
Report of the committee of the Maritime Law Association of the United States to consider proposals relating to the limitation of liability of shipowners. Document No. 418, July 1958-----	109
Report of the committee of the Maritime Law Association of the United States to consider shipowners' limitation of liability and the collision and arrest of ships conventions. Document No. 450, October 23, 1961-----	155
Text of Brussels 1910 Collision Convention, September 23, 1910-----	72
Text of Brussels 1957 Liability Convention, October 10, 1957-----	68

LIABILITY IN COLLISIONS BETWEEN VESSELS

THURSDAY, MARCH 1, 1962

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee was called to order, pursuant to notice, at 10:55 a.m., in room 5110, New Senate Office Building, Hon. E. L. Bartlett presiding.

Senator BARTLETT. The committee will be in order.

We have before the subcommittee today two bills whose enactment, we are told, would bring U.S. statutes governing liability in maritime casualties into line with the corresponding statutes of other leading maritime nations. Because the intent and the provisions of the two bills are so closely interrelated it would seem that the best way to handle them expeditiously would be to permit witnesses to discuss them as if they were sections of one bill, and this will be the procedure.

S. 2313, to unify apportionment of liability in cases of collision between vessels, and related casualties, would implement the Brussels Collision Convention of 1910.

S. 2314, to limit the liability of shipowners, and for other purposes, would implement the Brussels Convention of 1957 on limitation of liability.

(The bills follow:)

[S. 2313, 87th Cong., 1st sess.]

A BILL To unify apportionment of liability in cases of collision between vessels, and related casualties

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where a collision occurs between vessels the compensation due for damages caused shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

Sec. 2. If the collision occurs without fault, if it is caused by force majeure, or if the causes of the collision cannot be determined, the damages shall be borne by those who have suffered them. There shall be no statutory presumptions of fault in regard to liability for collision. This section shall be applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.

Sec. 3. If the collision is caused by the fault of only one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.

Sec. 4. (a) If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree their faults respectively contributed. If it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

Professional staff member assigned to this hearing: August J. Bourbon.

(b) In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties. When a vessel pays a larger part than that which in accordance with the provisions of subsection (a) hereof she ought ultimately to bear she shall have the right of recourse for the excess against the other vessel.

(c) The damages to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board shall be borne by the vessels in fault in accordance with the provisions of subsection (a) hereof without joint and several liability toward third parties and without right of recourse against the other vessels.

SEC. 5. The liability imposed by the preceding sections shall attach, in cases where the collision is caused by the fault of a pilot, even when the carrying of the pilot is compulsory.

SEC. 6. The right of action for the recovery of damages resulting from a collision shall not be conditional upon the entering of a protest or the fulfillment of any other special formality.

SEC. 7. The provisions of this Act shall not affect in any way the scope and effect of any statutory or contractual provisions which limit or otherwise affect any liability of the owner of a vessel toward persons or property. The last sentence of section 1 of the Act of September 4, 1890, 26 Stat. 425 (33 U.S.C. 367), is hereby repealed.

SEC. 8. Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty.

The court in which the action is brought may extend such interval if it shall be satisfied that during such period there had not been any reasonable opportunity of arresting the vessel involved within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business.

The time within which the action to enforce the right of recourse allowed by subsection (B) of section 4 must be instituted shall be one year. This limitation shall run only from the date of payment.

SEC. 9. This Act shall apply to the liability to make good the damages caused or contributed to by any fault of a vessel even if no collision has actually taken place.

SEC. 10. This Act shall apply to the liability to make good the damages in all cases to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damages are done or consummated on land. In such cases the liability to make good the damages in proportion to the degree of the faults respectively committed shall apply in the same manner between any vessel or vessels and the owners or operators of any land structure, facility, or other property as the rule is applied between vessels.

SEC. 11. This Act shall apply to actions brought against the owners or operators of a vessel or of such a land structure, facility, or other property in personam as well as to actions in rem.

SEC. 12. This Act may be cited as the "Collision Liability Apportionment Act, 1961". It shall apply only to causes of action arising after the date of its approval.

[S. 2314, 87th Cong., 1st sess.]

A BILL To limit the liability of shipowners, and for other purposes

Be it enacted by Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Shipowners' Limitation of Liability Act, 1961".

SECTION 1. DEFINITIONS. In this Act—

A. "Personal claims" means claims resulting from loss of life and personal injuries.

B. "Property claims" means all claims other than personal claims.

C. "Tonnage" means (1) net tonnage plus the amount deducted from gross tonnage for engineroom space in computing net tonnage, or (2) 300 tons, whichever is greater.

D. "Ship" includes all seagoing vessels and all vessels used on lakes or rivers or in inland navigation, including pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, or their tenders, canal boats, scows, car floats, barges, lighters, and all nondescript self-propelled and non-self-propelled vessels.

SEC. 2. CLAIMS, AND THE AMOUNT THEREOF, WITH RESPECT TO WHICH LIABILITY MAY BE LIMITED.—A. Except as hereafter in this section otherwise provided, the owner of a ship may limit his liability, and the liability of his ship, to the amount provided in section 3 of this Act, with respect to claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

1. Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship.

2. Loss of life of, or personal injury to, any other person whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect, or default the owner is responsible. In regard to the act, neglect, or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect, or default is one which occurs in the navigation or the management of the ship or in the loading, carriage, or discharge of its cargo or in the embarkation, carriage, or disembarkation of its passengers.

3. Any obligation or liability imposed by law, relating to the removal of wrecks and arising from, or in connection with, the raising, removal, or destruction of any ship which is sunk, stranded, or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbor works, basins, and navigable waterways.

B. An owner shall be entitled to limit his liability in the cases set out in subsection A of this section even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody, or control of the ship.

C. If the owner of a ship is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and as to that claimant the provisions of this Act shall only apply to the balance in claimant's favor, if any.

D. The act of invoking limitation of liability shall not constitute an admission of liability.

E. Subsection A of this section does not apply to (1) claims for salvage or for contribution in general average or (2) claims by the master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives, or dependents, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in section 3 of this Act.

SEC. 3. THE EXTENT TO WHICH LIABILITY MAY BE LIMITED.—A. A shipowner may limit his liability, and the liability of his ship, with respect to claims specified in section 2 of this Act to the following amounts:

1. If the occurrence has given rise to property claims only, an aggregate amount equivalent to 1,000 francs for each ton of the ship's tonnage.

2. If the occurrence has given rise to personal claims only, an aggregate amount equivalent to 3,100 francs per ton of the ship's tonnage.

3. If the occurrence has given rise to both personal claims and property claims, an aggregate amount equivalent to 3,100 francs for each ton of the ship's tonnage, of which a first portion equivalent to 2,100 francs for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion equivalent to 1,000 francs per ton of the ship's tonnage shall be appropriated to the payment of property claims, but if the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank ratably with the property claims for payment against the second portion of the fund.

4. The franc mentioned in this section shall be deemed to refer to a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amounts mentioned in this section shall be converted into the currency of the United States of America on the basis of the value of that currency by reference to the unit defined above at the date on which the limitation fund is constituted.

B. The limit of liability prescribed by this section applies to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

C. When the aggregate of claims which arise on any distinct occasion exceeds the limits of liability provided by this section, the total sum representing such limits of liability may be constituted as one distinct limitation fund.

D. Subject to the provisions of section 5C. hereof, the limitation fund thus constituted shall be available only for the payment of claims arising on the distinct occasion in respect of which limitation of liability can be invoked under this Act.

E. After the fund has been constituted, no claimant or potential claimant against the fund shall be entitled to exercise any right against other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant.

SEC. 4. JURISDICTION AND VENUE; RELIEF AND PROCEDURE; CONCOURSE OF CLAIMS; INJUNCTION.—A. The district courts of the United States in admiralty shall have exclusive original jurisdiction of all proceedings for limitation of liability under this Act. A shipowner, or other person included in section 7 of this Act, may assert as a defense in any action or proceeding in any court, or before any board, arbitrator, or any other tribunal whatsoever, his right to limit his liability and the liability of the ship to the extent herein provided, with respect to the claim or claims in such action or proceeding.

B. A proceeding for limitation of liability under this Act shall be commenced, at petitioner's option, within six months after (1) the occurrence as to which limitation is sought, or (2) the shipowner or other persons seeking relief under this Act, has actually received a written notice of a claim and demand subject to such limitation, stating the amount and nature of the demand, by filing a petition for relief under this Act. The petition shall state if and when such a written notice was first received by the petitioner. The petitioner shall present with its petition a proposed order, on an application for such order, providing for the deposit into court of a sum equal to the full limit of his liability as provided in section 3 of this Act or for the filing of approved security therefor. A proceeding shall be deemed commenced within said period even if the sum or security offered is determined to be inadequate or insufficient or if the deposit or filing thereof is delayed beyond such period.

C. Such sum or security shall constitute the limitation fund.

D. Upon the filing of a petition showing that the aggregate amount of the claims or potential claims, arising from an occurrence in respect of which limitation of liability is invoked, may exceed the limit of liability provided in section 3 of this Act and the deposit into court or the filing of security as provided in subsection B of this section, all other actions and proceedings upon such claims and the commencement or prosecution of any action or proceeding thereon in any court or tribunal whatsoever subject to the jurisdiction of the United States of America shall cease. All such claims shall be prosecuted and determined exclusively in the limitation proceeding and be brought into concourse for determination in said proceeding, and the court shall issue appropriate injunctions to enforce such concourse.

E. The court in which the limitation fund has been constituted shall, upon the issuance of such injunction, order the release of any ship or other property attached or arrested, or otherwise seized, by reason of any claim for which liability is sought to be limited, or order the cancellation of any security given to avoid or release such arrest or attachment, or other seizure. Such order shall be effective and enforceable in any other court or tribunal, subject to the jurisdiction of the United States of America or any State, territory, or possession thereof.

Where it appears to the satisfaction of the court after a preliminary and summary hearing, upon notice served not later than twenty days after the expiration of the time fixed for the filing of claims or within such further period as the court may allow for such service, that the petitioner is not entitled to any relief under this Act, or that it is manifest and patent that at the time the petition was filed, the claims or potential claims against the petitioner or the ship would not exceed his limit of liability, or, at any time, where the petitioner has failed to comply with an order for the deposit of a sum or the filing of security, the court may summarily dismiss the petition, vacate or modify any injunction, or grant other appropriate relief. A proceeding may not, with-

out the consent of all parties, be dismissed or the injunction vacated or modified solely by reason of (1) the withdrawal, dismissal, reduction, or settlement of less than all of the claims previously made, (2) the denial of the petitioner's right to limit after a trial of the issues thereon.

G. The claimant shall first proceed and go forward with evidence to establish the liability of the petitioner. If the liability of petitioner is established, by any claimant, the petitioner shall have the burden of proving absence of actual fault or privity.

SEC. 5. SUBROGATION; APPORTIONMENT AND DISTRIBUTION OF FUND, REFUND.—A. In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amounts of their established claims, saving, however, to all parties, any priority to which they may be legally entitled.

B. If before the fund is constituted or, if constituted, before it is distributed, the shipowner has paid in whole or in part any of the claims specified in section 2 of this Act, he shall pro tanto be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the law of the limitation forum.

C. If, before the fund is distributed, the shipowner establishes that he may be compelled at a later date to pay any claims specified in section 2 of this Act arising out of the same occurrence with respect to which the limitation fund has been constituted, the court may order that a sufficient amount of the fund shall be provisionally set aside to enable the shipowner at such later date to enforce his claim against the fund as provided in the preceding subsection.

D. After payment of all established claims any balance in the fund shall be refunded to the petitioner.

SEC. 6. RELEASE OF A SHIP OR SECURITY.—A. If a shipowner is entitled to limit his liability under the principles of the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, or under this Act, and his ship with respect to which he is entitled to limit his liability, or another ship, or other property has been arrested, or bail or other security has been given to avoid arrest, in the United States, its territories or possessions, the court may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under the principles of such convention or under this Act and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

B. Where, in circumstances specified in subsection A, of this section, bail or other security has already been given (1) at the port where the accident giving rise to the claim occurred, or (2) at the first port of call after the accident if the accident did not occur in a port, or (3) at the port of disembarkation or discharge if the claim is a personal claim or relates to damages to cargo, the court shall order the release of the ship or other property, or of the bail or security given, subject to the conditions specified in subsection A of this section.

C. The provisions of this section shall apply likewise if the bail or other security already given is in a sum less than the full limit of liability under this Act, provided that satisfactory bail or other security is given for the balance.

SEC. 7. LIMITATION OF LIABILITY BY OTHERS THAN SHIPOWNERS.—A. In this Act the liability of the shipowners includes the liability of the ship herself.

B. Subject to subsection C of this section, the provisions of this Act shall apply to the charterer, manager and operator of the ship, and to the pilot, and to the master, members of the crew and other servants of the owner, charterer, manager, or operator acting in the course of their employment, and to their respective insurers as well as to the insurers of the ship or of the owner, in the same way as they apply to an owner himself: *Provided*, That the total limit of liability of the owner and all such other persons shall not exceed the amount determined in accordance with section 3 of this Act.

C. When actions are brought against the pilot, master, or members of the crew, such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the pilot, master, or member of the crew is at the same time the owner, co-owner, charterer, manager, or operator of the ship, the provisions of this subsection shall only apply where the act, neglect, or default in question is an act, neglect, or default committed by the person in question in his capacity as pilot, master, or as member of the crew of the ship.

SEC. 8. REPEALS.—Sections 4283, 4284, 4285, and 4287 of the Revised Statutes of the United States, and the Act of June 16, 1884, 23 Stat. 57 (46 U.S.C., 183, 184, 185, 187, and 189) are repealed.

SEC. 9. REENACTMENTS.—Sections 4283A and 4283B of the Revised Statutes of the United States are reenacted without change as section 4283 of the Revised Statutes of the United States and are redesignated as subsections (a) and (b), respectively, of that section.

SEC. 10. EFFECTIVE DATE.—This Act shall become effective on the last day of the sixth month following the month in which it is enacted.

Senator BARTLETT. It is hardly necessary to say that the field of admiralty law to which these bills relate is one of the more complex areas of legal practice. We are fortunate, therefore, to have as witnesses for and against the bills practitioners in this field who have participated extensively in the meetings leading to drafting of the conventions, and in the succeeding study of the conventions on behalf of the Maritime Law Association. Their long experiences in the consideration of the conventions, and their exhaustive study of the bills now before us, well qualify them to speak to us here today.

The first witness will be Mr. Julian H. Singman, Deputy Maritime Administrator.

STATEMENT OF JULIAN H. SINGMAN, DEPUTY MARITIME ADMINISTRATOR, GENERAL ACCOUNTING OFFICE BUILDING, WASHINGTON, D.C.; ACCOMPANIED BY PERCY R. PECK, OFFICE OF GENERAL COUNSEL

Senator BARTLETT. We are pleased to have you here, Mr. Singman.

Mr. SINGMAN. May I say, first of all, I am very pleased to be here.

On behalf of the Maritime Administrator, I should like to express our appreciation for the committee's courtesy in inviting us to present our views. We do so because of our firm belief that these bills, both of them, are in the best interests of the U.S. merchant marine and would carry out the basic purposes of the Merchant Marine Act of 1936, and that they are beneficial to the maritime industry in general.

I want to express my personal pleasure and feeling of privilege to be here today to express the views of the Maritime Administration.

Senator BARTLETT. In the past, Mr. Singman, on occasion, you have been in a reverse role, have you not, and have been putting the questions and hearing the testimony?

Mr. SINGMAN. Yes, sir, Mr. Chairman, I have; and I must say this is my first experience on the other side of the table.

Mr. Chairman, we were unaware of your conclusion that these bills could be discussed together, so—

Senator BARTLETT. I reached it just a very short time ago.

Mr. SINGMAN. Right, and so we have prepared separate statements on them. Perhaps it would be best for me simply to read them seriatim.

Senator BARTLETT. I think so.

Mr. SINGMAN. Mr. Chairman, gentlemen, we in the Maritime Administration recommend favorable consideration of S. 2313.

The Convention for the Unification of Certain Rules With Respect to Collisions Between Vessels was signed at Brussels in 1910 by the representatives of 24 governments, including the United States. All of the convention signatories and other governments, except the

United States, Cuba, and Chile, have since ratified or adhered to this convention which is now the law of all the major maritime nations, except the United States. S. 2313, if enacted, would implement the convention upon formal adherence to it by the United States.

Enactment of S. 2313 would change the admiralty and maritime law of the United States in three principal respects. The core of the bill and the convention, and the most important respect in which they would change the present law of the United States, is the provision that in cases of collision between ships, where both ships are to blame, the damages resulting from the collision shall be divided between the ships in proportion to the gravity of their respective faults; however, if it is not possible to establish the degree of the respective faults, or if it appears the faults are equal, the liability shall be equally apportioned. Under the existing U.S. law, the total damages in a both-to-blame situation are divided equally between the vessels involved, regardless of how much the fault of one ship may have exceeded that of the other. The proportionate-fault rule is considered fair and equitable, and is preferable to our present arbitrary rule of divided damages.

The concept of proportionate fault is not new in U.S. legislation; it is applicable to issues of contributory negligence in litigation under the Death on the High Seas Act. Foreign courts that apply the rule of proportionate damages have not encountered particular difficulty in administering it.

The United States divided damages rule has repeatedly been criticized by our courts who have at times used various techniques to ameliorate its harshness, such as following the major-minor fault rule under which the vessel which is guilty of gross negligence is held liable for all the damages and the vessel which is guilty of trivial negligence is not held liable for any damages. Recently, the U.S. Court of Appeals, Third Circuit, in petitions of Oskar Tiedemann & Co. and of the United States, involving a most serious collision between the USNS *Mission San Francisco* and SS *Elna II*, stated:

It seems too bad that the *Elna*—whose fault was slight—should be tarred with the same stick as the *Mission*—whose faults were grave—in this case. If we had a rule which divided responsibility in proportion to the negligence of the parties, as is the case in many other countries, we could make an equitable adjustment. But our American rule of even division of the damages makes for some hard cases and this is one. With regret, the judgment as to the *Elna* will be affirmed.

Under the terms of the bill, liability for personal injuries and deaths resulting from collisions would also be governed by the proportionate-fault rule. The bill provides that the vessels in fault shall be jointly as well as severally liable to third parties in such cases.

Secondly, the bill and the convention would alter to some degree the liability of the vessels in collision to the owners of cargo carried on the vessels. When both vessels are to blame, the present U.S. law allows the cargo of either vessel to sue the other vessel for the entire cargo damage, but it does not allow the cargo to recover from its own carrying vessel if that vessel has met the statutory requirements in regard to the exercise of due diligence with respect to seaworthiness, manning, equipment, and proper stowage.

Adherence to the convention will make no change in this doctrine, also observed by most of the maritime countries. However, in a

both-to-blame collision, the noncarrying vessel is then allowed, under the admiralty law doctrine of contribution, to collect from the carrying vessel one-half of the damage which the former was required to pay to the cargo of that vessel, regardless of the degree of its fault, thus indirectly contravening the Harter Act and the Carriage of Goods by Sea Act which declare that a vessel owner who uses due diligence to make his vessel seaworthy shall not be liable for loss of or damage to cargo due to an error in navigation. Under the convention and the bill, cargo which is lost or damaged in collision recovers from each vessel that percentage of its loss which corresponds with the percentage of fault of that vessel, with no cross-contribution between them. In other words, only if the carrying vessel has not complied with the Harter Act or COGSA will the cargo be allowed to recover that percentage of its loss corresponding to the percentage of fault of the carrying vessel.

I might say, parenthetically that this basic doctrine is based upon the concept that a maritime voyage is in the nature of a joint undertaking between the owner of the cargo and the owner of the vessel and, therefore, if the owner of the vessel has carried out all of his obligations toward the owner of the cargo by making proper allowance in advance for the storage of the cargo and for the seaworthiness of the vessel, he should not be obligated to the owner of the cargo for any accident that happens to occur during the course of the voyage as a result of an error in navigation.

The doctrine is sound, but it was felt that it caused some difficulty in the Supreme Court case, and thus as often happens, a hard case resulted in bad law, which permitted by indirect methods the circumvention of these two U.S. statutes and this basic admiralty principal.

Now, thirdly, S. 2313 would establish a 2-year statute of limitations to govern litigation arising out of maritime collisions; a 1-year statute of limitations would apply to suits for contribution in respect of damages caused by death or personal injury. At present, there is no specific time limit for the commencement of such suits under American law, only the rule of laches, which as the committee realizes is an equitable rule with no specific time, except as to suits against Government-owned and operated vessels where a 2-year statute of limitations does apply.

Section 7 of the bill would abolish the presumption of fault under the so-called standby statute to conform with article 6 of the Brussels Convention. This statute provides that, in case of collision between two vessels, if the master of either vessel fails, without reasonable cause, to stay by the other vessel to give aid and to comply with certain other requirements, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default. However, the courts have not applied this statute in presumption of fault issue and, accordingly, its repeal would not substantively change our maritime law.

In 1937, President Roosevelt requested the advice and consent of the Senate to adherence to this Brussels Convention of 1910. The Senate Committee on Foreign Relations recommended that the Senate advise and consent to the ratification of the convention. The 76th Congress did not take action on the request for advice and consent.

A factor of paramount importance, aside from the substantive merits of the provisions of the bill, is the need to bring about world-wide uniformity in admiralty and maritime law, a subject of international scope and concern. Endorsement by the United States of the principle of international uniformity of maritime law is evident from the fact that it is a party to many multilateral maritime conventions. The enactment of this bill would promote this end by bringing the collision liability law of the United States into harmony with the law of the rest of the maritime world. The resultant uniformity will dispel uncertainties as to rights and liabilities, and will markedly decrease the tendency of litigants to shop around for the most favorable forum in which to bring suit.

The Bureau of the Budget advises there is no objection to the submission of this statement from the standpoint of the administration's program.

Senator BARTLETT. I guess you might as well go ahead with our other statement, and then there may be a question or two.

Mr. SINGMAN. All right, sir.

May I point out at this point, Senator, that I would like to call to the attention of the subcommittee a typographical error in the bill on page 3, line 24. The capital letter B should be a lower case letter b, since it makes a reference back to section 4(b), and if the committee will turn to line 13 of page 2, it will notice that the b there is the lower case b.

However, I understand that additional amendments or suggested alternative language will be suggested later in these proceedings and it will obviate the necessity of that change if the committee should accept those suggestions.

Senator BARTLETT. Thank you.

Mr. SINGMAN. Now, turning to S. 2314, we recommend favorable consideration of this bill as well.

This bill would repeal certain of the statutes on shipowners' limitations of liability, and my statement has a list of those statutes. And the bill will replace them with more progressive legislation that would be comparable to the provisions of the entire National Convention Relating to the Limitations of the Liability of the Owners of Seagoing Ships which was adopted at the 10th Diplomatic Conference on Private Maritime Law at Brussels, October 10, 1957.

I might say parenthetically at this point, Mr. Chairman, that the Maritime Administration was extremely active in that convention and participated to a great extent in the deliberations of the delegation before the convention and at the convention, and accordingly, we are most interested in this bill.

Senator BARTLETT. Off the record.

(Discussion off the record.)

Senator BARTLETT. On the record.

Mr. SINGMAN. The United States was not a signatory to the convention, nor has it since deposited an instrument of accession; although its delegation actively participated in the draft of the convention. The convention has not yet come into force, since the necessary number, 10, of instruments of ratification, have not been filed. The provisions of the bill are substantially the same as those of the convention.

Under existing U.S. statutes, a shipowner is allowed to limit his aggregate liability arising out of a marine case you will tie to the value of the vessel, after the occurrence, plus the pending freight, subject to a minimum of \$60 per ton of the vessel's tonnage insofar as claims for loss of life and personal injury are concerned.

Under these statutes, tonnage of a seagoing steam or motor vessel is here gross tonnage without deduction on account of engineroom, and tonnage of a seagoing sailing vessel is here registered tonnage, including space occupied by the crew.

Mr. BOURBON. Where are you?

Mr. SINGMAN. I am on page 2 for a statement on S. 2314.

Now, the proposed legislation would institute a system whereby the owner's aggregate liability, and that of his ship, would be limited to an amount equivalent to 3,100 "Poincare" gold francs—about \$207—per ton of the ship's tonnage. Of this fund, 2,100 francs—\$140—per ton is earmarked exclusively for the payment of personal injury and death claims and, if the first portion is not sufficient to pay the personal injury and death claims in full, the unpaid balance of such claims ranks ratably with the property claims for payment against the section portion, 1,000 francs per ton—\$67. "Tonnage" in the bill is defined as (1) net tonnage plus the amount deducted from gross tonnage for engineroom space in computing net tonnage, or (2) 300 tons, whichever is greater. Under the bill, as under existing U.S. law, the owner would not be allowed to limit his liability, and the liability of his ship, if the casualty resulted from his actual fault or privity, such, for example, his failure to make the ship seaworthy before the voyage began.

The legal principle that allows shipowners to limit liability is of ancient origin. It was first codified in U.S. law in 1851. The law of every maritime nation permits owners to limit liability to some extent through one system or another. This concept springs from the pragmatic need to insulate shipowners from the ruinous liability that could result from marine casualties. Also, the ship, unlike other property, normally operates in distant areas where the owner cannot personally see to its safe navigation and management. Because of this unique absentee ownership, he is relieved, in part, from the consequences of torts, such as negligence in navigation, unless the casualty giving rise to the claims resulted from his own fault or privity.

Under our present statutory formula, the limitation fund is basically the equivalent of the value of the ship after the casualty, somewhat akin to the doctrine of abandonment of the ship to the claimants. Statutory amendments in 1936 added the \$60 per ton increment as a minimum for the sole benefit of personal injury and death claimants. Where the ship is lost, if the court allows the owner to limit his liability, those who have suffered property damage recover nothing, except some comparatively small pro rata share of the freight pending on the current voyage.

I might point out since freight almost is universally prepaid today, there is often very little, if any, freight pending.

Personal injury and death claimants would recover pro rata portions of a sum based on \$60 per ton of the ship's tonnage.

In comparison, the bill would establish a fund which is fixed in amount, regardless of the value or the condition of the ship after

the casualty, based on \$207 per ton of vessel tonnage if personal claims are involved, or \$67 per ton if only property damage is involved. The Department considers this to be an equitable monetary adjustment of the existing formula. The decrease in the value of the dollar since the enactment of the 1936 amendment provides a sound justification for this change. Under the bill the amount of the fund is certain, independent of issues involving the value of the ship. Under existing law, all claims arising during the same voyage of the ship must share in a single fund, while the bill would create a separate fund for each occurrence.

It is of great importance that there be international uniformity in admiralty and maritime law. The rights and liabilities of ship-owners and claimants should not vary depending upon the country in whose courts litigation is brought.

Under the bill, ships which would be included are (1) all seagoing vessels and (2) all vessels used on lakes or rivers or in inland navigation, including pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, or their tenders, canal boats, scows, car floats, barges, lighters, and all nondescript self-propelled and non-self-propelled vessels. Under existing law, the above-mentioned types of vessels are not covered by the provisions of 46 U.S.C. 183 (b), (c), (d), and (e) nor 183b, and thus those vessels do not come within the \$60 per ton minimum requirement with respect to claims for loss of life or bodily injury, and related items.

Further, with respect to those types of ships, Mr. Chairman, in the event there is a loss of life and the vessel is his loss, there can be no recovery, even for loss of life or personal injury.

This bill provides that the exclusive original jurisdiction of all proceedings for limitation of liability shall be with the district courts of the United States in admiralty. With respect to the fault or privity of the petitioner for limitation of liability, the bill provides that, after a claimant has established the petitioner's liability, the petitioner shall have the burden of proving absence of actual fault or privity. These provisions would not change existing U.S. law.

The Bureau of the Budget advises there is no objection to the submission of the statement from the standpoint of the administration's program.

As I pointed out, Mr. Chairman, I have also this supplemental statement. I apologize for the length of these 3 statements, but as we prepared these statements we felt there were additional points that should be made and they are included in the supplemental statement, and with your permission, I will proceed to read.

Senator BARTLETT. If you will, please.

Mr. SINGMAN. As previously indicated, the Department of Commerce and the Maritime Administration are in favor of both S. 2313—apportionment of vessel collision liability—and S. 2314—limitation of shipowner's liability. I would like to make certain supplementary remarks which are applicable in some degree to both bills.

Although the limitation of liability bill is more favorable to cargo and property damage claimants than the present system, the collision bill does take away from the cargo interests a subrogation right they have in the United States, but have not had elsewhere since 1910, or at any rate since ratification by the other signatories.

The Brussels Collision Convention of 1910 was adopted by the United Kingdom, as a statute, in 1911 and has been applied there without difficulty. The Shipowners' Limitation of Liability Convention of 1957 was adopted in the United Kingdom by statute in 1958. While it is a comparatively new statute, there does not appear to be opposition to it.

According to the Insurance Division of the Maritime Administration, the marine hull and cargo underwriters in the United States and United Kingdom are largely the same; also, based upon discussions with London insurance brokers, there has been no increase in the level of cargo insurance rates charged by the London market as a result of the adoption of the Brussels Liability Convention.

It is recognized that the American-flag operators' higher cost of vessel repair and crew loss of life, injury and illness claims result in greater premiums for hull and P. & I. Insurances in the United States.

The insurance requirement of Maritime Administration for vessels on which the Government holds or guarantees mortgages, or are operating under subsidy contracts, provides that marine P. & I. insurance must be carried in a minimum amount of \$200 per gross registered ton or the world market value of the vessel, whichever is less.

This point was made to compare with the \$207 per ton requirement in the Brussels Convention.

This requirement was inaugurated in 1955. Prior to that date, the minimum was \$175 per gross registered ton or the full commercial value of the vessel, whichever was less. This requirement became effective in 1946. In general, Maritime Administration requirements for hull insurance have been in the minimum amount of the full commercial value from 1946 to 1955 and, since then, not less than the world or domestic market value whichever is higher for liability purposes, and the domestic market value for damage to or total loss of the vessel but in no event less than 110 percent of the mortgage. Many operators carried more than Maritime Administration minimum requirements and since World War II the amounts insured have proved adequate on all vessels in which the Maritime Administration or its predecessor agency had an interest.

Whether there are cargo subrogation benefits, which go back to the original shippers who paid the cargo insurance premiums, is speculative and depends in part upon where the particular collisions are litigated and how many of such collisions come within the both-to-blame category. There are indications that the same premium is charged for cargo insurance whether the cargo moves on a U.S.-flag vessel or on a Brussels Collision Convention-flag vessel, provided the vessels are of the same comparable type of construction and class.

However, U.S. courts appear to be a favorable forum for foreign underwriters who desire the benefit of our law which does not follow the Brussels Collision Convention. Many of our admiralty judges have recognized that this system is now unfair. For example, Judge Learned Hand in *The Western Farmer* (210 F. 2d 754, 1954) noted the preference of that admiralty court for the proportionate fault rule used by the majority of other nations, pointing out that our own limitation of liability statute subjects the claimant to the gamble of the offending ship's survival. In 1961 the Supreme Court of Texas ap-

proved the use of the maritime doctrine of comparative negligence in a case of maritime tort which was tried before a Texas jury which found the plaintiff 5 percent at fault, *Vassallo v. N. A. Holland* (344 S. W. 2d 421).

The doctrine of comparative negligence has been applied in maritime cases but not in collision cases because the courts have been waiting for Congress to change the law.

This concludes the statements we have, Mr. Chairman.

Senator BARTLETT. Thank you, Mr. Singman.

Mr. Baynton?

Mr. BAYNTON. No.

Senator BARTLETT. Turn, if you will, please, Mr. Singman, to your statement on S. 2313, the first page, where you said where both ships are to blame damages resulting from collision shall be divided between the ships.

Who originally makes this determination of blame?

Mr. SINGMAN. The court in which the action is brought. Wherever an action is brought by a claimant, the court in which the action is brought makes the determination as to whether there is blame on both sides, and if the proportionate damages rule is adopted, would also make the determination as to degree of fault on each side.

Senator BARTLETT. In the case of a collision between a Navy ship and a commercial ship, the Navy ship is held responsible in some degree or other.

How are damages obtained by the owner of the commercial ship?

Mr. SINGMAN. The suit is in the admiralty court, Mr. Chairman, just as in any other suit.

Senator BARTLETT. The same way as would be between two commercial vessels?

Mr. SINGMAN. That's right.

I might say, parenthetically, Mr. Chairman, that Mr. Leavenworth Colby, from the Justice Department, who is here, has handled just such a case and might be able to give you further details on it.

Senator BARTLETT. All right, please.

Mr. SINGMAN. Would you like him to come forward?

Senator BARTLETT. He is going to testify later?

Mr. SINGMAN. He is going to testify later.

Senator BARTLETT. Maybe he can go into that, yes.

For my further education, what is a noncargo vessel?

Mr. SINGMAN. Well, this is simply a phrase which is used to distinguish between two vessels which collide in describing the potential liability toward the owners of the cargo. And I must say it gets somewhat complicated, but perhaps I can simplify it this way, Mr. Chairman:

Let's take the *Andrea Doria* and the *Stockholm*. Under our law, the owners of the cargo being carried on the *Andrea Doria* could not sue the owners of the *Andrea Doria* for loss of that cargo due to the negligence of the skipper of the *Andrea Doria* in permitting this collision to take place. In other words, to state it in the terms that we have been talking about, the owners of the cargo cannot sue or cannot recover from the cargo vessel for damages to the cargo resulting from an error in navigation. They can, however, collect from the noncargo vessel, which, in the case I pose, would be the *Stockholm*, because the

Stockholm is not carrying the cargo which was on the *Andrea Doria*, obviously.

So if the owners of the cargo being carried on the *Andrea Doria* could establish that the collision was due at least in part to the fault of the *Stockholm*, they could recover from the owners of the *Stockholm* for the value of the cargo which was lost in that collision. However, they cannot recover from the owners of the *Andrea Doria*.

Now, by this peculiar fluke in our law, which was set forth in the Supreme Court in the *Chattahoochee* case, after the owners of the cargo being carried on the *Andrea Doria* have sued the owners of the *Stockholm* for the damage or the loss of their cargo, the *Stockholm* owners then turn around and sue the *Andrea Doria* owners for contribution toward the payment that the *Stockholm* had to make to these cargo owners abroad the *Andrea Doria*.

In other words, the result, when you come through this complicated convolution of legal actions, is that the *Andre Doria* winds up paying the owners of the cargo being carried on its vessel.

Senator BARTLETT. I salute you for not calling this simple.

Now you referred to the standby statute.

Mr. SINGMAN. Yes, sir.

Senator BARTLETT. And you said the courts have not applied this statute in presumption of fault issues.

I wonder why?

Mr. SINGMAN. I do not know, Mr. Chairman. They simply haven't done it. They have used it as a rule of evidence, but not as a presumption of fault. Perhaps some of the admiralty attorneys who are here, who will testify later, can elucidate further on that point. I have not tried such a case and can't answer it.

Senator BARTLETT. In mentioning the convention at the outset of your statement, you said that all of the signatories and other governments, except the United States, Cuba, and Chile, have since ratified or adhered to the convention. Do these include all the principal maritime nations of the world?

Mr. SINGMAN. Yes, sir; including the Soviet Union.

Senator BARTLETT. Some governments are adhering that didn't sign and didn't ratify?

Mr. SINGMAN. That is correct.

Senator BARTLETT. You told the committee that back in 1937 President Roosevelt requested the Senate to adhere to the convention, but the 76th Congress did not take any action. Was the same request made to any subsequent Congress?

Mr. SINGMAN. My understanding is that it was withdrawn by the State Department and they have withdrawn it pending a determination by the Congress as to whether this implementing legislation will be enacted. If the implementing legislation is enacted, it is my understanding that the State Department plans to resubmit the convention for ratification. The report of the State Department on these bills does go into that to some extent.

Senator BARTLETT. I see. Thank you. What is "privity"?

Mr. SINGMAN. "Privity" is a legal concept, Mr. Chairman, that is somewhat difficult to explain, but in general it means some legal connection with a fault, either by contract or by knowledge. In general, in this phrase, in this connection, it means prior knowledge of wrongdoing by the owner.

I can read you a definition of the term from a case that was decided in New York. It says, under this section that we are talking about:

Privity or knowledge must be actual and not merely constructive and must be personal knowledge or means of personal knowledge of conditions likely to produce or contribute to loss or injury.

In other words, if a vessel sails with some basic malfunction, which the owner knows about, and fails to correct before the sailing, this would be a privity relationship between the owner and the accident.

Senator BARTLETT. That explains it.

Turn to page 4, if you will, of your statement on 2314, and there you said this, and I quote your language:

Under the bill the amount of the fund is certain, independent of issues involving the value of the ship. Under existing law, all claims arising during the same voyage of the ship must share in a single fund, while the bill would create a separate fund for each occurrence.

Tell us something more about these funds. How are they established? Where are they to be found, and all the rest of it.

Mr. SINGMAN. Under the bill, 2314, Mr. Chairman, there is a detailed procedure set forth which provides that upon the application of the owner of a vessel for limitation of his liability, the court shall require the owner to establish just such a fund. He must put into the court, or under the court's supervision, an amount of cash equivalent to the limitation fund, which is either \$67 per ton of the vessel involved, if there are only property claims, or \$207 per ton of the vessel if personal claims or loss of life claims are present also.

He must put an amount of cash equivalent to that limitation fund under the supervision of the court, or other suitable security, and that constitutes the fund.

I might also say, Mr. Chairman, that the language, "The bill would create a separate fund for each occurrence," refers to the fact that under this bill if the same ship has two accidents on the same voyage, there would be two such limitation funds set up, one for each occurrence, if the petition is filed for limitation on each occurrence.

Senator BARTLETT. Now, Mr. Singman, you said that the bill includes categories of ships and vessels not to be found in existing law. And my question is this: May opposition to the bill be expected from the owners of such ships or vessels?

Mr. SINGMAN. Some of them may oppose, Mr. Chairman, but it is the position of the Maritime Administration that it is in the general public interest that persons who are damaged in accidents involving even such vessels, should have protection and they would have such protection under this bill because the owner would be required to put up this limitation fund, even though his vessel was lost.

Senator BARTLETT. Has much opposition been made known to the Maritime Administration?

Mr. SINGMAN. None to this point, Mr. Chairman.

Senator BARTLETT. What is a nondescript self-propelled vessel?

Mr. SINGMAN. Well, what it means is any kind of a self-propelled vessel, not otherwise covered by the categories preceding, which includes pleasure yachts, tugs, towboats, and so on, you might include a surface effect machine, you might include one of these surplus Army amphibious vessels.

Senator BARTLETT. A garbage barge?

Mr. SINGMAN. A garbage barge, perhaps, if self-propelled. Of course, the bill also includes non-self-propelled vessels, so it would be covered whether self-propelled or not.

Senator BARTLETT. Thank you, Mr. Singman.

Mr. SINGMAN. Thank you, Mr. Chairman.

Senator BARTLETT. The next witness will be Mr. Colby, Chief of Admiralty and Shipping Section, Department of Justice, and with Mr. Colby's permission, I should like to say that he has prepared some substitute language, and drafts of that that are mimeographed and will now be distributed and Mr. Colby will be the best witness as to whether these are personal suggestions or whether they represent the conclusions of the Justice Department. Would you care to proceed, Mr. Colby.

STATEMENT OF LEAVENWORTH COLBY, CHIEF, ADMIRALTY AND SHIPPING SECTION CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. COLBY. I would like to say that I am informed that Mr. Deutsch and Mr. Rault of New Orleans, who are here as witnesses, are anxious to get on so they can get out of town, so that the committee may wish to stop me if I start taking up too much time.

Senar BARTLETT. Well if you want to abbreviate your appearance before the committee, we would be happy to have this statement laid in the record in full text, and have you summarize.

Mr. COLBY. I will try and summarize, I think it will save time.

I appear in response to the requests of your chairman to state the views of the Department of Justice on S. 2314 and S. 2313, bills designed to bring the U.S. law regarding limitation of shipowners liability and apportionment of liability in collision cases and other maritime casualties into harmony with the law of other principal maritime nations. Enactment of these bills will implement and permit the United States to ratify or adhere to the Brussels' international conventions of 1957 on limitation, and 1910, on collision.

In accordance with the established U.S. practices, these two bills also maintain the identity and uniformity of the U.S. law applicable on our vast inland lakes and rivers with that that will be applied by the courts to what happens on the high seas and in coastal waters.

Now the most important of the two bills, from the standpoint of the changes it makes in U.S. law, and for its importance to industry, both as represented by shippers, and by vessel operators, is S. 2314, the limitation bill.

S. 2313, the collision bill, involves less substantial changes and is in effect a subordinate part of the overall alternations made by the two bills in the American law.

The official position of the Department of Justice has been set forth in letters dated February 16, 1962, to your chairman, from the Deputy Attorney General, and the statement which we have filed represents the official views of the Department in respect to the matter.

The Department of Justice favors the enactment of both bills in principle, while recognizing that your committee may find necessary some slight verbal modifications in order to clarify the bills and make them more effective in their application by the courts.

Now the committee will realize I am sure that these being implementation legislation for international conventions, it is always a little

difficult to know how to draft bills because in the case of the collision convention, for example, the text is in French, there are two translations, one the English translation, the other the American translation, neither corresponds as closely as one might hope to the French, neither is all together in the kind of language that an American lawyer would use to express the same thoughts. These problems have given rise to certain difficulties in the drafting of the two bills.

The language of the bills is that which was arrived at by committees of the American Merchant Marine Institute, and the Maritime Law Association, with the assistance of attorneys from the Maritime Administration, the Department of Justice, and other interested Government agencies.

The assistance of these attorneys was, of course, as a matter of technical help and constitutes a personal endeavor by those attorneys to aid the committee.

There the committee has suggested some substitute language for the collision bill. There will be, I understand, some substitute language for certain provisions in the limitation bill.

These, I think, may be regarded basically again as proposals of the American Merchant Marine Institute, again assisted by those who have been assisting with the work throughout.

Now in addition to the substantive merits of these two bills, provisions, there is, as Mr. Singman has pointed out, the high desirability of bringing about worldwide uniformity in admiralty and maritime law because this is necessary to the worldwide competition which characterizes the maritime industry.

And the enactment of these two bills will permit equality of competition by U.S. carriers by permitting the United States to adhere to these international conventions.

It will also permit shippers to ship indiscriminately on vessels without any consideration of what their flags are, and where the litigation might be brought. The American shippers, to a substantial extent, do use foreign vessels.

I represent, of course, the shipper who, for the most part, is required by statute to use only American-flag vessels and the shipper who is the largest uninsured shipper of export cargo there is probably anywhere in the world.

Now we have accordingly examined the bills with particular emphasis upon their importance to cargo shippers. And we have found that they are calculated to produce a highly desirable overall result.

The Department of Justice is particularly interested in the bills, involving as they do an increase in the amount of the limitation fund available and the adoption of the proportionate fault rule, because it receives more notices of limitation petitions than any other law office in the country.

As a result of the oversea operations, including the foreign aid program, the various agencies of the Federal Government, which ship cargo overseas or act as freight forwarders for other agencies, now include the General Services Administration, the Military Sea Transportation Service of the Navy, the Department of Agriculture, the State Department's foreign aid program, and the Despatch Agency of the State Department, the Federal Aviation Agency, and large numbers of other smaller agencies.

Now we, of course, in the Department of Justice represent all these various shipping interests. We also, of course, represent the Government as operators of vessels, both military vessels and to the extent that we still have it now in peacetime, the operation of a certain amount of merchant shipping, this merchant shipping being engaged almost exclusively in the transportation of Government cargoes and passengers, principally, to the South Pacific.

Now these two Brussels conventions and this implementing legislation are tied together, as we have seen. The principal worked by the 1957 limitation convention is the increase in the fund, particularly the fund for cargo, from virtually nothing, as it so often is under the present law in the event of a total loss of a vessel, to a sum of \$67 per ton. This, the committee will see, is because the total fund under the new legislation would be \$67 per ton, composed of a part of \$140 dedicated to the death and injury claimants, exclusively, and another second fund of \$67 per ton, which all goes to the cargo unless the death and injury claimants cannot get paid completely out of the \$140 ton figure, in which event, both the death and injury claimants and the cargo and property damage claimants share the \$67 a ton figure.

But it is anticipated that, having regard to the fact that most cargo moves on cargo vessels or combination vessels, there will in most instances be a \$67 a ton fund available for cargo claims, and this represents a very great increase in the fund available under the existing law. And this is a fund which will be available for our uninsured Government cargo claimants.

Now on the other hand, the legislation in the collision bill takes away from cargo the right to claim subrogation back against its vessel, the other vessel. In other words, as Mr. Singman explained, the conditions of carriage under the Harter Act, and Carriage of Goods by Sea Act, are such that the cargo may not recover against the ship which carries it if the owner of that ship has used due diligence to make the vessel properly seaworthy for the voyage. It may, however, in the event of any type of casualty involving two vessels, recover against the other vessel, this noncargo vessel. When the cargo recovers against the noncargo vessel, then that recovery by the cargo of the carrying vessel becomes, of course, part of the damages consequential upon the collision and the noncargo vessel, which has paid off the cargo, is able to recover back 50 percent in a both-to-blame situation from the cargo vessel.

This is, as Mr. Singman explained, the result of the Supreme Court's decision in the *Chattahoochee* case, and the further decision of the Supreme Court in the both-to-blame collision clause case, where the court held that the cargo shipper could not contract itself with the carrier out of this right to allow the noncargo vessel to recover back.

Now this legislation takes away that. However, as indicated by the reports of the Maritime Administration and our reports, and some of the information that will be made available by people from the industry here today, this change does not seem to affect the rights of cargo to such an extent as to bring about a different insurance rate. So that we may assume that even in respect of Government cargo, which is uninsured, this change would not be of great financial importance, so that the giving up of this subrogation right is a relatively small exchange for obtaining the larger \$67 per ton limitation fund.

Now one of the questions that may perhaps be raised here is the change in the definition of the type of tonnage. The tonnage figure that results from the conventions and S. 2314 is slightly less than that results from the existing law. However, this slight reduction again does not materially affect the outcome having regard to a very substantial increase that is achieved by giving the cargo the \$67 fund.

Now if the committee please, the Department of Justice, of course, also is not unmindful, as a representative of the public, of the interest of the death and injury claimants in matters of this sort. As you can see from the explanation made by Mr. Singman at present the forfeiture, the dollar amount limitation fund of existing law, is only \$60 per ton available for the death and injury claimants exclusively. Under the proposed legislation this will be increased to \$140 a ton. Now this is no more than a just and reasonable increase, having regard on the one hand to the smaller value of the dollar now than in 1936, when the Sirovitch amendment, \$60 a ton was fixed, and also the larger amount of death and injury judgments which are commonly now recovered.

We do feel that it does constitute a valuable and necessary increase to meet these requirements for death and injury to passengers and crew. And as you will hear from other witnesses scheduled today, the industry has found this an acceptable figure. And indeed, as shown by the acceptance of the international convention by England and France and some other of the leading maritime nations, by European countries as well.

As regards the effect of the collision convention on death and injury claimants, there is, of course, no effect there because this provision taking away the right of claimover in the case of cargo, does not affect the claims for death and injury.

I think that adequately, gentlemen, summarizes what I have here in the prepared statement which has been offered. If there are any questions I should be happy to answer them.

(Full statement follows.)

STATEMENT OF LEAVENWORTH COLBY, CHIEF, ADMIRALTY AND SHIPPING SECTION, CIVIL DIVISION, DEPARTMENT OF JUSTICE, BEFORE THE MERCHANT MARINE SUBCOMMITTEE OF THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON S. 2313 AND S. 2314

I appear in response to the request of your chairman to state the views of the Department of Justice on S. 2313 and S. 2314. These bills are designed to bring the U.S. law regarding limitation of shipowners' liability and apportionment of liability in collision cases and other maritime casualties into harmony with the law of other principal maritime nations. Enactment of these bills will implement and permit U.S. ratification of the Brussels' International Conventions of 1957, on "Limitation of Shipowners' Liability," and of 1910, on "Apportionment of Liability for Collisions." In accordance with the established U.S. practice the bills will also maintain the identity of the law applicable on our vast inland lakes and rivers with that applied by our courts to cases on the high seas.

The more important of the two bills from the standpoint of the U.S. law is S. 2314, the bill amending our law relating to limitation of shipowners' liability. S. 2313, the collision apportionment bill, involves changes of less overall importance which are essentially incidental to the provisions of the limitation bill. The Department of Justice position has been set forth in letters, dated February 16, 1962, to the chairman from the Deputy Attorney General. The Department of Justice favors the enactment of both bills in principle, while recognizing that your committee may find necessary some slight verbal modifications in order to clarify the bills and make them more effective in their application by the courts.

In addition to the substantive merits of the bills' provisions is the desirability of bringing about the worldwide uniformity in admiralty and maritime law which

is necessary for the shipping industry with its international scope and world-wide competition. Enactment of the bills will permit equality of competition by U.S. carriers by permitting the United States to ratify these international conventions. It will constitute a further endorsement by the United States of the principle of international uniformity which it has already followed in putting into effect the many international maritime conventions dealing with safety of navigation, oil pollution, conditions of maritime employment, carriage of goods by sea and many other matters. The resulting uniformity will dispel uncertainties as to the rights and liabilities of litigants, decrease their tendency to shop around for the most favorable country in which to bring suits and promote the just and prompt resolution of maritime controversies.

Enactment of S. 2314, the limitation bill, would repeal certain of the existing statutes of shipowners' limitation of liability (46 U.S.C. 183-189) and replace them with more progressive legislation derived from the provisions of the International Convention Relating to the Limitation of the Liability of Shipowners of Seagoing Ships, adopted at the 10th Diplomatic Conference on Private Maritime Law at Brussels, October 10, 1957.

Under existing U.S. maritime law and under S. 2314 the shipowner is allowed to limit his liability and that of his ship only if the casualty has resulted without his own fault of privity such as a failure to make the ship seaworthy before the voyage is begun. At present, however, the shipowner is allowed to limit his aggregate liability, arising out of a casualty, to the value of the vessel after the occurrence, plus its pending freight, subject only, insofar as claims for death and injury are concerned, to a minimum of \$60 per ton of the vessel's tonnage. Thus liability for loss or damage to cargo and other property, in the event of a total loss, is limited to the vessel's pending freight and the value of a few lifeboats picked up after the casualty. Cargo shippers can recover nothing or at most an infinitesimal amount. Death and injury claimants recover pro rata portions of a sum based on \$60 per ton of the ship's tonnage.

The proposed legislation institutes a system favorable to cargo and personal injury claimants alike. It increases the owner's aggregate liability, and that of his ship, to \$207 per ton of the ship's tonnage. Of this limitation fund, \$140 per ton is earmarked exclusively for payment of death and injury claims. If this first \$140 portion is not sufficient to pay death and injury claims in full, their unpaid balance ranks ratably with cargo and other property claims for payment out of the second or \$67 per ton portion of the \$207 total.

The Department considers this increase in the rights of both cargo and personal injury claimants to be an equitable and necessary upward adjustment from the existing formula which is unfavorable to personal injury and cargo claimants alike. The decrease in the value of the dollar since the enactment of the \$60 a ton formula in 1936 provides a second justification for the change. Moreover, S. 2314 creates a separate fund for each casualty, whereas under existing law all claims arising during the same voyage must share in a single fund.

Enactment of S. 2313, the collision bill, would change existing U.S. law relating to the apportionment between vessels of liability for casualties in three principal respects and replace it with the more just and equitable legislation derived from the International Convention for the Unification of Certain Rules with Respect to Collisions Between Vessels, adopted at the Diplomatic Conference on Private Maritime Law at Brussels, September 23, 1910.

Existing U.S. maritime law divides the total damages in both-to-blame situations equally between the two or more vessels, or other interests, involved regardless of the proportion by which the respective fault of one ship or interest has exceeded that of the other. It further allows property damage claimants, as well as those for death or injury, to recover the whole of their damages against each of the parties liable. In all other maritime countries the damages are divided according to the extent that the respective faults of the vessels or other interests have contributed to the casualty and permits property damage claimants to recover from each interest separately only in proportionate amount that their respective faults contributed.

The first important change of S. 2313, from the half-damage to the proportionate fault rule, is considered by the Department to be preferable to our present arbitrary rule of equally divided damages. The concept of proportionate fault is more fair and equitable and is not new in U.S. maritime law. It

is already applied by U.S. maritime law to the issues of contributory fault in litigation under the Death on the High Seas Act (46 U.S.C. 766) and the Jones Act (46 U.S.C. 688), as well as in death and injury cases under the general maritime law. The courts of the United States have had no difficulty in administering the rule just as they have had no difficulty in administering the international proportionate fault rule when it is applicable to collision cases arising in Canadian and other foreign waters but brought before American courts.

The second important change made by S. 2313 would alter the liability of the vessels involved in a casualty to the owners of the cargo which they carry. Present U.S. law allows owners of cargo on either vessel to recover their entire damages from the other vessel. It does not allow cargo to recover from its own carrying vessel if that vessel has met statutory requirements regarding the exercise or due diligence in respect of seaworthiness, manning, equipment and stowage (Harter Act of 1893, 46 U.S.C. 192, and Carriage of Goods by Sea Act, 1936, 46 U.S.C. 1304). In a both-to-blame collision the noncarrying vessel is then allowed to collect contribution from the carrying vessel to the extent of one-half the damage which the noncarrying vessel has been required to pay the cargo of the carrying vessel, regardless of the respective degrees of fault. It thus indirectly contravenes the intent of the acts of 1893 and 1936. Under S. 2313, cargo would be limited to recovering against the noncarrying vessel only to the extent its fault contributed to the casualty.

Thirdly, S. 2313 would extend the international 2-year statute of limitations to all claims for death, injury, or property damage arising out of collisions and similar maritime casualties with a one-year limitation on the right of recovery over for contribution or recourse in respect of payments made by any party in excess of the proportion to which that party's fault had contributed. At present this 2-year international statute of limitations has been adopted by the United States in connection with recovery under the Death on the High Seas Act (46 U.S.C. 763), recovery for salvage services (46 U.S.C. 730), and under the Suits in Admiralty and Public Vessels Acts (46 U.S.C. 741, 745, 781-782). At present there is otherwise no specific time limit, but American admiralty courts apply the rule of laches patterned after the local state limitation statutes thus often reducing the period of suit to only 1 year.

Finally, S. 2313 abolishes the statutory presumption of fault under the so-called standby statute (33 U.S.C. 367), which makes the vessel owner liable for the collision if the master of the vessel fails to stand by and give aid and his vessel's identity to the other vessel.

The Department of Justice is interested in these bills, involving the increase in the amount of the limitation fund available and adoption of the proportionate fault damage rule, because it receives more notices of limitation petitions than any other law office in the country. As a result of the oversea operations, including the foreign aid program, the various agencies of the Federal Government, which ship cargo overseas or act as freight forwarders for other agencies, now constitute the largest group of uninsured export shippers from the United States. These agencies which include General Services Administration, Military Sea Transportation Service, Department of Agriculture, foreign aid program, State Department Dispatch Agency, and a number of small agencies, including Federal Aviation Agency. They all come to us when they have a notice to come in and file a claim in limitation or be defaulted. Notices are also sent to this Department, and we often have to go out and find out which of our numerous possible clients has the claim.

Our clients have one factor which distinguishes them from almost all other cargo interests—they are usually uninsured. They have another factor which distinguishes them from most, if not all, other cargo interests—they are required by law to give a preference in their shipments to U.S.-flag ships. Our cargo interests are therefore uninsured and dedicated to the use of American-flag ships. This Department is therefore particularly interested in seeing how much we can get for cargo and at the same time have equality of competition so as to have enough American ships to carry our cargo.

The two Brussels conventions which are tied together in these two bills to implement them and permit their ratification represent another balance between the interests of hull and cargo. Under the 1957 Brussels Limitation Convention, the shipowner increases his limitation fund, making more available to cargo and in return gets a stable limitation value in a procedure which is expected to be uniform wherever his ship goes in the world. In the 1910

Brussels Collision Convention, the cargo loses a right against the noncarrying vessel in both-to-blame cases which is one of the peculiar irritating differences between U.S. law and the law in the rest of the maritime world including Canada.

The question of whether the old limitation law, which was based on the theory that the vessel would be surrendered after the accident, is really more favorable to the cargo and other property damage claims, has been thoroughly examined because of our special interest. In the single ship case, where the vessel has an explosion or fire or strands or breaks up during a hurricane, the limitation fund under the old system is the amount of freight not prepaid and the value of any lifeboats or liferafts which may be found after the loss. Under the new system, there is a fixed fund available. The total of this fund is based on the ship's tonnage multiplied by \$207 out of which there is a first fund of \$140 per ton for personal injury and death, and there is a second fund of \$67 per ton which will go to the cargo interests assuming that the first fund takes care of the death and injury claims.

The new legislation with \$207 per ton is thus always in favor of the death and injury claims in the single ship disaster case, like the old *Morro Castle* disaster. At present, in two-ship casualties, the value of the vessels after the collision might, in periods of high chartering rates such as we had during the Korean war, sometimes amount to more than \$207 per ton. It is always possible that some court might decide that a vessel should be appraised at greater than her insured value and we have had such appraisals in ship requisition cases. We are advised by the persons in the insurance business that today the insured value in the hull insurance policy on most American ships is lower than the \$207 per ton fund. But normally it would not be expected that the appraised value would be higher than the insured value. Thus the \$207 value must be recognized as more favorable.

Under the present system, where the offending vessel is not lost but is available for surrender in its damaged condition, there is equally no advantage to the claimants under existing law. In practice, this adjustment on the basis of surrender means that from the appraised cost of the vessel there is deducted the cost of repairs to put her in a seaworthy condition. When there is a collision, involving slight damage to one vessel which puts its bow through the middle of another vessel and cuts the other vessel in two, the limitation fund of the slightly injured vessel is going to be high. But the limitation value of the vessel which was cut in two is going to be low. The total amount will seldom even approach \$207 per ton.

The recovery to be made by cargo in such cases under the present system therefore depends upon the results of the litigation between the vessels as to their respective faults. When that is over it depends on whether the severely damaged vessel or the moderately damaged vessel is held at fault. Further considerations arise in both-to-blame situations where the recovery of cargo is against the noncarrying vessel. The possibilities are numerous and the amount of recovery is therefore somewhat speculative. Recent experience in collision cases seems to show, however, that both vessels are nowadays held at fault and both are severely damaged by the collision. This is especially true if one of the vessels is a tanker or a chemical carrier and there is a fire and explosion. In this case the \$207-a-ton limitation provided by the new system is always going to be better for the cargo claimants as well as injury claimants than would the old system.

Since we represent a continuing shipper on the American-flag merchant marine, we favor giving that merchant marine the same right to limit which the other maritime nations have given to their vessels. We recognize that there are cargo subrogation groups which do not use American-flag vessels and whose problems differ from ours. We recognize that there are some American lawyers, representing passengers and crews who quite properly are opposed to any shipowners' liability limitation system at all, without regard to the effect of this on driving regular established companies into an uninsurable condition. But no one would gain by having large judgments against single ship companies which might be judgment-proof.

In our view, these limitation and collision bills strike a fair balance between the continuation of American-flag merchant marine on internationally competitive terms and extend to American cargo interests the same enlarged fund and the same principles of liability which have been adopted in other leading maritime countries of the world. We accordingly recommend the passage of both bills.

Senator BARTLETT. Thank you, Mr. Colby.

Mr. Singman mentioned that types of vessels not included in existing U.S. law would be included in S. 2314. Can you tell me if the nations which now adhere to the Brussels convention include these same ships or vessels?

Mr. COLBY. Those countries which have adhered or ratified—I think I am stating it wrong. Those nations which have thus far passed implementing legislation to bring into effect the 1957 limitation convention, have, of course, the necessary legislation for this purpose. This includes the United Kingdom and, I believe, some of the other British countries. It includes France, it includes Spain, and we do not have up-to-date information on the convention beyond that.

The ratification and coming into force of the 1957 convention must await the deposit of ratifications by at least 10 of the signatory countries to the 1957 convention. And 10 have not yet deposited their ratifications. This is ordinarily brought about—nobody wants to bring this convention to effect singly, so they wait until they are ready to deposit the ratifications as to everyone concerned. So, at the present time, the British countries are the principal ones in the maritime field, plus France, which have the law already in force, that is identical to that proposed by these bills.

Senator BARTLETT. I have no further questions, Mr. Colby. Thank you very much.

Mr. Teige, please.

STATEMENT OF PETER N. TEIGE, VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN PRESIDENT LINES, LTD., SAN FRANCISCO, CALIF., IN BEHALF OF THE PACIFIC AMERICAN STEAMSHIP ASSOCIATION AND THE AMERICAN MERCHANT MARINE INSTITUTE, INC.

Mr. TEIGE. My name is Peter N. Teige. I am vice president and general counsel of the American President Lines, Ltd., and appear here today on behalf of the American Merchant Marine Institute, Inc., and the Pacific American Steamship Association, trade associations representing the great majority of American-flag passenger, tanker, dry cargo, and collier vessels in the domestic and foreign trade of the United States.

I might add that the members of the committee of American Steamship Lines are also members of the two trade associations just referred to.

I have with me today two industry representatives who are much more familiar with an extremely complex and technical subject than I am, who will testify subsequently on the merits of S. 2313 and S. 2314. They are Mr. Terence G. Burke, insurance manager of Moore-McCormack Lines, Inc., and Mr. Joseph M. Rault, a member of the law firm of Terriberly, Rault, Carroll, Martinez & Yancey.

We deeply appreciate this opportunity to express our views in connection with S. 2313 and S. 2314. We deem this legislation essential to the welfare of our industry. American law on the subject of collision and shipowners' limitation of liability differs significantly from the rest of the international shipping community. The results

have been extremely harmful to the orderly development and growth of our industry.

The American merchant marine is an integral part of our national transportation system. It is the public policy of our Government to foster the development and encourage the maintenance of a privately owned and operated merchant marine sufficient to carry a substantial part of our waterborne commerce and capable of serving our national defense needs.

Limitation laws serve to encourage private investment in our merchant marine. Without it we could hardly hope to induce private investment in so risky a venture. It is extremely difficult to comprehend how private American ownership could absorb the full impact of maritime casualties and survive when our chief competitors have the right to limit their liability.

The vast majority of limitation of liability actions arise from collisions. Accordingly, we cannot properly evaluate the effects of a limitation statute without correlating it with applicable collision law.

American collision law is out of step with the rest of the maritime world. Virtually all maritime nations have adopted the 1910 collision convention which established the proportionate fault rule in both-to-blame collision cases. The American law provides for an equal division of all damage between vessels irrespective of the degrees of fault. This has led to considerable forum shopping depending upon whether the American or foreign law is the more favorable. This has operated to produce uncertainty in the outcome of litigation, multiplicity of suits, and inconvenience to all concerned.

Further, world trade would be enhanced through uniformity in international maritime law. S. 2313 and S. 2314 would accomplish this purpose.

We strongly urge your support of these companion bills.

Thank you.

Senator BARTLETT. Thank you, Mr. Teige.

I assume that either Mr. Burke or Mr. Rault will be in position to comment upon the substitute language prepared by the Department of Justice.

Mr. TEIGE. I believe that is correct.

Senator BARTLETT. I have no questions.

Mr. TEIGE. And the other gentleman, too, who will testify.

Senator BARTLETT. Thank you.

The chairman is informed that Mr. Deutsch has to leave this afternoon, so we are going to call him out of order.

Mr. DEUTSCH. Thanks you very much, Mr. Chairman.

STATEMENT OF EBERHARD P. DEUTSCH, DEUTSCH, KERRIGAN & STILES, NEW ORLEANS, LA.; CHAIRMAN, STANDING COMMITTEE ON ADMIRALTY AND MARITIME LAW, AMERICAN BAR ASSOCIATION

Mr. DEUTSCH. Mr. Chairman, my name is Eberhard P. Deutsch. I am a lawyer from New Orleans, and am chairman of the Standing Committee on Admiralty and Maritime Law of the American Bar Association.

I appreciate the opportunity to appear in favor of both S. 2313 and S. 2314, the bills to implement the Brussels International Maritime Conventions on Limitation of Shipowners' Liability and Apportionment of Collision Liability.

At its midwinter session in Chicago, on February 20, 1962, the House of Delegates of the American Bar Association adopted resolutions that the association "favors, in principle, enactment" of S. 2313 and S. 2314, which correspond to H.R. 7911 and H.R. 7912, and authorized me to appear before your committee in support of these recommendations.

The effect of these bills will be to have the maritime law of the United States conform to the maritime law of the rest of the free world. Our present limitation law, and our present collision law, have not been reformed significantly in the last century.

Other witnesses, Mr. Chairman, the Deputy Administrator, Mr. Colby, particularly, analyzed the legislation, and with your permission, I will present a brief analysis of what I have prepared, except for one or two points, which we consider of particular significance to all lawyers.

Senator BARTLETT. As you choose.

Mr. DEUTSCH. Thank you, sir.

I want to emphasize, if I may, the statement, not dictum, by Judge Hand in the *Western Farmer*, which has already been put before you, and in which he said our present limitation law "subjects the sufferer to the gamble of the offending ship's survival."

You have already been informed as to the amount provided for limitation funds under 2313, and as to the minimum of 300 tons, I want to underscore, if I may, Mr. Colby's statement. In my experience, an experience which covers more than 35 years of active practice in the admiralty field, this is tremendously more favorable than the present law to both cargo and maritime labor interests.

With regard to the matter of the both-to-blame situation and the suits by various cargo interests and by the underwriters of various cargo interests, we are beginning to get, in my humble opinion, to a point which approaches the ridiculous.

Mr. Chairman, you made the statement upon the previous legislation before you that war risk insurance was extremely complex or not simple, I think you said. You will find that some of the ramifications which arise under these bills make your war risk insurance look like a Sunday school picnic. It is getting perfectly ridiculous.

Underwriters meet each other coming and going or paying each other losses less the amount they pay their counsel for determining that fact for them.

We have cases in which, for instance, and it is a frightful waste of manpower, frankly, a longshoreman, let us say, will be injured by falling over a hatchboard on a deck or something of that sort, and he will sue the ship, because that will bring him perhaps a more favorable return. The ship will sue the charterers, who are responsible for the unloading. The charterer then brings in the stevedore, the employer of the longshoreman in the first place, and they have a merry-go-round. There may even be other parties, and it goes on and on, and the same thing happens with this, to a point which, as I stated, in my humble opinion, there is a frightful waste of American man-

power. This will eliminate at least a part of that in regard to both collision claims in the cargo cases.

Reading a portion of my statement, to be sure it is entirely accurate rather than extemporaneous, I want to say this, that the second section of section 2 of the bill, speaking of S. 2313, dealing with the corresponding general problem of legal presumptions, follows too closely the English translation of the French language of article 6 of the convention, with the result that there is danger that it may be thought to abolish presumptions of fact such as the rule of *The Pennsylvania*, 19 Wall. 125, *res ipsa loquitur*, the so-called presumptions against overtaking vessels and vessels colliding with wharves and other stationary structures, and many similar types of evidentiary presumptions common to American law.

These rules, however, are merely matters of the burden of going forward with evidence. They are not legal presumptions of fault. The words of the international convention, literally translated, are "legal presumption", used by its draftsmen in the familiar sense of article 1349 of the French Civil Code, as "one which a special law attaches to certain acts or certain facts."

I submit my statement in that regard, Mr. Chairman, with a modicum of authority above average, practicing in the State of Louisiana, whose law is based on the French Civil Code, and being intimately familiar and having read with some care this particular provision in its French text. It thus has reference only to such legal presumptions as the Standby Act, which the bill also specifically repeals.

A French writing, De La Plesse, *Unification Internationale du Droit Commercial Maritime*, summarizes, at page 153, sees the effect of the convention as suppressing all legal presumptions of fault, leaving "intact the rules relating to proof and factual presumptions."

Both of these bills, Mr. Chairman, represent carefully considered balances of commercial interests and they appear to be fair to all interests involved. We cannot say that the proposed unification is untried and untested, or that our present law, either as to limitation or as to collision, is fair to all interests involved.

There will be great advantages in international uniformity and in freeing the jurisprudence from the mechanical rules of both to blame apportionment of liability, and from the surrender of the offending vessel in its established condition. Both of these concepts have served their time but no longer represent the recognized maritime law throughout the rest of the world. Henceforth the courts will be allowed to apportion liability according to fault and to distribute the larger limitation fund for achievement of the just and adequate results provided by the proposed legislation.

For all of these reasons, the American Bar Association recommends passage of S. 2313 and S. 2314.

(Prepared text follows:)

STATEMENT OF EBERHARD P. DUETSCH, CHAIRMAN, STANDING COMMITTEE ON ADMIRALTY AND MARITIME LAW, AMERICAN BAR ASSOCIATION, ON S. 2313 AND S. 2314

My name is Eberhard P. Duetsch. I am a lawyer from New Orleans, and am chairman of the Standing Committee on Admiralty and Maritime Law of the American Bar Association.

I appreciate the opportunity to appear in favor of both S. 2313 and S. 2314, the bills to implement the Brussels International Maritime Conventions on Limitation of Shipowners Liability and Apportionment of Collision Liability.

At its midwinter session in Chicago, on February 20, 1962, the House of Delegates of the American Bar Association adopted resolutions that the association "favors, in principle, enactment" of S. 2313 and S. 2314, which correspond to H.R. 7911 and H.R. 7912, and authorized me to appear before your committee in support of these recommendations.

The effect of these bills will be to have the maritime law of the United States conform to the maritime law of the rest of the free world. Our present limitation law, and our present collision law, have not been reformed significantly in the last century.

The rest of the world has long recognized that liability should be proportionate to fault, and that there must be a substantial limitation fund for both personal injury and cargo claimants, even though the vessel may have been lost.

Other witnesses have already summarized, or will summarize, the legal aspects of the legislation. I will not take the committee's time further to enlarge on their summaries.

Rather, I shall point out certain aspects of the bills which represent, in my opinion, a forward step toward international uniformity, permitting fair international competition, and emphasize the advantages of the bills for cargo and personal injury claimants, as well as the just and equitable solutions which are to be reached.

The most significant of the two bills is S. 2314, which will implement the 1957 Brussels International Convention in regard to limitation of shipowners' liability. Section 3 of S. 2314, specifying the amount of the limitation fund and its establishment, is the heart of the bill.

Much criticism of the present American limitation laws is directed to the use of the value formula for determining the extent of limitation, rather than the tonnage formula as substituted in this bill. The value formula is supported by the logical argument that a shipowner, having performed his duty by providing a seaworthy vessel and a competent crew, should not be required to risk more than his interest in the venture upon which the ship is embarked.

Any theory of limited liability may be described as an invasion of a natural right to full indemnity for damage sustained, enforced for political or pragmatic reasons. Criticism of this theory was especially extensive after notorious disasters such as the *Titanic*, the *Vestris*, the *Morro Castle*, and the *Andrea Doria-Stockholm*.

The use of a \$207 tonnage formula tends to blunt the criticism directed at the value formula, while retaining benefits for the shipowner, and establishing a maximum liability which nevertheless assures a substantial fund for claimants.

In 1936, following the *Morro Castle* disaster, we patched up our limitation law by adding a special fund of \$60 per ton available only to death and injury claims. This \$60 figure is now out of date, and the special treatment for personal injury and death claims should not be used to prevent any recovery at all by cargo and other property damage claimants.

Our present limitation law has been well criticized by Judge Learned Hand in the *Western Farmer*, 210 F. 2d 754, as "subjecting the sufferer to the gamble of the offending ship's survival."

The new system proposed by S. 2314, worked out at Brussels, and accepted by representatives of the U.S. interests, as well as by the British and continental maritime interests, including the British and Swiss underwriters who reinsure a large portion of American risks, is to have two funds aggregating \$207 per ton of the vessel's tonnage.

The first of these funds is \$140 per ton for death and injury claims. The second is \$67 per ton for property damage claims, in which the death and injury claims may share if those claims have not been satisfied by their \$140 fund.

There is a provision for a minimum, which will provide at least 300 tons, or \$62,100, when the vessel is smaller than 300 tons. This will increase the limitation funds with respect to many small vessels which operate in coastal and inland areas.

The purpose of S. 2313 is to implement the 1910 Brussels Collision Convention, to permit its ratification by the United States, which, alone among all the maritime nations of the world, has failed to ratify the convention, to bring its law on this subject into conformity with that of other nations. The bill will also apply the rules of the convention to all cases to which the admiralty and maritime law of the United States extends.

S. 2313 adopts the uniform law of all countries except the United States, under which the damages are divided proportionately to the fault of the vessels, with death and injury claimants recovering against all vessels at fault as joint tortfeasors in solido, while cargo and other property damage claimants recover against each vessel separately, and only in proportion to fault.

Aside from the advantages of uniformity, the justice of this rule, especially in situations which involve merely a conflict as to which underwriters should pay, is obvious.

While the limitation bill (S. 2314) is more favorable to cargo, and vastly better for personal death and injury claimants than the present \$60 per ton, the collision bill (S. 2313) will eliminate the subrogation of the noncarrying vessel to the claims by cargo on the carrying vessel, against the latter in both-to-blame cases.

Such cargo now has no claim against its carrying vessel, by reason of the Harter Act and the Carriage of Goods by Sea Act (46 U.S.C. §§ 192, 1304).

The effect of our law, which is partly statutory, and partly by decision of the Supreme Court before 1900, has permitted cargo and its underwriters to effect recovery against the noncarrying vessel, in turn recovered back from the carrying vessel and its underwriters.

There has heretofore been occasional advantage in some of these intrinsurer subrogation cases in which one group of underwriters is seeking contribution from another group of underwriters in a particularly bad loss situation.

In the maritime field, however, where the various original underwriters are reinsured, and the reinsurers in turn often reinsure, the parties who eventually bear the loss frequently wonder whether or not they have been paying the cost of extensive litigation only to allocate the loss to the correct bookkeeping account.

The collision bill will eliminate this. In other countries where the collision convention rule, now proposed by S. 2313, has been in effect for the last 50 years, its application has worked out to the complete satisfaction of all interests.

Section 5 of S. 2313 abolishes the defense of compulsory pilotage in cases of suit in personam, so that the liability of the vessel owner or operator will be the same, whether he is sued personally, or whether suit is brought against his vessel. Once again, aside from the desirability of uniformity, the obvious justice and practicality of this rule is its strongest endorsement.

Section 7 saves the effect of any statutory or contractual provisions in respect of limiting liability, while abolishing the rule that the personal fault of the master in failing to standby, throws the entire burden of the collision upon the owner of the hit-and-run vessel.

The rule is a shocking one, and has almost never been applied, with the result that shipmasters who should have been held at fault under the criminal provisions of the statute have gone scot free.

Unfortunately, the second sentence of section 2 of the bill, dealing with the corresponding general problem of legal presumptions, follows too closely the English translation of the French language of article 6 of the convention, with the result that there is danger that it may be thought to abolish presumptions of fact such as the rule of *The Pennsylvania*, 19 Wall. 125, *res ipsa loquitur*, the so-called presumptions against overtaking vessels and vessels colliding with wharves and other stationary structures, and many similar types of evidentiary presumptions common to American law.

These rules, however, are merely matters of the burden of going forward with evidence. They are not legal presumptions of fault. The words of the international convention, literally translated, are "legal presumption", used by its draftsmen in the familiar sense of article 1349 of the French Civil Code, as "one which a special law attaches to certain acts or certain facts". It thus has reference only to such legal presumptions as the Standby Act (33 U.S.C. § 367), which the bill also specifically repeals.

As pointed out in Griffin "On Collision", section 25, the British courts have applied the convention, and the British implementing legislation, as merely directing the English courts to decide on the evidence, as in cases of any other kind.

Similarly, De La Plesse, "Unification Internationale du Droit Commercial Maritime", summarizes, at page 153, the effect of the convention as suppressing all legal presumptions of fault, leaving "intact the rules relating to proof and factual presumptions".

In order to restate, in the language of American lawyers, the intention of the international convention, the second sentence of section 2 of the bill should

be eliminated, and the latter part of the first sentence enlarged to read: "the damages shall be borne by those who have suffered them, and no liability shall attach to the owners and operators of any vessel unless its fault has contributed to the casualty".

Section 8 of S. 2313 adopts the international convention time limit of 2 years, counted from the date of the casualty, for the filing of original suits, and 1 year from the date of payment for filing suits for contribution.

The second paragraph reproduces the provision of the Salvage Act (46 U.S.C. § 763), which permits the court to extend the time to sue, if the libellant has not had a reasonable opportunity to bring suit within the time provided. This change is highly desirable, in eliminating possible application of State tort limitation statutes, which are often as short as 1 year.

Both of these bills represent carefully considered balances of commercial interests, and they appear to be fair to all interests involved. We cannot say that the proposed unification is untried and untested, or that our present law, either as to limitation or as to collision, is fair to all interests involved.

There will be great advantages in international uniformity, and in the freeing of the jurisprudence from the mechanical rules of both-to-blame apportionment of liability, and from the surrender of the offending vessel in its established condition. Both of these concepts have served their time but no longer represent the recognized maritime law throughout the rest of the world.

Henceforth, the courts will be allowed to apportion liability according to fault, and to distribute the larger limitation fund for achievement of the just and adequate results provided by the proposed legislation.

For all of these reasons, the American Bar Association recommends passage of S. 2313 and S. 2314.

Senator BARTLETT. Thank you, sir.

Have you had an opportunity to look over the proposed substitute language for S. 2313?

Mr. DEUTSCH. I think you will find, Mr. Chairman, there are others who have worked on it in more detail. I have looked it over, but I think the others can answer you much better than I can on the substitute language.

Senator BARTLETT. Right.

Now, speaking again about section 2 of that bill, it provides, and I quote:

There shall be no statutory presumptions of fault in regard to liability for collision.

That is the end of quote.

And then in a minority report by Mr. Freedman, in the Maritime Law Association, dated October 23, 1961, regarding this subject, he stated that—and once more I quote:

The presumptions grew up in our law to offset the advantage which the offender has in such cases because instrumentality is in his exclusive control. Without these presumptions, the victims are at the mercy of the offender—

says Mr. Freedman.

Would you care to comment on that statement?

Mr. DEUTSCH. To this extent I will be glad to do the best I can. I have the highest regard for Mr. Freedman, and you are going to hear from him, as I understand it. There are always presumptions in my experience which favor one side or the other in any litigation. I think it is no different in this particular litigation. I personally am strongly opposed to the presumption of fault which arises under the so-called standby rule. I don't think it is fair; I don't think it is proper wherever the chips may fall while the hewing goes on.

It may help Mr. Freedman's clients on some occasions, perhaps on more than it does the ships, and the other interests involved.

I think these presumptions should better be left with the courts as presumptions of fact, like these others I mentioned, the rule of the *Pennsylvania*, *res ipsa loquitur* and so on, to be applied in particular cases as the situation seems to warrant. I think it is a better judicial than a statutory rule. That is why I favor the bill in that regard.

Senator BARTLETT. Mr. Baynton?

Mr. BAYNTON. No.

Senator BARTLETT. Mr. Bourbon?

Mr. BOURBON. No.

Senator BARTLETT. Thank you very much for your helpful testimony.

You will have noticed, I am sure, that during your pronouncement of French our reporter's agile fingers never hesitated for a second.

Mr. DEUTSCH. Your reporter had an opportunity to read the words while I was pronouncing them as best I could.

Senator BARTLETT. The committee will stand in recess until 1:45 p.m. today.

(Whereupon, at 12:20 p.m., the subcommittee was recessed, to reconvene at 1:45 p.m., the same day.)

AFTERNOON SESSION

Senator BARTLETT. The committee will be in order.

Mr. Boal, please. Proceed at your pleasure, Mr. Boal.

STATEMENT OF ARTHUR M. BOAL, ON BEHALF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Mr. BOAL. Mr. Chairman, my name is Arthur M. Boal. I am a lawyer, a member of the firm of Boal, McQuade & Fitzpatrick of New York.

I am here representing the Maritime Law Association and on behalf of the association and myself, I wish to express to the committee our appreciation for an opportunity to be heard on these two very important bills and we appreciate the committee sitting in the afternoon so that we can go ahead. I know that you are all very busy and have a great deal to do and I want you to know that we appreciate your courtesy.

Senator BARTLETT. Thank you.

Mr. BOAL. Now, the Maritime Law Association of the United States is an unusual organization. It was organized in the year 1899 for the purpose of obtaining membership in and participating in the work of the International Maritime Comite. The Comite had been organized in Belgium 2 years before and its purpose was stated as follows:

The object of the Comite Maritime Internationale is to promote, by the establishment of national associations, by conferences, by publications, and by any other activities or means, the unification of international maritime and commercial law and practice, whether by treaty or convention or by establishing uniformity of domestic laws, usages, customs, or practices.

Now, the Maritime Law Association of the United States stated its purposes as follows:

The objects of the association shall be to advance reforms in the maritime law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the maritime

law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

The membership of the Maritime Law Association of the United States consists of about 1,300 admiralty lawyers, about 150 nonlawyers, that is, men who are in the industry but are not lawyers, and about 160 Federal judges who are associate members.

From the time the association was organized in 1899, down to the year 1930, all of our presidents were Federal judges; the last one was a Justice Hand. He was followed by Judge Veeder, who had been a Federal judge but was then back in private practice. Since Judge Veeder's time, the presidents have all been practicing lawyers.

Now, the primary purpose of the International Maritime Comite is international uniformity. It has about, at the present time, 28 national associations who are members of it. Both of the conventions which are here under consideration came through the Comite, that is, they were considered first by a committee of the Comite, and then by plenary session of the Comite, and then went to the diplomatic conference. I don't think we can emphasize too much the really great need for international uniformity in the field of general maritime law.

It is perfectly obvious that the regulation of water transportation between nations is beyond the competence of any one country. It requires cooperation and a great deal of give and take.

Now, that has been recognized by our courts. I think an excellent statement of it is from the Supreme Court of the United States in *Scotia* case, which was decided about 90 years ago.

There the Court said:

Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effects, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalfitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of marine rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations?

Then a few years later in the *Lottarwanna* case, the Court had this to say:

No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on

natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations.

That is a very good statement of the fact that we have a general maritime law which is recognized by our courts.

Now, the necessity for this was further emphasized by Justice Holmes in the *Queens Insurance Company v. Globe and Rutgers*. That case involved a collision when two convoys ran through each other and the question at issue was whether it was a marine risk or a war risk? Our courts following the English decisions held it was a marine and Justice Holmes said:

There are special reasons for keeping in harmony with the marine insurance laws of England—the great field of this business * * *.

And the decision handed down in 1961, the House of Lords in reversing the court of appeal, adhered to American decisions in construing the provisions of the Harter Act and the Carriage of Goods by Sea Act, indicating their realization of the importance of harmony in the construction of these statutes.

Charles Rhyne in a speech made for a meeting of the African and Asian lawyers in Ghana in December of last year, had this to say:

Consider how law is now made internationally. Much of it is customary law growing out of centuries of practice in particular fields like the law of the sea.

While we have a general maritime law recognized by our courts, changing conditions require changes in that general law. The courts can and do by judicial decisions make some changes, but there remains a very large area where changes can be brought about only by legislation. The means used to bring about such legislative changes are international conventions which are implemented and carried into effect by legislation in the various countries. That is the reason why you are presented with bills designed to implement these two conventions and to make their principles a part of our domestic law so as to bring our law into harmony with the rest of the maritime world.

I think that in approaching these conventions, that we should bear in mind that the Congress when it legislates on this subject, is a part of a large legislative body composed of the legislators of the maritime world. We try to act in consort with them and to create uniformity and it will require a certain amount of give and take.

I found that in dealing with lawyers from other countries in the conferences we have had on other conventions, that they have peculiar problems which we are able to meet by a certain change of language, a certain amount of give and take, and that when we get down to fundamental, the lawyers of the world think very much the same. It is easy to get an agreement on the professional level among lawyers than in any other group with which I have had contact.

This subject is not a very simple one. We are dealing with a system of law which is the oldest system of law in the world. It is a complete system and we are dealing with changes in that system. But I don't think there is anything very radical in what is proposed here. Dealing first with the limitation of liability convention, that is an old principle. It was first adopted, so far as I know, by France in 1681, England followed in 1734. Massachusetts passed a statute in

1818, and Maine in 1821. Congress first legislated on the subject in 1851. That act followed the pattern of the then English act and limited the liability to the value of the vessel and her pending freight at the end of the voyage.

Nine years later, the English changed their act to a fixed sum. We did not follow suit. We made a slight change in 1936 when we provided that there should be a minimum of \$60 a ton available for personal injury in death claims.

The convention goes to the English rule of a fixed sum. Now, that is definitely to the advantage of claimants when the vessel is a total loss or when a vessel is badly damaged. They have the advantage of always providing a substantial limitation fund no matter what the value of the vessel is, whether she is in badly damaged condition or is completely gone.

It also eliminates from consideration in limitation cases the question of what is the value of the vessel. Under our existing law, the vessel may be surrendered or a stipulation may be filed for a value and then her value will be determined by the court. Value always involves many legal problems.

It is not simple. You may have the question of whether a ship will have a higher value because she is in a subsidized service or not. All those things are eliminated under the proposed convention.

Now, the Collision Convention is an old one. It goes back to 1910. As has been stated heretofore, we are practically the only maritime country of any consequence which has not either ratified or adhered to that convention. In the Great Lakes, we have a situation where if a collision occurs on the Canadian side of the lake, the convention rule applies. On the American side, the American rule applies.

But it does principally two things: It divides damages in proportionate fault, which I think everyone agrees is fairer than the half damage rule, and secondly, it does away with joint and several liability for property damages, so that a vessel found at fault, which damages property of third parties, is liable for only one-fourth of that damage. It has been sometimes described as a fractional tort.

Now, the Maritime Law Association has approved both of these conventions and implementing legislation in principle, has authorized its committee to appear here and present their position and to agree to any such changes and amendments, that we fit them into our requirements. And in the interest of international uniformity and the establishment of an international and workable general maritime law, we urge the approval of both bills.

Senator BARTLETT. Does that conclude your statement, Mr. Boal?

Mr. BOAL. Yes, sir, Your Honor.

Senator BARTLETT. I have before me, Mr. Boal, a mimeographed copy whose heading read: "Abstract from hearings before the Senate Foreign Relations Committee on the 1910 Brussels Convention held January 1938." Does that come from you?

Mr. BOAL. I have here, which I would like to offer for the record, a copy of a report made by Mr. E. Russell Lutz, to Max O'Rell Truitt, General Counsel of the Maritime Division on the collision bill.

Senator BARTLETT. That will be included in the record, to go with your statement.

Mr. BOAL. Thank you.

(The statements follow.)

STATEMENT OF ARTHUR M. BOAL, ON BEHALF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES RE THE BRUSSELS CONVENTION OF 1957 ON THE LIMITATION OF SHIPOWNERS' LIABILITY AND THE COLLISION CONVENTION OF 1910

I am appearing here as a representative of the Maritime Law Association of the United States in support of these two bills.

The Maritime Law Association of the United States was organized in 1899. One of the purposes of the Maritime Law Association of the United States was to secure membership and participation in the work of the International Maritime Comite which was organized in Belgium in 1899.

The purpose of the International Maritime Comite is stated as follows:

"The object of the Comite Maritime International is to promote, by the establishment of national associations, by conferences, by publications, and by any other activities or means, the unification of international maritime and commercial law and practice, whether by treaty or convention or by establishing uniformity of domestic laws, usages, customs or practices."

The International Maritime Comite is essentially an organization of maritime law associations of the world. There are now 28 members.

The purpose of the Maritime Law Association of the United States is stated as follows:

"The objects of the association shall be to advance reforms in the maritime law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the maritime law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the shipping laws, regulations, and practices of different nations."

The membership of the Maritime Law Association of the United States consists of about 1,300 lawyers, 150 nonlawyers and 160 Federal judges who are associate members.

From the time of its organization in 1899 until 1930 all of the presidents of the association were Federal judges, the last being Judge Augustus N. Hand. He was followed by Judge Veeder who had been a Federal judge but who was then in private practice. Since Judge Veeder all the presidents have been practicing lawyers.

The International Maritime Comite and the Maritime Law Association of the United States were organized primarily for the purpose of securing uniformity throughout the world in maritime matters. The Brussels Convention of 1957 was the result of a lot of preliminary work done by a committee of the International Maritime Comite and consideration of that work by a plenary session of the International Maritime Comite held in Madrid in 1955. This preliminary work was submitted to the Diplomatic Conference at Brussels and largely influenced the convention there adopted.

The Collision Convention of 1910 had a similar history.

THERE IS A GREAT NEED FOR INTERNATIONAL UNIFORMITY IN MATTERS INVOLVING WATER TRANSPORTATION

It is obvious that international transportation cannot be regulated by one nation acting alone. Over the centuries there has developed a law known as the general maritime law. This is essentially international law. It is the oldest international law in the world. The general maritime law is the result of an acknowledgement of the necessity for international uniformity in this field.

Our Supreme Court in the *Scotia* case, 14 Wallace, 170, 20 L.Ed.822, said:

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea, only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have

been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalfitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of marine rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nation?

The Lottawanna, 88 U.S. 558, 22 L.Ed.654 at 661: "No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations."

The need for uniformity was recognized by Justice Holmes in the *Queens Insurance Company v. Globe & Rutgers*, 263 U.S. 487. In that case there was a collision and two convoys went through each other and the issue was—Was the collision due to a war risk or to a marine risk? The court followed the English decision holding it a marine risk and stated at 493:

"There are special reasons for keeping in harmony with the marine insurance laws of England—the great field of this business * * *."

The House of Lords emphasized the need for uniformity in *the Muncaster Castle*, 1961 A.M.C. 1357 at 1366, 1 Lloyds Rep. 57, when they reversed the Court of Appeal and brought the English decisions into line with our own in the construction of the Harter Act and the Carriage of Goods by Sea Act. Viscount Simonds said:

"I think it is very important in commercial interests that there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject matter, and it is a matter of great satisfaction to me to find that the decisions of these courts seem to correspond with the decisions given by the courts of the highest authority in the United States."

In reaching this conclusion they reversed the court of appeal. Charles S. Rhyne, past president of the American Bar Association and chairman of its Committee on World Peace Through the Rule of Law, in a speech before a conference on that subject of the lawyers of Africa and the Middle East held at Lagos, Nigeria, December 4, 1961, said:

"Consider how law is now made internationally. Much of it is customary law growing out of centuries of practice in particular fields like the law of the sea."

Changing conditions require changes in the general maritime law. The courts can and do by judicial decisions make some changes, but there remains a very large area where changes must be made by legislation. The means used to bring about legislative changes is an international convention implemented by legislation in the countries which are parties to the convention. That is the reason why the Congress is presented with a convention and with a bill designed, if passed, to make the principles of the convention a part of our maritime law.

THE BRUSSELS CONVENTION ON LIMITATION OF SHIPOWNERS' LIABILITY

The principle of limitation of liability of shipowners is an old one. It was adopted in France as early as 1681 and in England as early as 1734. Two American States enacted laws limiting the liability of shipowners—Massachusetts in 1818 and Maine in 1821. The first congressional act was in 1851. The early statutes limited liability to the value of the vessel, but differed as to the time the value should be determined. When our original act was before the Senate, Senator Hamlin of Maine, who had it in charge, stated that its purpose was to put our shipowners on an equal basis with those of England. This statute limited the liability of the shipowner to the value of the vessel and her pending freight at the end of the voyage.

Nine years later, in 1862, England changed her statute from the value of the vessel to a fixed sum per ton. It provided £7 per ton for personal injury and

death claims and an additional £8 in which both personal injury and death claims and property damage claims shared equally. Our limitation was not changed until 1936. At that time it was amended to provide that there should be a minimum of \$60 per ton for personal injury and death claims. This represented a step toward the English principle of a fixed sum.

The 1957 Brussels Convention embodies the fixed sum principle. It provides \$67 per ton which shall be distributed pro rata among all claimants, and an additional \$140 per ton to be distributed pro rata, but only to personal injury and death claimants.

THE ADVANTAGES OF A FUND BASED ON A FIXED SUM PER TON

In all cases, \$207 per ton will provide a substantial fund. The fund will be very much larger in cases of a total loss, a badly damaged ship, or an old ship near the end of her useful life, than would be the case under the existing statute.

Under the convention once you have determined the tonnage of the ship it is a simple matter to compute the amount of the fund.

Under the existing statute there is always the issue of what was the value of the ship at the end of the voyage. The owner may surrender the ship and have her sold under court order, or he may provide a stipulation for her value. The price received at such sale will almost always be lower than the appraised value.

All ships, whether flying the American flag or a foreign flag, will be on the same basis. Under existing law you might get a higher value for an American-flag ship than for a comparable foreign flag ship. This is due to the fact that the American ship can engage in the protected coastwise trade and this might give her a higher value. Also, the American-flag ship might be operated in a service under subsidy and have a much higher value than a comparable foreign flag ship. The convention places the American shipowner on an equal plane with his foreign competitor. The convention will simplify limitation proceedings by eliminating all issues as to the value of the ship.

THE COLLISION CONVENTION

The Collision Convention has been considered a number of times. Opinion on it has been divided. The Maritime Law Association of the United States in the past has refused to approve it. However, at our meeting last November, it was approved by a vote of 166 to 84.

This proposed convention makes two basic changes in our law. (1) Under existing law, if both ships are at fault, damages are divided equally between them regardless of the degree of fault. Under the convention, damages are divided in proportion of fault. If ship A is one-third at fault and ship B is two-thirds at fault, of the total loss A will bear one-third and B two-thirds. (2) The other change is that under existing law there is joint and several liability to third parties for both damage to property and for personal injury and death claims. Under the convention the joint liability to third parties for property damage is abolished and ship A will be liable to third parties for property damage only for one-third of the damage, and ship B will be liable to third parties for property damage only for two-thirds of the damage. Each will be liable for the full amount of claims for personal injury and death.

The rule of comparative negligence applies in personal injury and death cases under the Jones Act and under the general maritime law. The only instance where it does not apply in admiralty is in collision cases. The passage of this proposed act implementing the convention will restore harmony within our own maritime law and bring us into uniformity with the other maritime nations of the world. The passage of the legislation necessary to implement this convention is desirable, both from the point of view of domestic law and from the point of view of international uniformity.

The Collision Convention has been ratified by 20 countries and adhered to by 17 others, for a total of 37. The United States is the only important maritime nation that has not ratified or adhered to the convention and made its principles a part of its domestic law.

In considering these two conventions and the bills before you to make them a part of our maritime law, you are acting in two capacities. In one you are determining the domestic maritime law of the United States and in another, together with the legislative bodies of other countries acting in concert, you are legislating in the international field and making international law.

We urge the passage of these two bills because we believe they are desirable from the point of view of our own domestic law and from the point of view of international uniformity.

ABSTRACT FROM HEARINGS BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE
ON THE 1910 BRUSSELS CONVENTION HELD JANUARY 1938

JULY 26, 1937.

U.S. Maritime Commission, Interoffice Memorandum.

To: Max O'Rell Truitt, general counsel.

From: E. Russell Lutz.

Subject: Maritime Collision Convention of 1910 (liability). Commonly known as the Brussels Convention.

You requested an impartial study of the question of the desirability of the ratification of the above convention by the Government of the United States, in view of a recommendation by one of the Maritime Commission's advisers, that:

"In view of the fact that the temporary Commission advised the Foreign Relations Committee of the Senate of its approval of the Brussels Convention, I recommend that the Commission advise the committee that they are reconsidering the matter and will advise their opinion at a later date after investigation."

THE BACKGROUND OF THE BRUSSELS CONVENTION

The Brussels Convention is an international convention signed at Brussels on September 23, 1910, by the duly authorized representatives of 24 governments, including the United States, for the purpose of unifying the law of the various maritime countries on certain rules with respect to collisions between vessels.

Prior to the movement which led up to the effort culminating in the convention, the laws of the various nations were in helpless confusion, there being three or four different rules applicable in the courts of the various nations as to the measure of damages to be applied, especially in collisions where each of the vessels were partly to blame for the collision (called both-to-blame cases) with respect to—

- (a) The extent of the liability of vessels for collision damage to each other;
- (b) The extent of the liability of the vessels for the damage to cargo;
- (c) The extent of limitations of the liability of vessel owners;
- (d) The laws of which country should be applied.

The confusion in the above rules, as well as in some others, led to an organized movement looking to a unification of the various maritime laws, starting about 1885. The movement developed so that in 1909 and 1910, diplomatic conferences were held, as a result of which the present convention on collisions was signed, as well as a convention on salvage, which has long ago been ratified by the United States.

THE TERMS OF THE CONVENTION ON COLLISIONS

The convention as signed was the result of a series of compromises among the representatives of the various nations having diversified and conflicting rules—each country necessarily having to make some concessions if the desired uniformity was to be obtained. (The convention has been adopted by all of the nations which signed it except Cuba, Chile, and the United States, and by a number of other countries. It is now the law in 29 countries, including all of the principal maritime countries, except the United States).

CONVENTION RULES COMPARED TO THE AMERICAN LAW

The convention sets forth the uniform rules to be applied in the various types of collisions (arts. 2, 3, and 4) and contains certain additional provisions. The convention rules in the main are similar to the laws of the United States, but adherence to the convention would constitute changes in our laws on the following four points:

(1) Statute of limitations: Under our law at present, the only limitation (except under the Suits in Admiralty Act) on the time for commencing actions for vessel collision damages, is the rule of laches. Article 7 of the convention places periods of limitation. (See appendix 1A for the convention.)

Comment.—There appears to be no objection whatever to this change.

(2) Article 6 of the convention abolishes presumptions of fault in regard to liability for collision.

Comment.—Some slight objection has been raised on this point. The rule was placed in the convention primarily because of a very complicated series of presumptions contained in French law, and because of the English and American presumption that a technical violation of the Rules of the Road constituted fault, unless it could be proven that the violation "could not have been" the cause or a contributing cause of the collision, a very difficult burden of proof to sustain. The adoption of the convention by England and France has terminated the presumptions in those countries.

(3) In a both-to-blame collision, the law of the United States divides the liability for damages equally between the vessels, irrespective of the degree of fault. Article 4 of the convention provides for the application of the proportional liability rule which divides the liability for damages between the vessels according to their degree of fault.

Comment.—On principle, this new rule is clearly a more equitable basis for division of damages than the present American rule (and former English rule) of making each pay half irrespective of the degree of fault. Insofar as the question of liability for damages to the vessels is concerned, there appear to be no objections to this change, to conform to the law of other countries.

(4) Under article 4 of the convention, in both-to-blame collision cases, cargo owners are entitled to hold each vessel (severally, not jointly) for its proportionate part of the losses according to the degree of fault. Under the existing American law, the rule is quite different, as explained in the following comment. (This change, reserved for final consideration, is the one which is the basis for practically all of the objections to the convention.)

Comment.—On principle, this new rule is clearly as equitable when applied to cargo as when it is applied to vessel damages. However, if brought into the law of the United States, because of the peculiar state of our applicable law, it would destroy the right of cargo owners (and the cargo underwriters) to a full recovery of their damages in both-to-blame collision cases, and that is the fundamental objection to the ratification of the convention by the United States. Under the Harter Act (1893), a cargo owner was prevented from collecting damages from a carrying vessel owner for losses to its cargo if the vessel owner has exercised due diligence to make the vessel seaworthy, properly loaded, manned, equipped, and supplied. Under that act (the principle of which has now been adopted by all maritime powers in furtherance of their merchant marine policies), if there is a collision in which the carrying vessel is solely to blame, the cargo (or cargo underwriter) can collect no damages. If it is a both-to-blame collision case, the Harter Act still prevents the cargo owner from collecting directly from the ship carrying the cargo. The Supreme Court has, however, held that under the American law, the cargo owner can sue both vessels "jointly and severally;" therefore, the cargo owner can sue the non-carrying vessel for the full losses, and then, in order to escape the obvious injustice of that result, that the noncarrying vessel can collect contribution (or 50 percent from the carrying vessel, despite the principle of the Harter Act, because that act purports to regulate solely the relationship between a vessel and its own cargo. (*The Chattahoochee* case, 173 U.S. 540, 1899.) In other words, the principle of the Harter Act was completely nullified in both-to-blame collision cases. How does the convention rule interfere? Insofar as cargo is concerned, it destroys the American rule of permitting cargo's right to recovery for the full amount of losses and damages against the noncarrying vessel, by permitting it to sue only for that proportion based upon the degree of fault of that vessel. The rest of the cargo's losses must be borne by the cargo owner or his underwriter, since there is no remedy against the carrying vessel under the Harter Act. Therein lies the heart of the opposition to the ratification of the convention by the United States.

THE PRESENT STATUS OF THE CONVENTION IN THE UNITED STATES

Before proceeding to a discussion of the convention and the arguments for and against its ratification, it is important to note the following facts regarding the present status of the convention, insofar as the executive and legislative branches of the Government are concerned:

1. On April 29, 1937, the President transmitted the above-mentioned convention to the Senate, with a message concurring in the recommendation of the Secretary of State, that the United States adhere thereto (see app. No. 4).

2. Attached to the report of the Secretary of State was a copy of a letter dated April 7, 1937, from the Secretary of Commerce to the Secretary of State, in which it was stated that, "It is thought it would be to the advantage of American commerce for the United States to adhere to the convention." That statement was in reply to a direct question on that point from the Secretary of State to the Secretary of Commerce (see apps. Nos. 1 and 2).

3. There was also attached to the report of the Secretary of State a copy of a letter dated March 31, 1937, from the Maritime Commission to the Secretary of State (see app. No. 3).

It will be noted that the Commission was not requested to express an opinion on the effect of the convention in general, but upon certain specific points (see copy of State Department's letter, also attached) which were as follows:

1. Whether adherence of the United States to the convention will be in the interest of American shipowners, and in particular in the interest of the ships which are still owned by the Government of the United States and operated on its behalf;

2. Whether adherence of the United States to the convention will adversely affect shippers of cargo, and, especially in this relation, whether American adherence to the convention will be likely to result in an increase in insurance rates paid by American shippers.

The Commission's reply of March 31, 1937, related to those points. In answer to the first point it was said that, "It seems to me that adherence to the convention would be in the interest of American shipowners." Then after giving reasons for that statement, it was said, "With respect to merchant ships owned and operated by the United States, I perceive no reason why they or the United States would be affected by adherence to the convention in any manner different from that in which private American shipowners and their ships would be affected."

In answer to that part of the second point relating to insurance rates, the Commission's letter contained the following paragraph:

"With respect to whether American adherence to the convention will be likely to result in an increase in insurance rates paid by American shippers, I am advised that ratification of the convention and enactment of enforcing legislation by other maritime nations has not in fact resulted in any increase of insurance rates on cargo moving in American bottoms and insurance rates on cargo moving in bottoms of nations that have adopted the convention. Thus, experience to date indicates that adherence to the convention would not result in any increase in insurance rates to American shippers; although it cannot be said, since under the proportionate damage rule shippers might not be able to effect full recovery for cargo loss resulting from collision of vessels mutually at fault, that an increase in insurance rates on cargo may not be made in the future, based upon such contingency."

Each of those answers appears to be correct, and the extensive material which I have now examined contains no suggestion to the contrary. (See app. No. 5 for list of references.)

The only question which can be raised as to the accuracy of that letter is whether it contains an appropriate representation of the Commission's views on that part of point (2) which relates to possible adverse effects of the convention upon shippers of cargo (other than on insurance rates). On this matter the letter contains the following paragraph:

"With respect to the effect upon American shippers of cargo of adherence by the United States to the convention, there has been some objection on their behalf, the real ground of which seems to be that under the rule of equal damages, the cargo owner can recover 100 percent of his loss from the non-carrying ship, whereas, under the convention rule, such recovery is limited by the degree of fault of the noncarrying ship, with the result that, since the Harter Act precludes recovery from the carrying ship, a portion of the loss under the proportionate damage rule falls on the cargo owner or his underwriter. I understand that, because of this objection, no attempt has been made to incorporate the principle of the convention in bills of lading issued for vessels operated by the Government. I also understand, however, that very recently the principal objector upon this score has consented to the inclusion of such provision in such bills of lading."

It is possible that that paragraph, because of the last sentence, might be construed as indicating that the objections need no longer be taken seriously, although a careful reading of it does not justify any such construction. The Commission's letter points out that some objections have been made to the convention by certain interests because it affects the liability of carriers to cargo owners to a certain extent (doubtless the reason for the recommendation quoted on p. 1), but that letter does not comment one way or the other as to the merits of such objections, nor offer any expressions of opinion thereon. Certainly, there would have to be some very real reason for advising the Secretary of State that the above letter was erroneous, since it has already been transmitted by him to the President, by the President to the Senate, and there referred to the Foreign Relations Committee (where hearings have already started). Therefore, any action at the present time based upon possible views contrary to those contained in that letter, should be taken only in case there exist very cogent reasons for such action.

Furthermore, the Senate Foreign Relations Committee is certainly not being misled by the Commission's letter as to the seriousness of the objections of certain interests to the convention, because it is known that the representatives of such interests are in contact with the committee, which is giving an opportunity to those who are interested in the convention, both for and against, to submit their views fully to the committee.

Since there is no fault to be found with the Commission's letter of March 31, 1937, the suggestion quoted on page 1 of this memorandum is in reality a request that the Commission reexamine the whole question as to the desirability of ratification by the United States (a question, incidentally, which was not submitted to the Commission by the Secretary of State), and if it reaches conclusions against ratification, that it undertake to convince the Secretary of State and the President, of the "error of their ways."

I have therefore collected as much material as was available on the subject and examined it objectively with a view to ascertaining whether the General Counsel would be warranted in making any recommendation to the Commission regarding the convention, in view of the known facts and the allegations and contentions of the opposing interests involved.

ANALYSIS OF THE INTERESTS OF THE VARIOUS PARTIES EXPRESSING OPINIONS FOR AND AGAINST THE DESIRABILITY OF ADHERENCE BY THE UNITED STATES

From the foregoing discussion, it is clear that the principal object to ratification by the United States is based upon the fact that the convention (with a reservation regarding the Harter Act as proposed by the President), would permit a cargo owner to collect from the noncarrying vessel for only that part of his losses as are proportional to the extent of the fault of that vessel—or in other words, cargo could not collect from that other vessel the full amount of losses and damages.

Who is really pecuniarily interested in such a change?

The shipowners? Not to a great extent. All ships are, of course, insured. If the convention is ratified, will rates on insurance be reduced on American vessels? In both-to-blame cases, the insurers of the carrying vessel will not be required to pay anything because of the Harter Act. However, rates are fixed on the world market. It is said that the amount thus saved to the underwriters would not be great. Ratification would make the same rules applicable in American cases, as are applicable in the cases which the underwriters handle for the rest of the world. It is easy to realize the interest of P. & I. underwriters in ratification from a pecuniary standpoint, and also from the standpoint of having uniform rules applied in their business.

Are the cargo owners pecuniarily interested? Not a great deal. Insurance rates on cargo will probably not go up as a result of adoption of the convention by the United States. Such rates were not increased as the remaining countries of the world ratified. Rates are fixed on the world market. In fact, the underwriters of cargo on American vessels collect the same premiums as that charged for cargo on all other vessels, but under existing American law they have the special advantage of full recovery for losses against the noncarrying vessel, something denied to them under the laws of all other countries. It is, therefore, to their particular advantage to try to prevent a change in the American law. It is the cargo underwriters whose views have been so forcefully expressed by their counsel, who, in opposing ratification, very frankly admits the pecuniary interest of the cargo underwriters in the result.

The Government of the United States might be said to have a pecuniary interest in the extent that it is an owner of ships. The convention rule is advantageous to shipowners, and therefore to the Maritime Commission. However, the Government's attitude, as a whole, should be based on the full shipping picture, including the cargo interests as well as the shipping interests. That is doubtless the viewpoint of the Secretary of Commerce, the Secretary of State, and the President. The Secretaries of Commerce have consistently favored ratification, the present Secretary of Commerce stating in his report of April 7, 1937, that "it is thought it would be to the advantage of American commerce for the United States to adhere to the convention." The Secretary of State and the President approve. They doubtless consider that the advantage of unification, plus the advantage to shipping, overbalance the disadvantages to cargo underwriters.

ANALYSIS AND APPRAISAL OF ARGUMENTS FOR AND AGAINST RATIFICATION BY THE
UNITED STATES

As has been noted above, the arguments against ratification are directed toward the change which will result in denying cargo underwriters and cargo owners an indirect recovery against the carrying ship and a full recovery against the noncarrying ship. The arguments considered will, therefore, be primarily limited to that point.

ARGUMENTS FOR RATIFICATION

New rule equitable

It is said that the convention should be ratified because the new rule apportioning damages according to fault is more equitable and just. That would seem to be obvious to require discussion. Opponents say that the new rule would be too difficult to be applied. The answer to that is that it has worked satisfactorily in the rest of the maritime countries. Furthermore, when both vessels are to blame and it is not possible to establish the degree of the respective faults, the convention rule, as applied in the rest of the world, provides for equal division of damages. This argument appears to be in favor of the proponents.

Uniformity

It is said that the convention should be ratified because it will bring the law of the United States in line with the law of the rest of the maritime powers. That such a result is desirable would appear to be clear. The Secretary of State urges this point in his report to the President and states that "uniformity will make for better trade conditions by lessening uncertainty." The convention has been adopted by all important maritime powers except the United States. It will end the advantage to cargo underwriters in having their cases tried in American courts when such action is to their advantage. Prior to the unification movement the various interests involved could try to shop around in several jurisdictions with a view to bringing suit, looking for the most advantageous rule.

The opponents' reply to this argument is that the rule would not be involved in many cases and, therefore, uniformity is of little practical value. The obvious reply to that is that it is in fact of little pecuniary interest to cargo underwriters, and that the advantage of uniformity overbalances the slight disadvantage to cargo underwriters.

The opponents also say that adoption of the convention would create uniformity insofar as it concerned collisions between American and foreign vessels; but since it does not apply as between American and foreign vessels; but since it does not apply as between American vessels, it would destroy uniformity between various American vessels, creating confusion in the American law. This objection deserves serious consideration and appears to be well taken. There is a remedy, however. All that would be required would be legislation making the new rule applicable to American vessels. In fact, if the Senate approves of the convention, it could easily be arranged so that it should not be applicable, if the Senate so desired, until such legislation was enacted and was effective.

It is also stated by opponents of ratification that, whereas the convention rule if adopted in the United States, would make the principle of the Harter Act effective as to carrying vessels, the various laws of different countries on limitation of liability would remain divergent, and there remains an extensive field

in which uniformity is lacking. That is true, but the answer is that the present convention is for the purpose of unifying the law on one subject only: that is, the subject of the allocation of damages in collision cases. The subject of the unification of the laws on limitation of liability has been discussed from time to time by private associations of lawyers from various countries and has been dealt with in an international convention signed at Brussels on August 25, 1924, by the delegates of 15 countries not including the United States. The opponents of the Collisions Convention contend that there is an international movement to reduce the liability of ships and shipowners, and that the whole subject of limitation of liability should be most carefully studied before further changes are made. The answer to that is that the present suggested change should be considered on its merits, that it is the law practically everywhere, and that the change does not involve limitation of liability by virtue of any provision of the convention. The argument on uniformity appears to be in favor of the proponents of ratification.

ARGUMENTS AGAINST RATIFICATION

Loss of Right of Cargo Owner to a Full Recovery in Both-to-Blame Collisions

As explained above, under the existing American law, a cargo owner (or his underwriter) can collect in full, in a both-to-blame case, from the noncarrying vessel, which vessel in turn can claim contribution from the carrying vessel despite the purpose and intent of the Harter Act. Under the convention rules, cargo could hold the noncarrying vessel only for a proportion of its damages measured by the degree of that vessel's fault and the cargo underwriter would have to pay for the rest of the loss without any right of recovery. This is the heart of the cargo underwriter's opposition.

The answers to this objection by the proponents of ratification are:

1. The policy of the United States on the question of liability of the carrying ship is laid down in the Harter Act, according to which the carrying ship is granted an exemption from liability for injury to its own cargo, although the application of that policy in both-to-blame cases was negated by the *Chattahoochee* decision.

2. That policy was recently reaffirmed in the adoption by the United States of the Convention for the Carriage of Goods by Sea and the enactment of the 1936 Carriage of Goods by Sea Act.

3. Cargo underwriters do not, in any other country, enjoy the special right of full recovery in both-to-blame cases—that is, under the American law they have this special right—yet the cargo insurance rates are based on the world market. There is no reason why this special privilege should be continued.

4. Experience shows that the adoption of the convention rule in other countries did not cause an increase in cargo insurance rates or a decrease in hull insurance rates. Apparently, the number of cases in which the change in law makes a financial difference is too few when considered in the whole insurance scheme, to make any appreciable difference.

5. The convention would correct a decided anomaly which exists under our law under the *Chattahoochee* decision. If a carrying vessel is solely at fault for a collision, under the Harter Act it is entirely exempt from any liability for damages to its cargo. However, if the other vessel is also to blame, in any degree, the carrying vessel must pay half the cargo damages by the circuitous route of being required to contribute to the other vessel half of the cargo damages paid by that vessel. The convention rule would correct that anomaly. The opponents of ratification admit the anomaly, and make no attempt to refute statements that the situation is wholly illogical and inconsistent, and submit no reasons whatever opposing a correction of the situation, other than the reason that it will affect cargo underwriters financially, which is to say that it will deprive them of a favored position not enjoyed under the law of any other country. They do contend that the convention is not the way to correct the situation. No other method, however, is suggested in the material examined. There can be no doubt that adoption of the convention would restore to carrying vessels the exemption from liability to its cargo which was intended by the Harter Act, the principle again being incorporated in the Carriage of Goods by Sea Act of 1936.

Appraising the arguments both ways on the changed situation under the exemption of the Harter Act, it seems to me that the advantages favor the proponents of ratification.

CHANGE OF LAW BY TREATY UNDESIRABLE

The opponents of ratification contend that it is undesirable to change existing American law by treaty, but that any change should be made by legislation—the principal reason being that by the regular legislative process, all parties concerned will have an opportunity to be heard.

In answer to that objection, those in favor of ratification reply that the arguments for and against the convention have been fully developed over a period of years and are well known.

It may be added that the Senate Foreign Relations Committee is receiving briefs from the various parties interested, and is offering an opportunity to those interested to be heard. I am very firmly of the opinion that they should all be heard, especially those opposing ratification, because the action by the executive branch of the Government followed the filing by a proponent of ratification of a 40-page brief with the State Department. Therefore, those opposing ratification should be given an opportunity to submit their present-day views on it.

There would seem to be no inherent merit to the objection to following the treaty process in adopting this change in our law. Uniformity in law on other maritime matters has been obtained by the treaty procedure, such as, for example, in the Carriage of Goods at Sea Convention, only recently adopted by the United States.

EXISTING LAW UNDERSTOOD; CHANGE UNDESIRABLE

The opponents of ratification contend that the present law is well understood, that it works satisfactorily, and should not be changed. The obvious answer to this contention is that the convention rule is clearly more equitable, that it is desirable that our law be uniform with that of the rest of the world, and that under it the carrying vessel would obtain the benefit of the exemption of the Harter Act in a both-to-blame collision, as well as in a case where it is solely to blame.

This objection should not bear much weight in a final decision.

THE TREATY, SIGNED IN 1910, IS NOW OBSOLETE

The opponents of ratification contend that it is now (1937) rather late for the United States to ratify a convention signed over 25 years ago (1910). The proponents reply that the changes which have occurred since 1910 make it more desirable than ever for the United States to act favorably, those changes being:

1. In 1910 the convention was an untried suggestion—now it has been adopted by practically the whole world and has proven satisfactory.

2. In 1910 the United States had few vessels on the seas and was principally a cargo nation—now we have a merchant marine and a very definite merchant marine policy looking to the fostering and development of an adequate fleet of merchant vessels. The convention is one step in that direction.

Appraising this argument, it appears to favor the proponents.

THE TREATY IS BEING URGED BY REPRESENTATIVES OF FOREIGN COUNTRIES, NOT BY AMERICAN INTERESTS

This contention of the opponents relates to the fact that a proponent of ratification admits that he was requested to act by English P. & I. underwriters. He answers that he also represents American P. & I. underwriters and says that he answers that he also represents a number of American shipowners.

Considering the matter as a whole, it would appear that the "foreign influence" argument is not entitled to much weight. The division of interest rather is between P. & I. underwriters (foreign and American) as opposed to cargo underwriters (foreign and American).

THE TREATY SEEKS BY INDIRECTION TO DO WHAT THE P. & I. UNDERWRITERS HAVE FAILED TO DO BY DIRECT MEANS

This contention of the opponents of ratification relates to the both-to-blame collision clause placed in bills of lading in recent years, which in effect gives the carrying vessel the exemption provided by the Harter Act. In the case of *The Bruce* (14 F. Supp. 894, April 24, 1936, District Court, E.D. N.Y.) such a

clause was upheld, so that the cargo underwriter would, in both-to-blame cases in which that clause is used, collect only half of his damages, and from the noncarrying vessel.

In the same month in which that decision was rendered the 1936 Carriage of Goods at Sea Act became law. Counsel for cargo underwriters contends that this new act contains a provision under which he can defeat the validity of the above clause, and apparently some members of the admiralty bar agree with him.

The obvious reply to the above contention is, first, that the shipowners have not thus far failed to procure the desired exemption, since the only case decided up to the present is in their favor, although the 1936 act raises some serious doubt whether it will now be sustained. If the carrying vessel is to be exempted from liability in the type of case under consideration, there would appear to be no reason to await the outcome of judicial interpretations of the legality of the clause in bills of lading. The adoption of the convention is the forthright way of having the governmental policy determined.

It is interesting to note that counsel on behalf of some shipowners has referred to this both-to-blame clause and draws a conclusion just the opposite from that of counsel for the cargo underwriters, contending that the clause, as approved in the *Bruce* decision, obtains the exemption intended by the Harter Act for the carrying vessel, and therefore it is useless to adopt the convention, which it is feared will reopen the whole question of the limitation of liability for vessels, a subject discussed below. On this the proponents reply that counsel for cargo underwriters insists that he thinks that he can induce the courts to hold the clause invalid under the 1936 act, and therefore the exemption based on the clause might be lost after all; and further, that the exemption issue is only incidental to the main purpose of the convention, which is the proportionate distribution of damages between colliding vessels, according to the degree of fault.

Appraising all of the diverse and conflicting arguments based upon the present status of the both-to-blame collision clause in bills of lading, the advantage appears to be decidedly in favor of those who favor ratification. In this connection it should be noted that counsel for cargo underwriters made an effort to have a section inserted in the 1936 Carriage of Goods by Sea Act which would clearly make the above-discussed clause invalid, which would in effect have been a legislative approval of the anomalous situation resulting from the *Chattahoochee* decision. There was strenuous opposition to that suggestion, and the committees of both the Senate and the House refused to agree to its inclusion in that act. The suggested section was left out.

THE CONVENTION (ARTS. 4 AND 10) WILL OVERRULE SECTION 3 OF THE HARTER ACT
AND ALSO SECTION 4 OF THE CARRIAGE OF GOODS BY SEA ACT

As of the Harter Act, a specific reservation was made by the delegates of the United States who signed the convention, and the Secretary of State and the President have recommended the adoption of the reservation. I believe that such a reservation should be adopted so that it will be perfectly clear and beyond question that the Harter Act is not changed.

The 1936 Carriage of Goods by Sea Act, section 4, contains a restatement of section 3 of the Harter Act. No one desires that section to be affected. It is therefore suggested that the above-mentioned reservation be extended to cover the 1936 act if the convention is to be adopted. I have discussed this point with an official in the State Department and he agrees.

THE CONVENTION (ART. 6) TERMINATES PRESUMPTIONS OF FAULT IN REGARD TO
LIABILITY FOR COLLISION, WHICH IS SAID TO BE UNDESIRABLE

It is true that the convention abolishes presumptions. This is one of the four changes that would be made in our law.

The recent report of the Secretary of State, which was approved by the President, contains the following statements on this question:

"*Presumptions.*—Because there were many presumptions relating to collision in the laws of foreign countries, all legal presumptions of fault so far as responsibility for the collision is concerned are abolished under article c of the convention. I understand that in the United States there are few or no statutory presumptions applicable to collision cases. There are, however, some legal presumptions which are applied to them set forth in judicial decisions.

The delegates of the United States therefore made a reservation, which I shall discuss in another place in this report, on signing the convention that the provisions of article 6 should not affect legal presumptions created by the laws of the United States.

* * * * *

"With reference to reservation No. 3, the American delegates stated in their 1909 report, a copy of which is attached, that the sweeping away of all legal presumptions, which the second paragraph of article 6 of the convention will do without this reservation, could not fail to leave our law in a state of more or less uncertainty, especially in view of the difficulty in many cases of distinguishing between presumptions of law and presumptions of fact. The Secretary of Commerce, in a letter of April 7, 1937, to me, a copy of which is attached, stated that he saw no objection to this reservation. The Chairman of the U.S. Maritime Commission, however, in a letter to me dated March 31, 1937, a copy of which is attached, made the following comments with reference to this reservation:

"While I believe that what has been said answers the question which you submitted for my views, since the copy of your letter to the Secretary of Commerce, enclosed with your letter to me, makes special reference to the third reservation of the United States to the convention, I venture to suggest that serious consideration be given to the question whether this reservation should stand. Its effect is to preserve the rule that a ship violating at the time of collision a statutory rule for the prevention of collisions has the burden of proving that such violation "could not have been" the cause, or a contributing cause, of the collision. That rule, as I am advised, was promulgated in *The Pennsylvania* (86 U.S. 125, 136), decided in 1873, and followed ever since.

"Under the existing rule of equal division of damages, where a violation of such a regulation is established and the vessel guilty if it fails to sustain the difficult burden of proving that the violation could not have contributed to the collision, the damages are equally divided, regardless of to how slight a degree such violation could have contributed. Since under the convention, subject to this reservation, the court could consider evidence respecting degree of fault attributable to violation of such a regulation and could hold the degree so slight as to be almost negligible, it is possible that the reservation may be unnecessary in view of its small practical effect under the proportionate damage rule."

"From all the considerations appearing in the letters from the Chairman of the U.S. Maritime Commission and the Secretary of Commerce, I believe that reservation No. 3 may be abandoned. * * *"

It is noted that the Secretary of State recommended abandonment of the reservation originally made but that neither the Commerce Department nor the Commission went that far—the Commission only stated that "serious consideration be given to the question whether this reservation should stand."

It is helpful to examine the reasons why the reservation was originally made. The draft convention was prepared at a diplomatic conference in 1909, 1 year prior to the Conference at which it was signed. The American delegates to the 1909 Conference reported as follows on the draft of article VI:

"The second paragraph, however, requires consideration. It provides that there are no legal presumptions of fault so far as responsibility for collision is concerned. In form this is a broad and sweeping provision, although the narrowness of the subject deprives it of any very serious effect. There are, of course, few legal presumptions, as distinguished from presumptions of fact, which exist in determining the mere question of responsibility in case of a collision. We understand that the object of the provision is to reach certain legal presumptions existing in the laws of England and continental countries which are said to operate unjustly.

"But, while the subject is a narrow one, we consider this provision as affecting presumptions created by the laws of the United States inexpedient. Presumptions belong to the law of evidence and really should have no place in a treaty. Furthermore, the sweeping away of all legal presumptions could not fail to leave our law in a state of more or less uncertainty, especially in view of the difficulty in many cases of distinguishing between presumptions of law and presumptions of fact. In our opinion, if the United States should approve the convention, the protocol should contain a provision that the paragraph under consideration should not affect legal presumptions created by the laws of the United States. It was stated by the officers of the Conference that such a provision in the protocol reserving the rights of the United States would be satis-

factory, and we deem it desirable that it should be inserted. With this provision we see no serious objection to the article. We think that the citizens of the United States would not be injuriously affected by the elimination of legal presumptions in other countries. If they wish to do so other countries may now remove such presumptions by national laws, and we see no reason why they should not do so by treaty. Moreover, we are not aware of any legal presumptions existing in foreign countries, which, from the point of view of this country should be preserved."

The instructions given by the Secretary of State to the delegates appointed to attend the 1910 Conference, contained the following:

"You will also procure the insertion in the protocol of a paragraph providing that the convention shall apply only to courts of admiralty and maritime jurisdiction, and of a paragraph prescribing that the provision of article VI, that there are no legal presumptions of fault so far as responsibility for collision is concerned, shall not affect legal presumptions created by the laws of the United States."

The delegates, therefore, signed the convention with the following reservation: "The provisions of article 6 of said convention shall not affect legal presumptions created by the laws of the United States."

In their report to the Secretary of State, the delegates stated as follows:

"The third provision, with regard to presumptions created by the laws of the United States, is not of great importance, as there are few statutory or other legal presumptions relating to collisions in our law. There are many such presumptions, however, in the laws of other countries, and it was for that reason that the Conference adopted article 6, which provides that 'all legal presumptions of fault in regard to liability for collision are abolished.'"

Without an exhaustive study of all "legal presumptions of fault in regard to liability for collision," it is difficult to make an impartial appraisal of the question whether the retention of the reservation is desirable.

There is no question that article VI has been beneficial in destroying many presumptions contained in the law of continental countries. By agreeing to the convention without a reservation, there would be uniformity on this point. The opponents of ratification contend that it is undesirable to have American presumptions destroyed, but have not discussed the question in detail. The two presumptions which have been discussed would appear to have little relative importance, if the convention rule as to the division of damages were to be adopted.

The presumption usually discussed is that promulgated by the Supreme Court in *The Pennsylvania* (86 U.S. 136), decided in 1873, to the effect that a vessel violating at the time of collision a statutory rule for the prevention of collisions, has the burden of proving that such violation "could not have been" the cause, or a contributing cause, of the collision. Another presumption was recently mentioned by counsel for cargo underwriters—the presumption that a colliding vessel which goes away without offering assistance (a "hit-and-run" vessel) is presumed to be at fault for the collision.

It is readily understandable that under the American rule that each vessel pays half of all damages, in a both-to-blame collision, no matter how slight the fault of one may be, the above presumptions are very important. However, their importance would seem practically to vanish under the equitable convention rule for apportioning damages according to the degree of fault. If other more serious presumptions are not involved, it would appear to be advantageous to abandon the presumptions as the convention provides, and as recommended by the Secretary of State and the President. However, the situation would seem to be the same now as in 1910, and at that time the Secretary of State and the delegates thought that the reservation was desirable. Also, the general sweeping away of presumptions affects all collision cases, including those in which the question arises as to whether one of the vessels is solely at fault, and possibly those involving death and personal injury.

I think that the proper solution for the Government, on this question, is for the Senate committee to give the opponents of ratification an opportunity to develop their objections in detail, and, if desirable, to give the proponents an opportunity to discuss those objections. In the light of such a discussion the committee could reach a sound conclusion as to whether the reservation on presumptions should be abandoned, as now suggested by the Secretary of State and the President, or should be retained as was thought desirable by all concerned in 1910.

RECENT LEGISLATIVE CHANGES IN OUR LAW SHOULD BE DIGESTED BEFORE FURTHER CHANGES ARE MADE

The opponents of ratification make this point without a detailed discussion and the proponents have not discussed it in the available material. It is believed that the objection should not be controlling in passing upon the merit of the question at issue.

ADOPTION OF THE CONVENTION WILL REOPEN THE QUESTION OF LIMITATION OF LIABILITY OF VESSELS

It is contended that adoption of the convention, and thereby changing one American rule regarding a vessel's liability, may reopen the whole question of the limitation of liability. It is very difficult to appraise this argument. Because of the conflicting interests of shippers and cargo underwriters as against vessel owners and P. & I. Underwriters, the question of the limitation of liability may be expected to be a constant field of contention, the cargo interests endeavoring to reduce the statutory limitations of liability of vessels for losses, and the shipowners endeavoring to maintain the present limitations and gain more.

Appraising this contention on the merits of the particular change involved, it would appear that the resulting change in the application of the Harter Act would be so small that it would not upset the present law balancing the opposing interests on limitation of liability, and clearly that it would not justify any movement for a complete reexamination of the subject. It is understood that the effect would be so small on the insurance market that it probably wouldn't cause any insurance rate increase. Why then, has the suggestion of reopening the whole question as to the statutes on the limitation of liability been made as an argument against ratification of the convention? Because limitation of liability is a very important element to shipowners, and any serious changes in the law might well upset the whole industry, and the shipowners apparently are not sure what the Congress might do if the subject is reopened.

It appears to me that this is a matter on which the shipowners, in any event, must rely upon the National Government, and that the change in limitation of liability resulting from an adoption of the convention would be so slight that it cannot reasonably be used as an excuse for reopening the whole subject. If there already exists a movement for a reexamination of the subject, this one change can have no reasonable bearing on it one way or the other.

As indicated above, it is difficult to appraise this contention, but for the reasons just mentioned, it is believed that it should not be given undue weight by Government authorities, in deciding whether the convention should be ratified.

CONCLUSION

The heart of the whole controversy on its merits comes down to this: Are the advantages of obtaining what is admittedly a more equitable method of apportioning damage between the colliding vessels themselves, according to their proportion of fault rather than by the rougher rule-of-thumb method of holding both vessels equally responsible, plus the restoring of the original and underlying intent of the Harter Act (nullified by the *Chattahoochee* decision), plus the advantages of uniformity, plus the advantages obtained by the shipowner and the policy-and-interest underwriters by the adoption of the convention overbalanced by the disadvantages to the cargo underwriters? They consist solely of the fact that they will be deprived of recovery in both-to-blame collision cases of that proportion of losses attributable to the fault of the carrying vessels, a right which they do not enjoy under the law of any other maritime country, and one which is wholly anomalous and illogical under the principles of our law. After an impartial and careful consideration, I believe that advantages of adherence clearly overbalance the disadvantages, and that conclusion squares with the conclusion of every official whose position I have been able to find. Such valid objections as have been made to ratification can be adequately cared for by reservations or by legislation, as follows:

It would be desirable that the new rule be applicable as between American vessels, as well as between American and foreign vessels. Therefore, if the convention is adopted, it is suggested that some arrangements be made so that it will become effective simultaneously with such legislation as may be enacted to make the rule effective between American vessels.

It would be desirable that a reservation be made so that it is perfectly clear that the adoption of the convention does not change section 4 of the Carriage of

Goods by Sea Act of 1936, as well as section 3 of the Harter Act, already covered by a suggested reservation.

It would be desirable that the opponents of ratification be given a full opportunity to submit their reasons for contending that ratification is undesirable and untimely. A very special reason for this suggestion is the contention that the opponents of ratification were taken by surprise by the action of the Executive in transmitting the convention to the Senate, after representations made by the proponents. A representative of those shipowners who oppose ratification should also be given an opportunity to be heard.

It is desirable that both opponents and proponents of ratification be given an opportunity to submit their views in detail on the question of the abandonment or retention of the reservation regarding presumptions of fault in regard to liability for collision, if the convention is to be adopted; and incidentally, the same thing is true regarding the reservation making the new rule applicable only in courts of admiralty and maritime jurisdiction.

E. RUSSELL LUTZ.

Appendix 1: Letter of March 9, 1937, from the Secretary of State, and its enclosure.

Senator BARTLETT. First, sir, I want to congratulate you for presenting to the committee an enormously learned, scholarly paper. It is very impressive.

You stated that passage of these bills would do two things, namely, restore harmony within our own maritime law, to use your own words, and secondly, bring the United States into uniformity with the other leading maritime nations of the world. Which of those two objectives, in your opinion, if either, is the more important?

Mr. BOAL. To bring us into uniformity with the international law. I think that is of the utmost importance.

Senator BARTLETT. Do you know, sir, if any previous legislative effort has been made in these directions?

Mr. BOAL. In connection with these?

Senator BARTLETT. Yes, sir.

Mr. BOAL. I know there has been in connection with the Collision Convention. Of course, the Carriage of Goods by Sea Act came up the same way. That was known as the Hague Rules, at first, and that convention was adopted in 1924; legislation was enacted in 1936. The Salvage Convention and also the agreement on the rules of the road, go back into the last century, and they were enacted into legislation, and there is a Ship Mortgage Act, too, which was enacted and there are a number of other acts.

Senator BARTLETT. Mr. Singman told us this morning that in 1937, President Roosevelt requested the advice and consent of the Senate to adhere to the earlier Brussels Convention. Of your personal knowledge, do you know why that effort was not renewed when the 76th Congress took no action?

Mr. BOAL. Except that I think the outbreak of the war shelved it.

Senator BARTLETT. Mr. Boals, you have spoken about the advantages which, in your opinion, and in the opinion of the Maritime Law Association of the United States, would come to this country if these bills were enacted into law. Do you see any disadvantage?

Mr. BOAL. Yes, sir, I do. Now, we have worked in the Comité on a convention dealing with the liabilities of the nuclear ship. That convention was considered at the diplomatic conference in Brussels in April of last year. It reconvenes in May of this year. In working in the Comité on that convention, we met with a feeling that you are

not cooperating with the rest of the world, because you haven't ratified a number of these conventions, and one of the things we had to deal with is what we would do with existing conventions.

One was the Collision Convention, which we had not ratified and we were not a party to. I think that we will advance our own international position, strengthen our hand in the future by letting these people know that we are really in earnest about international maritime uniformity.

Senator BARTLETT. Do you foresee the possibility that any of our citizens or groups of citizens might be hurt in anyway whatsoever by passage of this proposed legislation?

Mr. BOAL. Well, let's take, for instance, the Collision Convention. That does not change the liability so far as personal injury and death claims are concerned at all, so there is no difference there. The only difference would be that cargo on the noncarrying ship in case of collision, could not recover in full from the cargo ship. And that is a question of insurance adjustment, because practically all cargo is insured.

Now, as to the Limitation of Liability Convention, there may be cases where American citizens would get less than they would under present statute, but I think there are more cases where they would get more. They get more in all of the cases of a total loss. They will get more in the cases of very old ships or in the cases of ships that are very badly damaged and those would be the cases where you would have the greater losses.

Senator BARTLETT. Do you approve, sir, of S. 2313 in the form which it appears before the committee—that is to say, the printed version—or would your preference be for the substitute language which was distributed this morning?

Mr. BOAL. Mr. Greene is the chairman of our committee. He would like to answer that tomorrow morning, if he might.

Senator BARTLETT. All right. I was just going to suggest, this is coming a little fast, a question of that kind.

Thank you.

Mr. Bourbon, do you have any questions?

Mr. BOURBON. No.

Senator BARTLETT. Thank you.

Senator BARTLETT. Mr. Haight, please.

STATEMENT OF CHARLES S. HAIGHT, HAIGHT, GARDNER, POOR & HAVENS, NEW YORK, N.Y.

Mr. HAIGHT. Mr. Chairman, my name is Charles S. Haight.

Senator BARTLETT. We welcome you, sir.

Mr. HAIGHT. I am a lawyer with 30 years' active practice, specializing in admiralty law. Our firm is Haight, Gardner, Poor & Havens.

I am appearing here as one of the committee members of the Maritime Law Association, in support of the basic principles of both of these bills.

With the chairman's ruling this morning, if I understand it correctly, I may address myself to both bills and save time and economy of effort, as they relate to each other and bear collaterally upon very definitely related points.

If I understand further correctly, sir, I may offer for the record and have received in the record my formal or prepared statement. I will not read it. I would like, if I may, to address myself to the principal points of that statement in particular as they relate to the major points of both bills and in the light of the discussion so far today under the Chair's guidance.

Senator BARTLETT. Your understanding is correct in each instance, and you may proceed in the manner you have outlined.

Mr. HAIGHT. Sir, I have in mind the given when we should close this afternoon, and I will stay well within that.

I had the privilege and honor of heading the Maritime Law Association delegations to the Brighton meeting of the Comité Maritime Internationale, which was the occasion when this new Limitation Convention first was brought forward and came up for serious discussion. And again at Madrid in 1955, when the proposed convention was actually drafted and agreed upon and adopted there, subject of course to the Brussels Diplomatic Convention, which was held in 1957.

Now, for some time, going back to Brighton and Madrid, the Maritime Law Association, their representatives and delegations, and American shipowners, as they saw the matter then, they preferred a continuation of the present American limitation system, of a limitation fund based on the value of the vessel after the casualty. And at that time, it did not seem to them that there were prevailing reasons for the United States to consider changing the limitation law and our system.

However, when the Brussels Limitation Convention in 1957 actually came into being with certain modifications and, as we see it, improvements, over the draft adopted in Madrid in 1955, and then as the new convention was put into force and enacted in Great Britain and in other countries, and it became apparent that additional countries were getting ready with their own local laws, and that we could know that a substantial number of additional most important maritime nations will in the near future be adopting the new Limitation Convention.

And then, as other factors developed and it became apparent that the Brussels Limitation Convention did establish a new and a fair system to all the parties concerned, then in the Maritime Law Association the matter which had been under close study was kept under close study and the American shipowners did, too. And that new limitation convention, plus the 1910 Collision Convention, came up for joint consideration and review.

As I will try to show briefly, the two conventions together make possible, as the Maritime Law Association see it, a fair and equitable adjustment among the different interests in the American foreign commerce. That adjustment can be made with fairness to all and at the same time remove very substantial burdens now upon American carriers under the present disparity and differences of our maritime law and the maritime laws of virtually the entire remaining nations in its national trade.

So that we did come to change our mind and it takes not only the hard work that has gone into it, but the courage to say we now see it as it has developed, that this is a better and proper solution.

Now, for some time, the shipping industry has been a sick industry. The American carriers and the American merchant marine are

probably the most ill segment of that sick industry and, therefore, the American carriers should and must reckon with all of the various factors which place them at a competitive disadvantage in meeting foreign competition.

It is not just a question of the costs of construction of American ships or the higher costs of operation, but it is also from the legal point of view a question of the impact upon American carriers of the burdens which result directly from the differences between our maritime law and the maritime law of other nations.

The most serious burden is one which has arisen quite recently in a judicial trend among our courts, to deny, to seek to find a way to deny limitation in cases of serious marine catastrophe where the present limitation fund, under our present law, can quite clearly be seen to be inadequate.

Now, that tendency is one which if it isn't stopped will amount to a judicial erosion of the limitation statute and if that occurs it will put American shipowners at a fatal disadvantage with the carriers of other nations.

The second burden on American carriers resulting directly from the differences that I just referred to that has been developed in prior testimony is the one relating to the wholly anomalous situation in both-to-blame collision cases in which, if the American vessel is solely at fault, he pays nothing with respect to the cargo on his own ship, because under the congressional policy, if he has used due diligence to make the ship seaworthy, then he is protected and has no liability for matters relating to navigational errors, he has no liability of his own. But if his vessel and another ship are jointly at fault, then indirectly he must bear or pay 50 percent of the damage to his own cargo because under our law the total of the collision damages, everything borne and paid and suffered by the two ships, when both are at fault, is added together and then equally divided between the ships. So, in the end, he must bear or pay 50 percent of his own cargo damage.

And that leads to the very strange situation that in some cases the cargo vessel—the noncargo, the vessel carrying his own cargo—it would be to his own advantage, under our present law, for him to urge upon the court that his ship was solely at fault, and let the other ship off.

Now, that illuminates some of the errors in our present law.

Now, the reason that the anomalous situation arose is because our judicial branch, by announcing to the Supreme Court, in the *Esso Belgium* case, that the judiciary could not allow or sanction ship owners or cargo owners, among themselves, to deal with the problem, but that in order for the conflict between the legislative policy of the Harter Act and of the Carriage of Goods by Sea Act, protecting a shipowner as to liability with respect to his own cargo, if he has used due diligence to make the ship seaworthy, the conflict between that legislative policy and the conflict between the inconsistent common law tort rule, that if two people commit a joint wrong then the innocent party may collect in full from either one.

The Supreme Court has said they cannot let the parties resolve. That came up in the *Esso Belgium* case where by agreement, among

the owners and with the concurrence for a long time of the cargo owners, a so-called both-to-blame collision clause was put into bills of lading and shipping documents, and that provided in substance what the collision convention would do, namely, that the cargo recovers only from the noncargo ship the proportion of the cargoes damages which relate to the contributory fault of the other vessel.

In 1951 the Supreme Court said, now we can't let the parties do that. The Court said that the matter between the two parties could not be settled without congressional authority, and legislative consideration and action can best bring about a fair accommodation of the diverse but related interests.

Now, that is what is before your subcommittee, and the full committee in due course. It is that problem to be worked out in the legislature, as the Court has indicated.

Now, the third serious burden upon American carriers from the disparity of their laws, American and foreign, in maritime matters, is this, and the problem before you, sir, I won't go into detail, but it is what is called the compulsory divided damages rule, as against the proportionate fault in both-to-blame collisions again.

And there, if I may refer to a collection of comments of eminent jurists in the 1938 hearings in the Collision Convention matter, to which you referred, sir, in the transcript of those hearings, at pages 85 to 88 of the transcript, there are collected the comments and views of some 28 eminent jurists in admiralty matters, 26 of them in unqualified language recommended that the United States should depart from the compulsory division of damages and should adopt the Collision Convention principle of proportionate fault. Two weren't quite sure that perhaps judges should carry the burden and they were in very small minority.

Now, if I may refer just briefly to two or three recent cases to show the committee that the present jurists in admiralty feel just the same way and even more strongly.

In a recent case, in 1956, the petitioner of diesel tanker, *A. C. Dodge*, Judge Frank of the Second Circuit said in a case where both ships were at fault, "The resultant division of damages, half and half, is irrational and unjust."

And Judge Hand, in a case of about the same time, *Adams* petition, I will add if I may, and not take time now, the exact citation or memorandum, if I may submit one. There Judge Hand said:

The contention now made that the damages should be proportioned in accordance with the comparative faults of the colliding vessels is overruled. In so ruling, we do not disagree with the finding below that a division of the damages, 80 percent against *Sandcraft* and 20 percent against *Melrose*, would accord with the facts and the equities. However, the trial judge was plainly right in holding that prior decisions of this court required that the damages be equally divided. (Citing cases.)

We have frequently called attention to the inherent injustice of this rule (citing cases) but the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction, such as ours, to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom.

And in a later case, it is made clear, the sanction is that of the legislature.

Now, sir, the fourth burden on American carriers is that the cargo interests can often choose the legal principles most favorable to them, simply by choosing the country in which they wish to sue.

The fifth burden—and this is one which we submit is more serious in progressive development than the others, serious as they are—is that if the legislature does not remedy the problems which put these burdens upon American carriers, then the situation will become progressively worse. As other maritime nations widely adopt a new limitation convention, as they have, the Collision Convention, then the consequence will be that American carriers can be sued in the United States, they can be sued in other countries, they can be required to put up multiple limitation funds, whereas by comparison their foreign competitors and friends abroad, by adhering to these two conventions, can be required to put up only one limitation fund, they will have no indirect liability as to their own cargo, and they will have proportional fault in both-to-blame collision cases.

Therefore, the same type of marine casualty, two cargo vessels or two tankers, of about the same consequence and damages to the American owner, can be several times as costly as to the foreign owner and that comes directly through the disparity between the two legal systems.

Now, sir, our second point we would like to urge in taking up the two bills is this, that the enactment of these two bills before your subcommittee will remove the burdens upon American carriers and will do so with fairness to all of the other interests concerned, and it will come about this way.

As to limitation of liability, the burdens I have mentioned upon carriers would be removed by, first, very substantially increasing the amount of the limitation funds in a marine casualty. Such increasing of the fund would enable the courts to stop the judicial erosion process and enable them to grant limitation in maritime catastrophes without denying a reasonable recovery to all innocent claimants, to crew members, to passengers, to cargo and other property claimants and third parties.

Second, there would be removed from the shipowner the burden of suits in two or more jurisdictions. Third, the shipowner—I am referring to the American shipowners, of course—would not be faced with multiple limitation funds.

Fourth, they would not be faced with indirect liability of the shipowner through unlimited liability of their agents and servants.

And, fifth, by fixing the amount of the limitation fund on a definite basis relating to the vessel's limitation tonnage, as Mr. Boal explained, much effort and work and uncertainty would be eliminated on a fixed basis.

Now, as to the collision liability problems, the burdens on the American carriers would be removed, first, by giving to the American carriers the protection which was intended to be given them by the legislative policy in the Carriage of Goods by Sea Act and the Harter Act; that is, cargo carried in their own vessels.

Second, the burden on them would be removed in the respect of the extent of the liability of each vessel and would now be determined by the degree of the contributory fault of his vessel in a both-to-blame case.

Thirdly, by making it possible for the more careful American shipowner, by engaging crews under the requirements of managing officers, number of seamen, number of officers on watch under American rigorous standards and safety standards, the American owner would have a better record of performance and it would appear and could be seen to be better. As it is now, but under proportional fault, that better record would then carry through—that having a better record and better loss record, the consequences that benefit all concerned would, rather than compulsory division of damages in both-to-blame collision cases.

Now, sir, as to the fairness with which these burdens can be removed, fairness to all the other interests concerned—first, the American carriers and those who man and sail their ships stand together, and the removal of the burdens upon the American carriers is matched by the various substantial increase made in the size of the limitation fund provided for death and personal injury claims.

A \$140,000 per limitation fund would be set aside in the first instance, exclusively for death and personal injury claims, crew members, officers, seamen, passengers, other people, in personal injury. And they will share in that fund, \$140,000 per limitation fund. And if then they are not paid in full, and if any crew members and other people have an unpaid balance, then they will share with cargo and property claimants in the additional \$67,000 per limitation fund. So that the substantial increase in the fund will be of great benefit to the personal injury claimants.

Now, quite aside from these benefits to death, personal injury, including seamen and all others, will come the benefits which will result from the American carriers being in a position to compete with their foreign carriers and competitors on an equal basis, as to their respective rights and liabilities in all cases of marine casualties.

Now, secondly, coming to the cargo and other property claims, they also will be treated with fairness under the provisions of the proposed new laws, because they will have a limitation fund fixed in relation to the vessels' limitation tonnage. They will have this fund even if the vessel is lost. They will no longer have to gamble on whether the vessel stays afloat or how badly she is damaged or whether she has another casualty in completing the same voyage.

Now, these benefits to cargo and other property owners, we submit, are a fair adjustment by the shipowner in favor of cargo and the other property owners, to balance the removal from the American shipowners of the burdens upon them resulting from those two factors relating to our present collision law.

Coming next, sir, to the real substance of what the new limitation law does, as upon the basis of the extended study made by the Maritime Law Association, by the American Merchant Marine Institute, by the Pacific American Steamship Association, and others, and the shipowners, we think it is clear that American claimants will have adequate safeguards in the operation of the proposed new limitation law, because the new law provides three clearly equitable and logical locations for setting up of the limitation fund.

First, the port where the accident giving rise to the claim occurred; second, at the first port of call after the accident, if the accident did not occur in port; third, at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo.

Next, the vitally important factor, that before security obtained in any other jurisdiction can be released, the limitation fund set up, in whatever jurisdiction it is set up, must be actually available for the benefit of the claimant.

Therefore, the American courts will be in a position to protect the rights of American claimants by refusing to allow release of security obtained in the United States and refusing to allow such release in any case where the American court finds that the fund, as established abroad, is not actually available for the benefit of the claimant.

And, furthermore, if the fund abroad is not so available, the American court may then allow a suit in the United States to be prosecuted to judgment and execution obtained thereon.

And, still further, the American courts may in their discretion refuse to allow the release of securities obtained in the United States if the limitation fund is not set up in one of the three equitable and logical locations I just mentioned.

So we submit that in complete fairness to the other interests concerned, the burdens on American carriers, we submit, should be removed.

If I may add one comment to the question the Chair put to Mr. Boal, as to why perhaps the 1937 efforts were not renewed with respect to the collision convention. If I might add what appears to me further factors there, it was not until 1938 that the Senate full committee report recommending favorably the collision convention came out, about a year after the hearings. It wasn't very far, as Mr. Boal said, until then came World War II.

After World War II came the cold war, which is still continuing. But there is another factor which, if I may refer to just briefly. That is the fact that it was not until 1951 that the both-to-blame collision clause was held invalid by the Supreme Court, with the indication that it should come to the legislature for then adjustment here. And that is close to the time where the new limitation convention, under consideration and discussion, actually came to formal meeting in the Brighton meeting of the Comité in 1954.

It does seem that the two matters, for the reason mentioned, being fair to all, meet the burdens and remove them upon American ship-owners.

So, thank you very much, sir. That completes my oral statement.

Senator BARTLETT. Thank you very much, Mr. Haight. Your written statement will be placed in the record.

Mr. HAIGHT. Thank you, sir.

(The prepared statement follows:)

I am a member of the law firm Haight, Gardner, Poor & Havens, 80 Broad Street, New York, N.Y. Since 1930 I have been engaged in active law practice, primarily in the field of admiralty law. I served as president of the Maritime Law Association of the United States from May 1954 until May 1956. In that capacity I attended the meeting of the Bureau Permanent of the Comité Maritime International held at Brighton, England, in the fall of 1954, and the Plenary Session of the Comité held at Madrid, Spain, in the fall of 1955, serving on both occasions as the head of the United States Maritime Law Association delegation to these meetings, at which steps were taken leading to the 1957 Brussels Limitation of Liability Convention.

I very much appreciate this opportunity to appear before this subcommittee of the Senate Committee on Commerce on behalf of the Maritime Law Association of the United States, which supports the basic principles of the 1957 Brussels Limitation of Liability Convention and the basic principles of the 1910 Brussels

Collision Convention, and the legislation (S. 2314 and S. 2313, respectively) proposed to carry the basic principles of these two conventions into effect.

I. UNDER PRESENT LAW AMERICAN CARRIERS ARE AT A COMPETITIVE DISADVANTAGE WITH THE CARRIERS OF OTHER MARITIME NATIONS

The shipping industry is sick—very sick—and the American Merchant Marine is probably the most seriously ill segment of it. Operating in international trade in competition with shipowners of other nations with much lower operating costs, the American Merchant Marine has found it virtually impossible to survive without subsidies and protection against coastwise competition—and even then many American carriers have found it necessary to give up the struggle. American carriers, in enlightened self-interest to be sure—but also because of the importance to our Nation of a strong and vital merchant marine—must reckon with all the various factors which place them at a disadvantage in meeting foreign competition.

In meeting such competition, it is not merely a question of the costs of construction and the costs of operation of the vessels of American Carriers, but there is also vitally concerned the impact upon American carriers of the difference between the maritime laws of the United States and the laws of other maritime nations. Most litigation concerning American carriers is in U.S. courts where U.S. maritime law is applied. Because of certain aspects of present U.S. maritime law, which differ from the law of other maritime nations, American carriers who are, of course, always available to suit here, are under a disadvantage compared to foreign carriers who may not be reachable in a suit in our courts. These differences impose very serious burdens upon American carriers, and there is great need for such burdens to be removed.

The principal disadvantage imposed by present U.S. limitation of liability law results from a recent judicial trend of U.S. courts to deny the right to limit liability, in cases concerning maritime catastrophes where the fund available for claimants under present U.S. law is obviously grossly inadequate. This tendency is doubtless accentuated by the fact that under present law in cases where the loss is greatest, the fund under the American limitation system is least. For example, in a situation where both vessels have been sunk, there would be available for property claimants only the pending freight of the vessels, and for death and personal injury claimants only the \$60 a ton amount provided pursuant to the Sirovich amendment (which was enacted in congressional recognition of the existing inadequacy of the limitation fund available for death and injury claimants in a total loss case such as the famed *Morro Castle* disaster which motivated the Sirovich amendment). It is, however, precisely in this total loss situation that claims would be highest and the need for an adequate limitation fund greatest. Judicial erosion of the limitation of liability statute, if not checked, will put American shipowners at a fatal disadvantage in international commerce.

American shipowners have concluded that legislation implementing the limitation of liability convention would be more equitable for claimants than the amounts provided for under present U.S. limitation law—especially so in the cases of greatest need where there has been a total loss or very severe damage; would liberalize U.S. maritime law; and would serve the best interests of American shipowners.

As to collision liabilities, carriers are very seriously handicapped because under present U.S. law, in a both-to-blame collision case, the carrier indirectly is required to pay, or bear, an amount corresponding to 50 percent of the damages sustained by his own vessel's cargo, whereas in such cases under maritime law of other maritime nations carriers are not required, even indirectly, to pay any amount relating to the damages sustained by their own vessel's cargo.

Under the law of the United States and of other maritime nations, a carrier who has exercised due diligence to make his vessel seaworthy is exempted from liability to the cargo of his own vessel for collision damage resulting from negligent navigation. It is only in the United States, for the reasons discussed below, that the anomalous situation has arisen where a shipowner is protected, by statute enacted by Congress, from liability to the cargo carried by his own vessel if the collision is caused by the sole fault of his vessel, whereas if the collision is caused by the fault of his vessel and another vessel, then he is required to pay, or bear, indirectly an amount corresponding to 50 percent of the damages sustained by the cargo carried by his own vessel.

This anomaly has grown up because of the declared lack of power on the part of the judicial branch to resolve the conflict between the legislative policy laid

down in the Harter Act (and subsequently continued in the Carriage of Goods by Sea Act) and the inconsistent common law tort rule which the courts have felt bound to follow until Congress fills the gap and specifically affirms its legislative purpose to relieve the carrying vessel of liability for collision damage as to its own cargo in a both-to-blame case as well as when the carrying vessel is solely at fault. Thus, in the *Esso Belgium*¹ case the Supreme Court held that despite the policy of the Carriage of Goods by Sea Act prohibiting direct liability of the carrying vessel as to her own cargo for collision damage, it would not permit shippers and shipowners to contract out of indirect liability as to her own cargo "without congressional authority", holding that "legislative consideration and action can best bring about a fair accommodation of the diverse but related interests".

Analysis of the principles of the Harter Act² and of the Carriage of Goods by Sea Act³ shows, therefore, that rather than the collision convention extending carriers' immunities, it simply fulfills the purpose of present U.S. maritime law by removing the anomaly created by the courts' having thwarted legislative policy in allowing indirect liability where the statute prohibits direct liability.

Because U.S. legal principles are still at variance with those of the rest of the maritime world, cargo interests can often choose the legal principles most favorable to them simply by choosing the country in which to sue. This places the U.S. shipowner at a disadvantage, because he can always be sued at home and therefore is always subject to U.S. law, whereas his foreign-flag competitor can often avoid U.S. law.

A further disadvantage is the present U.S. rule of division of damages in maritime collisions, under which in a both-to-blame collision case the total damages arising from the collision must be equally divided between the two vessels. This procedure of compulsory equal division of damages between two vessels is equitable when the faults of the two vessels are equal, but in cases where the faults of one vessel are greater than the faults of the other vessel, it is manifestly inequitable for the courts of the United States to be required to divide the total damages equally between two vessels. On a great number of occasions, eminent judges have commented upon such inequitable result, and I ask permission to add a summary of such judicial comments to the record before this subcommittee. Under the laws of other maritime nations which have enacted the 1910 Brussels Collision Convention, in both-to-blame collision cases the liability of each vessel is in proportion to the degree that her own fault contributed to the collision.

The maritime law of the United States as to limitation of liability and as to collision liability is out of step with the law of other leading maritime nations, and this imposes severe burdens upon American carriers in meeting the competition of the carriers of other nations. Furthermore, with respect to the Limitation of Liability Convention, it is clear that the situation will become more and more aggravated unless S. 2314 is enacted, because most of the maritime nations of the world will ratify or adhere to the 1957 Limitation Convention within a short time—as is already true of the 1910 Collision Convention. The result of the United States being out of step with the other maritime nations is that in maritime casualties involving U.S. vessels their owners can be sued not only in the United States but also, because the injunctive provisions of our present limitation statutes have no extraterritorial effect, such American owners can also be sued in foreign jurisdictions and can be required to put up multiple limitation funds. On the other hand, shipowners of nations adhering to the Limitation Convention and whose vessels do not trade to the United States can be required to put up only one limitation fund and cannot be required to make indirect payments as to their own cargo in collision cases. A maritime casualty thus can be several times as costly to a U.S. shipowner as to such foreign shipowner, with attendant increases in insurance cost reflecting such adverse loss record.

II. THE BASIC PRINCIPLES OF THE LIMITATION OF LIABILITY CONVENTION AND OF THE COLLISION CONVENTION ARE A REASONABLE AND FAIR ADJUSTMENT AS BETWEEN ALL INTERESTS CONCERNED IN THE FOREIGN COMMERCE OF THE UNITED STATES

The relationship between shipowners, cargo owners, loss of life, and bodily injury claimants (and the underwriters respectively concerned) is one which

¹ *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 242 (1951).

² 46 U.S. Code, secs. 190-195.

³ 46 U.S. Code, secs. 1300-1315.

over the years has called for a reasonable and fair understanding of their respective positions and problems. From time to time, it has been seen that adjustments were required, and to a large extent such adjustments have been made with understanding and fairness by all concerned and with the guidance provided by the Congress in enacting the various acts relating to shipping.

Before the Harter Act was enacted by Congress in 1893, ocean carriers were liable virtually as insurers of the cargoes which their vessels carried. This was changed by the Harter Act, which provided that if the shipowner exercises due diligence to make the vessel seaworthy, then the shipowner could not be held responsible for damage resulting from errors of navigation. This protection of the shipowner was confirmed and continued in the U.S. Carriage of Goods by Sea Act.

The protection which the Carriage of Goods by Sea Act, and the earlier Harter Act, guarantee to shipowners was not carried out by the courts in a vitally important respect: in both-to-blame collision cases the shipowner has not been relieved of liability as to damage caused to his own vessel's cargo by negligent navigation. The Supreme Court held in the *Chattahoochee*⁴ case that the cargo of the carrying vessel having recovered in full from the noncarrying vessel, the latter includes in her own damages the full amount paid to such cargo, with the result that under the U.S. law of equal division between the two ships of the total damages arising from the collision, the carrying vessel is thus compelled to pay an amount corresponding to 50 percent of the damage to her own cargo. This failure to protect the shipowner is vividly illustrated by the fact that if the carrying vessel had been solely at fault for the collision, then she would have paid nothing with respect to her own cargo. Thus, it is sometimes actually in the shipowner's interest to persuade the court that the whole blame rests on his ship.

In an effort to reduce to some extent the burdens resulting from the *Chattahoochee* decision, shipowners put into their bills of lading and other shipping documents the both-to-blame collision clause. Until it was finally held invalid by the Supreme Court in the *Esso Belgium* case, this clause gave to shipowners a measure of redress from the *Chattahoochee* decision.

Ultimately, the cargo interests attacked the validity of the both-to-blame collision clause. The clause was held to be valid in the trial court. On appeal, the clause was held to be invalid. In the U.S. Supreme Court, the clause was held to be invalid, substantially on the ground that the relationship between shipowners and cargo owners was a matter within the field of Congress, and not, one to be dealt with directly by the shipowners and the cargo owners. Accordingly, it became clear that the only means of relief to shipowners from the burdens put upon them by the *Chattahoochee* decision would be by action of the Congress.

The laws relating to limitation of liability were first enacted in 1851,⁵ to encourage investment in ocean transportation. At the time of the *Morro Castle* disaster in 1936, Congress recognized the inadequacy of the fund then available to death and personal injury claimants, and enacted the Sirovich amendment which provided a fund of not less than \$60 per limitation ton to be available to claims for loss of life and bodily injury.

The proposed Limitation of Liability Convention considered at the Madrid meeting of the Comité was adopted at Brussels in 1957, and is now known as the 1957 Brussels Limitation of Liability Convention.

As time passed, and the new Limitation Convention was put into force in Great Britain and in other countries, and as other maritime nations were proceeding with their plans to enact into their laws the basic provisions of the Limitation Convention, the matter was continued under close study in the United States. The situation developed to a point where the American shipowners came to the conclusion that the adjustments made by the new Limitation Convention and by the Collision Convention in the relationship between shipowners, cargo owners and loss of life and bodily injury claimants are fair and reasonable under modern times and conditions, and that it would be in the best interests of all those concerned in the foreign commerce of the United States for the basic principles of both conventions to be enacted in the maritime law of the United States.

⁴ 178 U.S. 540 (1899).

⁵ 9 Stat. 635 (1851), 46 U.S. Code, secs. 187-189, and Sirovich amendment, 46 U.S. Code, secs. 183 (b)-(f).

At its meeting on November 3, 1961, the Maritime Law Association of the United States voted decisively in favor of the basic principles of both conventions.

The Collision Convention does not come before the Senate as a new matter. In January 1938, a subcommittee of the Senate Committee on Foreign Relations held extensive hearings with respect to the Collision Convention, which had been referred to the Senate for its advice and consent by President Franklin D. Roosevelt, with the favorable recommendation of the President and of Secretary of State Cordell Hull. In June 1939, the Senate Committee on Foreign Relations reported the Collision Convention favorably to the Senate,⁶ with the understanding that the convention would not become effective, so far as the United States was concerned, for a period of 1 year after its approval by the U.S. Senate. Under the conditions of World War II, the continuing cold war and the litigation relating to the both-to-blame collision clause, the matter was not brought to a vote in the Senate, and is now replaced by S. 2313.

III. ENACTMENT OF THE BASIC PRINCIPLES OF THE LIMITATION OF LIABILITY CONVENTION AND OF THE COLLISION CONVENTION WILL REMOVE THE BURDENS UPON AMERICAN CARRIERS, WITH FAIRNESS TO ALL OF THE INTERESTS CONCERNED

1. *Removal of burdens upon American carriers*

Enactment into U.S. law of the basic principles of the two conventions will remove the burdens upon American carriers as to limitation of liability, (a) by enabling the courts to grant the right of limitation in cases involving maritime catastrophes, without denying a reasonable recovery to innocent claimants, (b) by relieving shipowners of indirect liability through unlimited liability of their agents and servants, (c) by relieving shipowners of the burden of suits in two or more jurisdictions, and of the burden of multiple limitation funds, (d) by fixing the amount of the limitation fund on a definite basis related to the vessel's limitation tonnage; and as to collision liability, (a) by giving to carriers the protection intended by the Carriage of Goods by Sea Act, and by the earlier Harter Act, with respect to cargoes carried in their own vessels in both-to-blame collision cases, (b) by the extent of liability of each vessel in both-to-blame collision cases, being determined by the degree of contributory fault of each vessel, and (c) by making it possible for the more careful shipowner, by manning and equipping his vessel in accordance with rigorous American standards, to gain the benefit of reduced insurance costs resulting from a better loss record.

2. *Fairness to all of the other interests concerned*

Removal of these burdens upon shipowners would be accomplished with fairness to all of the other interests concerned.

The cargo and property claimants will have for their own benefit a limitation fund fixed with definiteness not only as to amount, in relation to the vessel's limitation tonnage, but also fixed with definiteness even if the vessel is lost in the casualty. It will no longer be a gamble for the cargo and property owners as to whether the vessel is lost (in which case the limitation fund under present U.S. law consists of only the pending freight) or whether the vessel survives the casualty, and if so whether the extent of the damage to the vessel destroys the major part of her sound value; or whether the vessel may sustain a later casualty on the same voyage.

The death and personal injury claimants will have for their own benefit a limitation fund calculated at \$140 per limitation ton, more than double the Sirovich amendment \$60 per ton, and they will also share, if not already paid in full, in the additional \$67 per ton. And these amounts will be available to death and personal injury claimants in casualties occurring in domestic waters, to which the Sirovich amendment does not apply, and thus a defect in the present limitation law which makes an untenable distinction between seagoing and nonseagoing vessels will be cured.

3. *The basic principles of limitation of liability and of collision liability should be extended as provided in the bills*

Marine transportation obviously could not be carried on alone by shipowners and bareboat charterers, who are the only persons entitled to limitation of liability under the present laws of the United States. A vital part in marine transportation is carried on by time charterers, voyage charterers, managers

⁶ See 64 Yale Law Journal 878.

and operators by servants of the owners, charterers, managers and operators, and of course by the masters, officers, and members of the crews. It is manifestly fair and equitable that limitation of liability should be available to these persons as well as to underwriters, shipowners, and bareboat charterers.

When the limitation of liability statutes were enacted in 1851, time chartering and voyage chartering were rare, and suits were not brought against persons other than an owner or a bareboat charterer.

Under present conditions, the restriction of the right to limit to only bareboat charterers, in addition to owners, is an unrealistic and harsh restriction. Canadian law now grants to the right of limitation to any charterer.⁷ There is already a precedent in U.S. law for extending the right of limitation to agents and to other persons acting for or on behalf of the owner or of the charterer. In 1943, Congress extended the right of limitation so as to make it available to the United States with respect to vessels owned by or chartered to the War Shipping Administrator, and this right of limitation was extended to agents or other persons acting for or on behalf of the Administrator in connection with the operation of such vessels.⁸ This extension of the right to limit liability, going far beyond the owner or bareboat charterer, is strong support for the provisions of S. 2314 which would extend the right to limit liability.

Experience shows that the damages caused by marine casualties do not occur only on board the vessel or vessels concerned, but that often damages from such marine casualties are caused to persons and to properties on shore. It is right and proper that the basic provisions of the limitation of liability convention and of the collision convention should be extended so as to include such damages occurring on shore. This is particularly so since the Congress in 1948 extended the admiralty jurisdiction to include damage "caused by a vessel * * * notwithstanding that such damage or injury be done or consummated on land."

4. The proposed legislation will achieve practical international concurrence with adequate safeguards for American claimants

Neither the limitation convention nor the proposed bill implementing it provides for compulsory concurrence on an international scale. However, such concurrence (subject to suitable safeguards) is in effect provided for by the security provisions designed to protect the shipowner, once he has provided a "satisfactory" limitation fund, from having to post security in diverse nations in various parts of the world. Once the "fund has been constituted" (provided it is "actually available for the benefit of the claimant"), other assets of the shipowner are immune (sec. 3E); if the fund is in the United States, any other property seized in the United States is ordered released (sec. 4E) (as is any property seized in any other convention country); and if the fund is established abroad, any security given in the United States may be ordered released, and shall be ordered released if the fund has been established at one of the following:

"(1) At the port where the accident giving rise to the claim occurred, or

"(2) At the first port of call after the accident if the accident did not occur in a port, or

"(3) At the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo" (6 A and B).

It will be noted that release of security other than that in the limitation fund established, is in all instances conditioned on the fund being "actually available for the benefit of the claimant." Thus the U.S. courts are in a position to protect the rights of American claimants by refusing to order release of security obtained in the United States in those instances where the courts find that the fund as established abroad is not "available." Further, where the foreign fund is found not "available," the U.S. court is free to allow a suit in the United States to be prosecuted to judgment, and execution obtained thereon. In addition, American courts have discretion to refuse to order release of security obtained in the United States if a fund established abroad is not in one of the three clearly equitable and logical locations set forth in the bill. Thus American claimants are protected, while in instances where the foreign fund is found by the American court to be available and in an appropriate jurisdiction, shipowners are protected against the injustice of being forced to post multiple security, and perhaps to pay a number of separate limitation funds in different nations—a result to which, as above pointed out, only American shipowners will be subject once the limitation convention is widely adopted by other nations.

⁷ Canada Shipping Act, 1934, ch. 44, as amended.

⁸ 78th Cong., Public Law 17.

IV. CONCLUSIONS

The heavy burdens upon American carriers should be removed by enactment of S. 2313 and S. 2314, which embody the basic principles of the 1957 limitation of liability convention and of the 1910 collision convention.

Respectfully submitted.

CHARLES S. HAIGHT.

Senator BARTLETT. Do I infer correctly that it was not until comparatively recently that American opinion swung around to a position of support for the principles set forth in these two conventions?

Mr. HAIGHT. I missed the first part of your question, sir. May I have it again, please?

Senator BARTLETT. Is my inference correct from what you said that it was only comparatively recent that American opinion swung around to the position of support for the principles embodied in these conventions?

Mr. HAIGHT. By "comparatively recently," in my understanding, it goes back to some 3 years ago. Let's see, this is 1962, that would be 1959—that is my understanding because, you see, it was only 1957 that the Brussels Convention was adopted and it was a year or two before Brighton and others had their own statute and then you could see the beginning of the operation and that it was a fair adjustment between the parties. So that, by "comparatively recently," I would say some 3 years ago.

Senator BARTLETT. Has there ever been any substantial divergence of opinion in respect to the 1910 convention?

Mr. HAIGHT. Yes, sir; there have been opposing views in our Maritime Law Association. This has been from the time of the Supreme Court in the *Chattahoochee* case, where they said that the legislative intent of the Carriage of Goods by Sea Act, or to put it another way, that the legislature, as I read the decision, that the legislature had not directly dealt with that problem and there was a gap in the law and it needed to be taken care of by the legislature, not by the parties. The *Chattahoochee* decision came not long after the Collision Convention of 1910.

Senator BARTLETT. Would you say that the opinion within the U.S. Maritime Law Association is fairly unanimous at this time?

Mr. HAIGHT. The vote was decisively in favor of the basic principles of both conventions. The minority speakers in the Maritime Law Association meeting put forward all their considerations. The majority did, too. And the vote, when it came, was substantially in favor of both conventions. I don't think I could say that it was virtually unanimous. It was something like 2 to 1, if I remember rightly, on one convention, and a little less than that upon the other.

Senator BARTLETT. It is always appropriate and necessary for a politician to remark, if he could get that vote, he would feel very happy.

Mr. HAIGHT. Sir, we in the Maritime Law Association, and this is true of both sides, the majority and the minority, I don't think we can look upon it in the political sense. What we try to do is to view the overall picture, seeing the other's problems and the difficulties, and then try to find the most favorable solution in the best interests of the maritime industry, including all segments.

Senator BARTLETT. I am confident that political considerations do not enter in here. It is beset by enough as it is without that.

Let me ask you, if I may, sir, the same question I put to Mr. Boal. Do you see any substantial disadvantage to the United States or to any of its citizens if these bills should become law?

Mr. HAIGHT. In the sense that the fund stabilized perhaps under some circumstances could be a higher fund. It could be said, perhaps, that it is a disadvantage to get all these bills will give them and still to want more, if anyone wants a larger fund. So on that point I do not see a disadvantage in the size of the fund. I think it is an advantage and a proper one and a fair adjustment under modern conditions.

With respect to the factor as urged by the minority in our full discussion, that perhaps under some circumstances, American citizens would find their remedy and find the very much enlarged fund in another country and that the suggestion is that to have to go to another country would be a burden. I do not personally see that a disadvantage or a burden because of the immeasurable benefits of the uniformity in meeting competition from abroad and the safeguards in the operation of the limitation convention, under the guidance of the American courts, I don't think it would hurt. And, fundamentally, in world relations and in conventions, it isn't possible or desirable or proper, in my view, for any one party to say I want everything all my own way. There must be some give and take and, under the arrangements, I do not see a burden under either convention upon any American interest.

Senator BARTLETT. Mr. Singman this morning called to our attention that S. 2314 would include pleasure yachts, tugs, towboats, et cetera, and likewise nondescript self-propelled vessels. Do you think that there is going to be an outcry from those so included?

Mr. HAIGHT. Sir, I had better leave that question to someone who follows me. I, myself, have not gotten into that field. I have been personally in the ocean transportation end. I really would not be able to answer that question from my own knowledge. I do not believe there is a burden. If there is, it would be dealt with, if I may suggest, by a later speaker.

Senator BARTLETT. Do you happen to have a copy of S. 2313 before you?

Mr. HAIGHT. Yes, sir, I do.

Senator BARTLETT. May I call your attention to section 4(b).

Mr. HAIGHT. Yes, sir, I have it.

Senator BARTLETT. That concerns damages caused by death or personal injury and provides that vessels in fault are jointly and severally liable to innocent third parties. But section 4(c), which pertains to damages to vessels, provides that the damages shall be borne by the vessels in fault without joint and several liability to third parties. Would you or can you or will you tell us how these two subsections change the present law?

Mr. HAIGHT. Yes, sir. These provisions follow closely the 1910 collision convention. The basic thought in that convention, and in this bill is, that with respect to 4(b) cases of death or personal injury, as to those claims, it is fair and right and proper that there

should be joint and several liability between the two ships and that as to death and personal injury cases and claims, those parties may recover in full from either vessel. Then it is up to that vessel to obtain a measure of redress through total division of the damages between the two ships.

On the other hand, under 4(c), as to cargo and other property claims, there it is a different category and has been since 1910 in the marine world. You have in the cargo and property field, cargo insurance and property insurance, which covers the shipper or the consignee in the first instance and then it becomes a question as between the underwriters and it is a different category. With respect to property, it is fair and right and as the convention sees it proper, that there you do not have joint and several responsibility.

And it has worked in the marine world abroad because there they have not had this gap situation where the carrying vessel becomes indirectly liable in an amount corresponding to one-half of its damage of its own cargo. This problem has not come up there.

Senator BARTLETT. You do not deem this to be an inconsistency then at all?

Mr. HAIGHT. No, sir, not in the slightest. It is the basis on which the collision convention and the limitation convention properly go together and have gone together abroad and we think should go together here.

Senator BARTLETT. Mr. Haight, on section 2 again, the first sentence reads and I quote:

If the collision occurs without fault, if it is caused by force majeure, or if the causes of the collision cannot be determined, the damages shall be borne by those who have suffered them.

How does this sentence change existing law?

Mr. HAIGHT. I don't see a change there, sir, because under our present law, if the collision occurs without fault, if the shipowner is found not at fault, of course, he wouldn't be liable. If the cause of the collision cannot be determined, as force majeure, act of God, inevitable accident, without fault, then there would not be liability.

Senator BARTLETT. So this does not effectuate any change in existing law, in your opinion?

Mr. HAIGHT. No, sir, I do not see that it does.

Senator BARTLETT. In your opinion, Mr. Haight, what would have happened in the *Andrea Doria* case if S. 2314 had been law?

Mr. HAIGHT. Under the new limitation venture?

Senator BARTLETT. Yes, and 2313, too.

Mr. HAIGHT. Well, sir, as I have in my mind the facts, the limitation funds as they actually developed in court, taking the *Andrea Doria* as a total loss, as she was, at an estimated limitation tonnage at 30,000 tons in a round figure, that means 30,000 limitation tons, and the *Stockholm*, with severe bow damage getting back to New York, and her limitation tonnage being estimated at roughly one-half of the *Doria's* so say 15,000 limitation tons, then under the present law, the *Doria's* funds came in this way:

Her pending freight, meaning the earnings in the voyage, in round figures, about \$400,000. The \$60 per ton supplement under the Sirovich amendment, on a basis of 30,000 limitation tons, produced

about \$1,800,000. So that the *Andrea Doria's* total limitation fund under present law was \$2,200,000.

The *Stockholm*, staying afloat, coming back to New York, had a damaged value, the value after the casualty and including her earnings on the voyage of about \$3,900,000, the total of the two combined limitation funds under present law was about \$6,100,000.

The situation, if it had been under the bill S. 2314, as I can best see it, would have been this way:

The *Andrea Doria's* fund—she was lost—but even though she was lost, her fund would have been \$140 per limitation ton and there is a little difference in the computation of tonnage, but for practical purposes, if we may take the same limitation tonnage of 30,000 and 15, that would have produced a fund or would have required a fund from the *Doria*, although she was lost, of \$4,200,000 and that would have been set aside exclusively for death and personal injury claims.

Then, if they had not been paid in full, this is just for the *Doria's* share, they would have come into share with the cargo and other property owners in the supplemental \$67 per ton, which would have produced another, as I compute it, \$2,010,000.

So the *Doria's* total limitation fund, under S. 2314, would have amounted to about \$6,200,000, to which would have been added, for the benefit of all, the *Stockholm* fund at \$140 per ton. Though the *Stockholm* came back afloat, it would have been evaluated on the same basis, \$140 per ton, which would have produced \$2,100,000, exclusively again for death, personal injury of seamen, crew, passengers, all those and for their benefit.

Then if they were not paid in full, they would have shared in the \$67 supplemental amount per ton, which would have produced another \$1,005,000. So the *Stockholm's* fund under S. 2314 would have amounted to \$3,105,000. And the two funds together would have totaled \$9,315,000 as against the actual total under our present law of \$6,100,000, or the fund's total would have been some \$3 million more under S. 2314.

Now if I may have one moment more, sir, on the question the Chair has put—

Senator BARTLETT. I want to thank you for your reply to my question.

Mr. HAIGHT. If I may have one moment more to carry through and show an even more startling advantage and benefit to all concerned under S. 2314. The fund as set up in and under the present limitation law was, as the Chair will recall, \$2,200,000 total for the *Andrea Doria*. Now, I should add that, for this example, I am assuming that both vessels were lost, that the *Stockholm* went down as well as the *Doria*, and it was very close. She very nearly did go down. Her collision bulkhead was destroyed and the master, by handling his tanks and fine seamanship, got her back to New York; but, if she had been lost, then this is what would have happened under the present law:

The *Doria's* fund—I won't repeat the calculations—would have been, as before under present law, \$2,200,000. The *Stockholm*, not afloat but lost too, her pending freight would have amounted to about \$135,000. The \$60 per ton under the Sirovich amendment would have produced an additional \$900,000. The total *Stockholm* fund would

have been \$1,035,000. The total of the two funds would have been \$3,235,000. Now that, as compared to under S. 2314, is about \$6 million less than would be the result under S. 2314, because the *Doria's* fund would have been as lost. Her \$140 per ton exclusively for death and personal injury would have produced \$4,200,000. The \$67 per ton supplemental would have been \$2,010,000, making a total for the *Doria* alone of \$6,210,000.

The *Stockholm*, assuming she was lost, too, her fund of \$140 per ton, exclusively for death and personal injury, would have meant \$2,100,000. Adding the supplemental would produce \$1,005,000, making her fund \$3,105,000 and the total of the two funds, under S. 2314, would have amounted to \$9,315,000 as against a combined fund, with both vessels lost, under our present law, of \$3,235,000, or some \$6 million more under the proposed new limitation convention.

Even with that increase in the fund, for the reasons we have mentioned, from the American shipowners' point of view, they urge the increase in the fund because it will bring about a fair adjustment as between all the parties—cargo, crew, passengers, personnel injuries, and the owners. It will bring the American picture into proper balance between all parties and, at the same time, it will remove the burdens under which American carriers are now really suffering. It will bring us into harmony and the benefits from uniformity with the rest of the maritime world.

Senator BARTLETT. These are practical and useful examples you have just given.

Mr. Haight, the Sirovich amendment has been mentioned more than once today. Is this Dr. Sirovich, the late U.S. Representative from the State of New York?

Mr. HAIGHT. Yes, sir, it was; and just one word on that. When the *Morro Castle* disaster occurred, it was evident at that time, in 1935, that there was not a fair adjustment between the parties and the death and personal injury claimants needed a larger fund. And under Sirovich's amendment, as enacted by Congress, came the additional provisions in the 1936 amendment, that if under the then limitation system of taking the value of the vessel, if afloat after the casualty or a pending freight, if she is lost, if then death and personal injury claims did not recover in total among them as much as \$60 per limitation ton, then the shipowner, even though he has lost his vessel, would be required to increase the limitation fund up to the amount where death or personal injury claims would receive a total in the aggregate of \$60 per limitation ton and in that increase, only death and personal injury would share and cargo and property would not share.

That again emphasizes that there is a proper basis, as we see it, to treat death and personal injury claims differently than you do property claims, but that did come about through Dr. Sirovich.

Senator BARTLETT. Do you have any questions, Mr. Bourbon?

Mr. BOURBON. No.

Senator BARTLETT. Are you going to be here in the morning?

Mr. HAIGHT. I shall be.

Senator BARTLETT. Well, in advance of your final departure from the stand, I want to say, Mr. Haight, that you are a competent and courteous, informative, and most helpful witness. Thank you.

Mr. HAIGHT. Thank you very much.

Senator BARTLETT. If you will return in the morning, the staff members will have some questions to put to you and I will probably dream up a few more.

Mr. HAIGHT. I certainly will be here.

Senator BARTLETT. Off the record.

(Discussion off the record.)

Senator BARTLETT. The committee will stand in recess until 9:15 a.m. tomorrow.

(Whereupon, at 3:20 p.m., the committee was adjourned, to reconvene at 9:15 a.m., Friday, March 2, 1962.)

LIABILITY IN COLLISIONS BETWEEN VESSELS

FRIDAY, MARCH 2, 1962

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee was called to order, pursuant to recess, at 9:25 a.m., in room 5110, New Senate Office Building, Hon. E. L. Bartlett presiding.

Senator BARTLETT. The committee will be in order.

Mr. LEONARD J. MATTESON (prospective witness). Mr. Chairman, I am Leonard Matteson, one of the witnesses in opposition. I would like to inquire about the time available and whether there will be some allocation of it, because the presentation of the opposition will take quite a little time in view of the statements that have been made in support which we deem quite inadequate.

Senator BARTLETT. Well, in that connection I should say that it will be necessary to conclude the hearings this morning and that I have no idea at this moment, without looking over the list, how many witnesses are yet to be heard. Mr. Bourbon says five.

I am going to suggest to all the witnesses that this morning they should do as the others heretofore have done—be prepared to offer any written statements in full text and to summarize verbally this morning those statements.

We will run until 12:30, about, and there will be no opportunity for resuming this afternoon.

Is that going to give enough time?

Mr. MATTESON. I would imagine that our presentation would lead to a great many questions, and I am sure that committee will not wish to act on this bill unless it understands what it is about and what it does. I think that time may run pretty short.

Would there be an opportunity for a resumed hearing at a later date?

Senator BARTLETT. I do not know. I would doubt it very much, because the committee has many, many bills to consider at this session. Here it is after the 1st of March.

I do not know what the judgment of the chairman would be in this matter. It would not matter so far as I am concerned. But on a bill of this nature—and this will be the second day of hearings—I should think this would give ample time.

First, let's see whom we have here to be heard from: Mr. Freedman, Mr. Matteson, Mr. Greene, Mr. Burke, and Mr. Rault. And then one other arose in the room yesterday.

Mr. BOURBON. Mr. Elder from the Lake Carriers Association. He will only take a minute or two.

Senator BARTLETT. Let's not try to lay down any hard and fast rules at the moment.

First, the acting chairman will offer for inclusion in the record the text of the conventions, namely, those of 1910 and 1957, and the reports of the Department of Justice and the Treasury Department on both bills; also letters from the Comptroller General of the United States and from Ralph B. Dewey, president of Pacific American Steamship Association, on both bills.

(The material referred to follows:)

[Department of State—No. 577—Oct. 15, 1957]

The Department of State is today releasing the text of the two conventions signed at the Diplomatic Conference on Maritime Law, held at Brussels September 30 to October 10, 1957, inclusive. These conventions relate to the limitation of the liability of owners of seagoing ships, and to stowaways, respectively.

The conference was convened by the Belgian Government to consider, at governmental level, draft conventions developed by the International Maritime Committee (Comité Maritime International) at its Madrid Conference in 1955. That Committee is an international coalition of national law associations of various countries. The Maritime Law Association of the United States is a member. The Belgian Government and the Comité have taken the lead since 1910 in the development of private international maritime law, the Comité drafting conventions for submission to diplomatic conferences convened by the Belgian Government. As a well-known example, the so-called Hague rules, 1922, embodied in our American Carriage of Goods by Sea Act, were developed in this manner.

Thirty-two governments, including the United States, were represented by delegations at the 1957 Brussels Conference and six others sent observers.

The U.S. delegation consisted of Hon. Clarence G. Morse, Maritime Administrator and Chairman of the Federal Maritime Board (chairman of delegation), John W. Mann, Department of State (vice chairman), Oscar Houston, of Bingham, Englar, Jones & Houston, and E. Robert Seaver, General Counsel of the Maritime Administration.

The decision as to whether the conventions will be signed on behalf of the United States will not be made until there has been consultation between the Departments of State, Commerce, Justice, and Navy and with the Admiralty bar and shipping industry.

INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEAGOING SHIPS

ARTICLE 1

(1) The owner of a seagoing ship may limit his liability in accordance with article 3 of this convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

(a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship.

(b) Loss of life of, or personal injury to, any other person whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: *Provided, however*, That in regard to the act, neglect, or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect, or default is one which occurs in the navigation or the management of the ship or in the loading, carriage, or discharge of its cargo or in the embarkation, carriage, or disembarkation of its passengers.

(c) Any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded, or abandoned (including

anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbor works, basins, and navigable waterways.

(2) In the present convention the expression "personal claims" means claims resulting from loss of life and personal injury; the expression "property claims" means all other claims set out in paragraph (1) of this article.

(3) An owner shall be entitled to limit his liability in the cases set out in paragraph (1) of this article even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody, or control of the ship.

(4) Nothing in this article shall apply—

(a) to claims for salvage or to claims for contribution in general average.

(b) to claims by the master, by members of the crew, by any servants of the owner on board the ship, or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives, or dependents, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in article 3 of this convention.

(5) If the owner of a ship is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this convention shall only apply to the balance, if any.

(6) The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault of privity of the owner shall be determined by the *lex fori*.

(7) The act of invoking limitation of liability shall not constitute an admission of liability.

ARTICLE 2

(1) The limit of liability prescribed by article 3 of this convention shall apply to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

(2) When the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by article 3, the total sum representing such limits of liability may be constituted as one distinct limitation fund.

(3) The fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

(4) After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant.

ARTICLE 3

(1) The amounts to which the owner of a ship may limit his liability under article 1 shall be—

(a) Where the occurrence has only given rise to property claims, an aggregate amount of 1,000 francs for each ton of the ship's tonnage;

(b) Where the occurrence has only given rise to personal claims an aggregate amount of 3,100 francs for each ton of the ship's tonnage;

(c) Where the occurrence has given rise both to personal claims and property claims an aggregate amount of 3,100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2,100 francs for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 1,000 francs for each ton of the ship's tonnage shall be appropriated to the payment of property claims: *Provided, however*, That in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank ratably with the property claims for payment against the second portion of the fund.

(2) In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amount of their established claims.

(3) If before the fund is distributed the owner has paid in whole or in part any of the claims set out in article 1, paragraph (1), he shall pro tanto be placed

in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the national law of the state where the fund has been constituted.

(4) Where the shipowner establishes that he may at a later date be compelled to pay in whole or in part any of the claims set out in article 1, paragraph (1), the court or other competent authority of the country where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable the shipowner at such later date to enforce his claim against the fund in the manner set out in the preceding paragraph.

(5) For the purpose of ascertaining the limit of an owner's liability in accordance with the provisions of this article the tonnage of a ship of less than 300 tons shall be deemed to be 300 tons.

(6) The franc mentioned in this article shall be deemed to refer to a unit consisting of 65½ milligrams of gold of millesimal fineness 900. The amounts mentioned in paragraph (1) of this article shall be converted into the national currency of the state in which limitation is sought on the basis of the value of that currency by reference to the unit defined above at the date on which the shipowner shall have constituted the limitation fund, made the payment, or given a guarantee which under the law of that state is equivalent to such payment.

(7) For the purpose of this convention tonnage shall be calculated as follows:

In the case of steamships or other mechanically propelled ships there shall be taken the net tonnage with the addition of the amount deducted from the gross tonnage on account of engineroom space for the purpose of ascertaining the net tonnage.

In the case of all other ships there shall be taken the net tonnage.

ARTICLE 4

Without prejudice to the provisions of article 3, paragraph (2) of this convention, the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the state in which the fund is constituted.

ARTICLE 5

(1) Whenever a shipowner is entitled to limit his liability under this convention, and the ship or another ship or other property in the same ownership has been arrested within the jurisdiction of a contracting state or bail or other security has been given to avoid arrest, the court or other competent authority of such state may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under this convention and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

(2) Where, in circumstances mentioned in paragraph (1) of this article, bail or other security has already been given—

(a) At the port where the accident giving rise to the claim occurred;

(b) At the first port of call after the accident if the accident did not occur in a port;

(c) At the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo;

the court or other competent authority shall order the release of the ship, bail, or other security given, subject to the conditions set forth in paragraph (1) of this article.

(3) The provisions of paragraphs (1) and (2) of this article shall apply likewise if the bail or other security already given is in a sum less than the full limit of liability under this convention, provided that satisfactory bail or other security is given for the balance.

(4) When the shipowner has given bail or other security in a sum equal to the full limit of his liability under this convention such bail or other security shall be available for the payment of all claims arising on a distinct occasion and in respect of which the shipowner may limit his liability.

(5) Questions of procedure relating to actions brought under the provisions of this convention and also the time limit within which such actions shall be brought or prosecuted shall be decided in accordance with the national law of the contracting state in which the action takes place.

ARTICLE 6

(1) In this convention the liability of the shipowner includes the liability of the ship herself.

(2) Subject to paragraph (3) of this article, the provisions of this convention shall apply to the charterer, manager, and operator of the ship, and to the master, members of the crew, and other servants of the owner, charterer, manager, or operator acting in the course of their employment, in the same way as they apply to an owner himself: *Provided*, That the total limits of liability of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with article 3 of this convention.

(3) When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, coowner, charterer, manager, or operator of the ship, the provisions of this paragraph shall only apply where the act, neglect, or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

ARTICLE 7

This convention shall apply whenever the owner of a ship, or any other person having by virtue of the provisions of article 6 hereof the same rights as an owner of a ship, limits or seeks to limit his liability before the court of a contracting state or seeks to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of any such state.

Nevertheless, each contracting state shall have the right to exclude, wholly or partially, from the benefits of this convention any noncontracting state, or any person who, at the time when he seeks to limit his liability or to secure the release of a ship or other property arrested or the bail or other security in accordance with the provisions of article 5 hereof, is not ordinarily resident in a contracting state, or does not have his principal place of business in a contracting state, or any ship in respect of which limitation of liability or release is sought which does not at the time specified above fly the flag of a contracting state.

ARTICLE 8

Each contracting state reserves the right to decide what other classes of ship shall be treated in the same manner as seagoing ships for the purposes of this convention.

ARTICLE 9

This convention shall be open for signature by the states represented at the 10th session of the Diplomatic Conference on Maritime Law.

ARTICLE 10

This convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government which shall notify through diplomatic channels all signatory and acceding states of their deposit.

ARTICLE 11

(1) This convention shall come into force 6 months after the date of deposit of at least 10 instruments of ratification, of which at least 5 by states that have each a tonnage equal or superior to 1 million gross tons of tonnage.

(2) For each signatory state which ratifies the convention after the date of deposit of the instrument of ratification determining the coming into force such as is stipulated in paragraph (1) of this article, this convention shall come into force 6 months after the deposit of their instrument of ratification.

ARTICLE 12

Any state not represented at the 10th session of the Diplomatic Conference on Maritime Law may accede to this convention.

The instruments of accession shall be deposited with the Belgian Government which shall inform through diplomatic channels all signatory and acceding states of the deposit of any such instruments.

The convention shall come into force in respect of the acceding state 6 months after the date of the deposit of the instrument of accession of that state, but not before the date of entry into force of the convention as established by article 11(1).

ARTICLE 13

Each high contracting party shall have the right to denounce this convention at any time after the coming into force thereof in respect of such high contracting party. Nevertheless, this denunciation shall only take effect 1 year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all signatory and acceding states of such notification.

ARTICLE 14

(1) Any high contracting party may at the time of its ratification of or accession to this convention or at any time thereafter declare by written notification to the Belgian Government that the convention shall extend to any of the territories for whose international relations it is responsible. The convention shall 6 months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the convention in respect of such high contracting party;

(2) A high contracting party which has made a declaration under paragraph (1) of this article extending the convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Government that the convention shall cease to extend to such territory. This denunciation shall take effect 1 year after the date on which notification thereof has been received by the Belgian Government;

(3) The Belgian Government shall inform through diplomatic channels all signatory and acceding states of any notification received by it under this article.

ARTICLE 15

Any high contracting party may 3 years after the coming into force of this convention in respect of such high contracting party or at any time thereafter request that a conference be convened in order to consider amendments to the convention.

Any high contracting party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within 6 months thereafter.

ARTICLE 16

In respect of the relations between states which ratify this convention or accede to it, this convention shall replace and abrogate the international convention for the unification of certain rules concerning the limitation of the liability of the owners of seagoing ships, signed at Brussels on the 25th of August 1924.

In witness whereof the plenipotentiaries, duly authorized, have signed this convention.

Done at Brussels, this 10th day of October 1957, in the French and English languages, the two texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

(The convention relating to stowaways is not before the subcommittee at this time, and will not be included in the record. The Convention for the Unification of Certain Rules With Respect to Collisions Between Vessels, done at Brussels, Sept. 23, 1910, follows:)

1910 COLLISION CONVENTION

International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them; and a Protocol thereto. Signed at Brussels, September 23, 1910.

(The official text is in French. Translation used by the U.S. Senate Ex. K, 76th Cong., 1st sess. April 29, 1937.)

ARTICLE 1. Where a collision occurs between seagoing vessels or between seagoing vessels and vessels of inland navigation the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

ART. 2. If the collision is accidental, if it is caused by force majeure, or if the causes of the collision are in doubt, the damages shall be borne by those who have suffered them. This provision shall be applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.

ART. 3. If the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.

ART. 4. If two or more vessels are in fault the liability of each vessels shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.

In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear.

It is left to the law of each country to determine, as regards such recourse, the scope and effect of any legal or contractual provisions which limit the liability of the owners of a vessel toward persons on board.

ART. 5. The liability imposed by the preceding articles shall attach, in cases where the collision is caused by the fault of a pilot, even when the carrying of the pilot is obligatory.

ART. 6. The right of action for the recovery of damages resulting from a collision shall not be conditional upon the entering of a protest or the fulfillment of any other special formality.

There shall be no legal presumptions of fault in regard to liability for collision.

ART. 7. Actions for the recovery of damages shall be barred after an interval of 2 years from the date of the casualty.

The period within which the action to enforce the right of recourse allowed by paragraph 3 of article 4 must be instituted shall be 1 year. This limitation shall run only from the date of payment.

The grounds upon which the said periods of limitation may be suspended or interrupted shall be determined by the law of the court where the case is tried.

The high contracting parties reserve to themselves the right to admit into their legislations, as ground for extending the periods fixed above, the fact that it has not been possible to arrest the defendant vessel in the territorial waters of the state in which the plaintiff has his domicile or his principal place of business.

ART. 8. After a collision, the master of each of the vessels in collision shall be bound, so far as he can do so without serious danger to his vessel, her crew, and her passengers, to render assistance to the other vessel, her crew, and her passengers.

He shall likewise be bound, so far as possible, to make known to the other vessel the name of his vessel and the port to which she belongs, and also the names of the ports from which she comes and to which she is bound.

A breach of the above provisions shall not of itself impose any liability on the owner of a vessel.

ART. 9. The high contracting parties whose legislation does not forbid infringements of the preceding article bind themselves to take or to propose to their respective legislatures the measures necessary for the prevention of such infringements.

The high contracting parties will communicate to one another, as soon as possible, the laws or regulations which have already been or may be hereafter promulgated in their states for giving effect to the above undertaking.

ART. 10. Without prejudice to any conventions which may hereafter be made, the provisions of this convention shall not affect in any way the rules in force in each country with regard to the limitation of shipowners' liability, nor shall

they affect the obligations arising from contracts of carriage or from any other contracts.

ART. 11. This convention shall not apply to ships of war or to government ships appropriated exclusively to a public service.

ART. 12. The provisions of this convention shall be applied as regards all persons interested when all the vessels concerned in any action are subject to the jurisdiction of the governments of the high contracting parties and in any other cases for which the national laws provide. Provided always that:

(1) As regards persons interested who belong to a noncontracting state, the application of the above provisions may be made by each of the contracting states conditional upon reciprocity.

(2) Where all the persons interested belong to the same State as the court trying the case, the provisions of the national law and not of the convention shall be applicable.

ART. 13. This convention shall extend to the making good of damages which a vessel has caused to another vessel or to persons or things on board either vessel, either by the execution or nonexecution of a maneuver or by the non-observance of the regulations, even if no collision has actually taken place.

ART. 14. Any one of the high contracting parties shall have the right, 3 years after this convention comes into force, to call for a new conference, with a view to possible amendments therein, and particularly with a view to extending, if possible, the sphere of its application.

Any power exercising this right must notify its intention to the other powers through the Belgian Government, which will make arrangements for convening the conference within 6 months.

ART. 15. States which have not signed the present convention shall be allowed to accede thereto on their request. Such accession shall be notified through the diplomatic channel to the Belgian Government, and by the latter to each of the governments of the other contracting parties; it shall become effective 1 month after the dispatch of such notification by the Belgian Government.

ART. 16. The present convention shall be ratified.

After an interval of at most 1 year from the date on which the convention is signed the Belgian Government shall enter into communication with the governments of the high contracting parties which have declared themselves prepared to ratify it, with a view to deciding whether it should be put into force.

The ratifications, when made, shall be deposited forthwith at Brussels, and the convention shall come into force a month after such deposit.

The protocol shall remain open another year in favor of the states represented at the Brussels Conference. After this interval they can only accede to it, in conformity with the provisions of article 15.

ART. 17. In the case of one or the other of the High Contracting Parties denouncing this convention, such denunciation shall not take effect until a year after the day on which it has been notified to the Belgian Government, and the convention shall remain in force as between the other contracting parties.

Additional article. Notwithstanding anything in the provisions of article 16 above, it is understood that the provisions of article 5, establishing liability in cases where the collision is caused by the fault of a compulsory pilot, shall not come into full force until the High Contracting Parties shall have arrived at an agreement regarding the limitation of liability of shipowners.¹

Table of ratifications, overpage.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., February 16, 1962.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning S. 2313, to unify apportionment of liability in cases of collision between vessels and related casualties.

¹ An international convention for the unification of certain rules relating to the limitation of the liability of the owners of seagoing vessels was signed at Brussels, Aug. 25, 1924, *ad referendum*; and was subsequently ratified or adhered to by 12 of the 32 states which have ratified and adhered to the collision (liability) convention 1910.

This bill was drafted by a committee of the Maritime Law Association of the United States and sponsored by the American Merchant Marine Institute. It is designed to bring the collision law of the United States into conformity with other maritime jurisdictions by permitting American admiralty courts to fix the percentage of fault and the division of liability on other than the old moiety rule which apportions the damages equally although one vessel may have only one technical fault, and the other vessel many. This plan was adopted by the Brussels Collision Convention of 1910 and has worked well in Europe and in Canada.

Thus, under present law, a vessel with five navigational faults and a vessel with one fault would share the damages equally. In certain cases our courts adopted a rule known as the major-minor fault rule. Under this rule the court decides not to look at the fault of the less offending vessel. Hence, the present state of our collision law is uncertain. The trial judge may take the 50-50 rule or the major-minor fault rule. Experienced lawyers cannot predict which way the judge will decide. This may be one reason why so few collision cases are settled even after the depositions of all witnesses have been taken.

For these reasons the Department of Justice recommends the enactment of this bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE,
Deputy Attorney General.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, February 7, 1962.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to the request of your committee for the views of this Department on S. 2313, to unify apportionment of liability in cases of collision between vessels, and related casualties.

The purpose of the proposed legislation is to establish rules governing the apportionment of compensation for damages caused by the collision of vessels. Statutory presumptions of fault in regard to liability for collision would be eliminated. Where more than one vessel is at fault, liability would be proportioned to the degree of fault. In the event of death or personal injury, the vessels at fault would be jointly as well as severally liable to third parties. Vessels at fault for damages to other vessels or their cargoes, or to the effects of crews, passengers, or other persons on board, would be solely liable without joint and several liability toward third parties and without recourse against other vessels. Vessels would respond for collisions caused by the fault of their pilots even when carrying a pilot is compulsory. The right of action would not be conditioned upon filing a protest or other special formality. Existing limitations on liability would not be disturbed. A 2-year statute of limitations for actions for recovery of damages in collisions would be established as well as other procedural rules.

The Treasury Department as a vessel owner is interested in changes in this field of law which will improve admiralty court procedure, lower litigation costs and enhance justice. The changes advocated appear to be a step in this direction. Much of admiralty law is not of statutory form; therefore changes in this field have been slow as compared to other fields. Statutory confirmation of accepted legal principles in admiralty and an extension of acknowledged legal principles of law in other fields to admiralty would do much toward improving procedure, reducing litigation time and costs, and improving justice.

The Department has no objection to the enactment of S. 2313.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

ROBERT H. KNIGHT, *General Counsel.*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 9, 1961.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of July 28, 1961, acknowledged July 31, 1961, requesting our comments on S. 2313, a bill to unify apportionment of liability in cases of collision between vessels, and related casualties.

We have no special information or knowledge as to the need for or desirability of the legislation and, therefore, make no recommendation with respect to its enactment.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, February 6, 1962.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: The comments of the Treasury Department on S. 2314, a bill to limit the liability of shipowners, and for other purposes, are presented in response to your request of July 28.

Under present law the liability of owners of vessels is limited to the value of the vessel and its pending freight. In the case of seagoing vessels where loss of life or bodily injury is involved, if the amount available to pay such losses is not equal to at least \$60 per gross ton of the vessel, then the liability of the owner for such losses is increased to that amount.

This bill would remove the distinction between seagoing and other vessels and establish a single limitation of liability for all vessels. The liability of an owner would no longer be limited to the value of the vessel and pending freight but would be based upon the tonnage of the vessel. In case of property claims only, the shipowner could limit his liability to an amount equal to 1,000 francs (about \$67) per ton; for personal claims only, such as for bodily injury or loss of life, or where there are both property and personal claims, the liability could be limited to an amount equal to 3,100 francs (about \$207) per ton.

The bill provides in effect that vessels of less than 300 tons will be liable to the same extent as if they were of 300 tons in size. Claimants would not be able to proceed any other assets of the shipowner if the limitation fund were available for such claimants. Salvage claims are excluded and the limitation of liability privilege is extended to the personal liability of pilots, masters, and crewmembers. The bill provides for the jurisdiction of the district courts over proceedings for limitation of liability and contains implementing procedural provisions.

Enactment of this bill may have some beneficial effect on water safety by expanding the potential liability of owners of small craft, thus influencing them to use more care in the operation of their boats. Its effect however, would be limited since an owner is not entitled to limitation of liability if the incident giving rise to the claim results from the fault or privity of the owner. Since most small craft are operated by the owners or with the owner aboard, they would not be allowed to limit their liability either at present or under the proposed bill. The bill may also have the effect of expanding the liability of the United States as a vessel owner, but such expansion should also be limited since most government vessels which are liable to be involved in incidents giving rise to large claims have a value greater than the minimum amount to be used under the bill. On the other hand, in the case of larger vessels, the potential liability of vessel owners, including the United States, may be less than at present.

Since the net effect of this bill on the Treasury Department will probably be minimal, no objection is made to its enactment.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

ROBERT H. KNIGHT, *General Counsel.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., February 16, 1962.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 2314, a bill to limit the liability of shipowners, and for other purposes.

The bill will liberalize the present U.S. law by establishing a limitation fund of \$140 per ton for personal injury and death recoveries exclusively; and another fund of \$67 per ton to be divided ratably with cargo irrespective of the value of the vessel and irrespective of whether the vessel is a total loss.

This bill is designed to bring our limitation of liability statutes up to date and in conformity with the maritime laws of other countries which have adopted the Brussels Convention on Limitation of Liability of 1947. Some sort of reform was overdue and the present bill represents the result of a long study of the matter by admiralty experts.

For the foregoing reasons, the Department of Justice favors the enactment of this legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE, *Deputy Attorney General.*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August, 9, 1961.

B-131747.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate.*

DEAR MR. MAGNUSON: We refer again to your letter of July 28, 1961, acknowledged July 31, requesting our comments on S. 2314, a bill to limit the liability of shipowners, and for other purposes. We note that the bill is identical with H.R. 7912 of the current Congress except that the latter includes dollar equivalents of limitations on liability expressed in gold francs.

We have no special information or knowledge on the need for or desirability of the legislation and, therefore, make no recommendations as to its enactment.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION,
San Francisco, Calif., February 26, 1962.

Re S. 2313 and S. 2314: Limitation of shipowner liability.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.*

DEAR MR. CHAIRMAN: Pacific American Steamship Association takes this opportunity to indicate its full support for the above two bills whose purpose is to clarify in law the statutes of shipowners in regard to public liability. This will be accomplished through the implementation of the International Convention on Limitation of Shipowners' Liability of 1957 as well as the International Collision Convention of 1910. Both of these conventions have been either ratified or implemented in law by a number of maritime nations and it is for the purpose of conforming U.S. law to the laws of other maritime nations that we seek favorable action of the Congress in this matter.

Mr. Peter N. Teige, vice president of American President Lines, will testify on behalf of this association at hearings scheduled to commence February 28.

Yours very truly,

RALPH B. DEWEY.

Senator BARTLETT. Mr. Elder, how long would you require?

Mr. ELDER. No more than 5 minutes, sir.

Senator BARTLETT. Come up, then.

STATEMENT OF SCOTT H. ELDER, OF JOHNSON, BRANAND & JAEGER, CLEVELAND, OHIO, ON BEHALF OF LAKE CARRIERS ASSOCIATION

Mr. ELDER. My name is Scott H. Elder, from Cleveland. I appear as assistant counsel for the Lake Carriers Association and also a practicing attorney and member of the firm of Johnson, Branand & Jaeger, in Cleveland, Ohio.

I appear here on behalf of Lake Carriers Association, an organization of vessel owners and operators operating about 95 percent of the American-flag Great Lakes fleet. These vessels are all engaged in bulk-cargo transportation.

I wish merely to say that the Lake Carriers Association favors in principle the two bills, S. 2313 and S. 2314.

With respect to the first bill, I would like to point out that half of, or approximately half of, the territorial waters of the Great Lakes are within Canada. Canada already has apportionment of liability.

So we do have a problem on the lakes when a collision occurs; whether it occurs in Canadian waters or American waters has great bearing on how the liabilities are divided.

Frequently it is impossible to tell whether a collision is in Canadian waters or United States waters.

Senator BARTLETT. What do you do in such a case?

Mr. ELDER. Well, there are several ways of solving it.

First of all, the courts frequently duck the issue, because they will say, "Well, if both vessels are equally at fault, it makes no difference whether it is under the Canadian law or the United States law." That was one fairly recent case.

If the collision is between two American vessels within Canadian waters, frequently the parties will stipulate that it is governed according to the U.S. law.

Where the collision is between a foreign vessel and a U.S. vessel, it has been stipulated that the liabilities will be determined according to the Brussels Convention. That is one recent case that has taken place on the lakes.

It is rather a moot question, frankly, where two American vessels are involved in collision in Canadian waters, whether the U.S. law of damages applies or the Canadian law.

We feel that this bill in that respect would be of benefit to ship-owners.

There are two things about the bill I would like to point out. We feel that some provision should be made to strengthen the section of the bill—I believe it is section 7—which deals with your immunities under the Carriage of Goods by Sea Act and the Harter Act. I think if the Canadian provision were adopted or a provision similar to the Canadian it would be clearer.

Senator BARTLETT. That is on S. 2313?

Mr. ELDER. S. 2313, yes. The language of the Canadian act in that respect is as follows:

Nothing in this section affects the liability of any person under a contract of carriage or any contract or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law or as affecting the right of any person to limit his liability in the manner provided by law.

We feel that that would be a better provision than the present section 7.

One more thing with respect to this bill. We believe there should be a specific cutoff date—in other words, that this bill would become effective as to collisions occurring on or after a certain specific date—so that it does not affect litigation that might be in process at the time the bill is enacted.

Turning next to S. 2314, as I said before, we favor in principle the bill—that is, the concept of a limitation of amount based on a fixed dollar per ton.

As we construe the intent of the bill, it does not intend to prevent limitation in any instance which is already covered by present law.

I would like the privilege of asking that the record remain open for a few days. We would like to submit some written comments and some possible clarifying amendments to preserve that right.

Senator BARTLETT. We will be glad to accommodate your desires in that respect, because I think this would be most helpful to have you make a more extended statement.

Mr. ELDER. Thank you.

(The extension of remarks of Mr. Elder follows:)

SUBMISSION OF LAKE CARRIERS' ASSOCIATION, CLEVELAND, OHIO, RE S. 2313 AND S. 2314

Lake Carriers' Association, hereinafter referred to as "association", is an organization consisting of 28 vessel companies owning and operating in the aggregate 264 cargo vessels of U.S. flag engaged primarily in the transportation of iron ore, coal, limestone, grain, and petroleum products between ports on the Great Lakes. In all the vessels of association members transport about 95 percent of the total commerce of the Great Lakes which moves by American-flag vessels. At times this commerce has totaled as much as 175 million tons in a single 8 months navigation season.

During the hearings on S. 2313 and S. 2314 on March 2, 1962, Scott H. Elder appeared briefly on behalf of the association and stated its position with respect to these bills. His statement was to the effect that the association favored the principles of these bills but desired at a later date to file a supplemental statement suggesting certain amendments. The community of interest on the Great Lakes between the United States and Canada in matters of this kind leads the association to suggest that prime consideration be given to achieving the greatest possible uniformity with Canada. Accordingly, there are submitted herewith certain suggested amendments to S. 2313 and S. 2314 which in most respects would accomplish greater uniformity with Canada and also serve to clarify the bills.

COMMENTS WITH RESPECT TO S. 2313

The basic purpose of this bill, as we understand it, is to apportion liability arising out of cases of collision which are subject to the admiralty and maritime jurisdiction of the United States. Such being the case, it is suggested that the phrase "compensation due for damages caused" be deleted from lines 3 and 4 of page 1 and the phrase "liability to make good the resulting damage or loss" substituted so that the introductory paragraph of the bill would read:

"That where a collision occurs between vessels the liability to make good the resulting damage or loss shall be settled in accordance with the following provisions, in whatever waters the collision takes place."

Concerning section 2 of S. 2313, the first sentence thereof deals with situations where either no fault exists or if it does exist the courts are unable to determine

it. Thus the sentence merely states well-founded principles of existing law. See *The Jumna*, (2 Cir.) 149 F. 171. Present law is clear that in a collision case there can be no recovery or partial recovery unless fault is affirmatively shown. *The Clara*, 102 U.S. 200; *The Grace Girdler*, 7 Wal. 196.

The second sentence of section 2 would eliminate all statutory presumptions of fault in regard to liability for collision. Presumably this sentence is aimed at the last sentence of section 1 of the Stand By Act (33 U.S.C.A. § 367). The Brussels Convention of 1910 provides in Article 6 that "There shall be no legal presumptions of fault in regard to liability for collision." The framers of the bill did not adopt this language and it is, therefore, presumed that the intent of section 2 is to eliminate statutory presumptions only, such as that found in the Stand By Act, but not legal or evidentiary presumptions such as the rule of *The Pennsylvanian* (86 U.S. 125). There are many examples of this latter type of presumption. For instance, the failure to produce a vessel's log books, unless sufficiently explained, raises an inference of fault. (*The Philadelphia* (3 Cir.), 44 F. 2d 1.) Similarly, there is a presumption of fault where a vessel fails to produce a principal witness although available to testify. (*The New York* 175 U.S. 187). A moving vessel which comes into collision with one at anchor is presumptively at fault and has the burden of exonerating herself from liability. (*The Charles Hubbard* (6 Cir.), 229 F. 352.) These presumptions do not cast a party in fault but merely place on him a duty to supply proof of his lack of fault. Such presumptions only excuse the injured party from making proof at the outset. Collision liability is still based on fault. (See *Cranberry Creek Coal Co. v. Red Star Towing & Transp. Co.* (2 Cir.), 33 F. 2d 272; Cert. den. 280 U.S. 596). Presumptions are useful tools for determining which party has the burden of going forward with the evidence but they do not shift the burden of proof.

It should be noted that the comparable Canadian statute contains no provisions similar to section 2 of S. 23113. (See the Canada Shipping Act, 1934, §§ 648-657.) Since then, the second and third sentences of section 2 would modify certain legal presumptions, which presumably was not intended, it is the view of the association that the first sentence of section 2 only should be retained and the rest of the section deleted from the bill.

With respect to section 4 of S. 2313, it is believed that the first sentence of paragraph (a) thereof should be amended by inserting after the word "vessel" in line 8 the phrase "to make good the damage or loss" so that such paragraph would read as follows:

"(a) If two or more vessels are in fault the liability of each vessel to make good the damage or loss shall be in proportion to the degree their faults respectively contributed. If it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

In addition there should be added to section 4 a new paragraph (d) as follows:

"(d) Nothing in this Act shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed."

It is urged that the above suggested amendments to section 4 would clarify the intended meaning of such section by indicating, first, that the bill deals only with apportionment of liability and, second, that the bill is not intended to cast a vessel in fault where, in fact, no fault exists. With respect to this latter point the suggested new paragraph (d) is of particular importance in view of the second sentence of paragraph (a) which might otherwise suggest that it is not always necessary to find a vessel at fault in order to hold her liable. This, of course, is not the intended meaning of paragraph (a). In addition such amendments to section 4 as are suggested above would bring that section more nearly in conformity with Canadian law (Canada Shipping Act, § 648).

The next section of concern to the association is section 7. Again the language of the bill does not appear to be adequate to convey its intended meaning. In this respect it is believed that the language of the Canadian statute, Canada Shipping Act, 1934, sections 648 and 649, is more appropriate. It is, therefore, suggested that the last sentence of section 7 repealing the presumption of the Stand By Act (33 U.S.C.A. sec. 367) be enacted as a separate new section 13 and section 7 rewritten to read as follows:

"The provisions of this Act shall not affect the liability of any person under a contract of carriage or any contract; nor shall such provisions be construed as imposing any liability upon any person from which he is exempted by any

contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law; nor shall this Act be construed as depriving any person of any right of defense on which, independently of this Act, he might have relied in an action brought against him by any person or persons entitled to sue in respect of any damage or loss caused by a vessel on navigable water."

On the basis of sections 9 and 10 it is apparent that the bill is intended to apportion liability in all cases of damage or loss caused by a vessel on navigable water. In so doing, the bill follows the analogy of the act of June 19, 1948, extending the admiralty and maritime jurisdiction of the United States (46 U.S.C.A. sec. 740). In order to clarify the bill in this respect it is believed section 9 should be deleted in its entirety and section 10 amended so that said section 10 would read as follows:

"This Act shall apply to the liability to make good the damage or loss caused by a vessel on navigable water and to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damage or loss is done or consummated on land. In such cases the liability to make good the damages or losses in proportion to the degree of the faults respectively committed shall apply in the same manner between any vessel or vessels and the owners or operators of any land structure, facility or other property as the rule is applied between vessels."

In reviewing S. 2313 the substitute language proposed during the course of the hearings on March 1, 1962, was carefully studied. If, however, the amendments suggested above are adopted the numerous changes suggested during the course of the hearings would seem to be unnecessary. Further, the substitute language submitted at that time represents a considerable variance from the Brussels Convention of 1910, particularly in the use of the term "casualty" rather than collision. In the interest of achieving the greatest possible uniformity with Canadian law for the Great Lakes, the association urges that the amendments to S. 2313 suggested above be adopted in lieu of the substitute language proposed during the course of the hearings.

COMMENTS WITH RESPECT TO S. 2314

It is understood that the primary purpose of this bill is to provide a limitation fund in all instances based upon a fixed amount determined according to the vessel's tonnage. It is intended neither to broaden nor to narrow the shipowner's right to limit liability as that right exists under present law (46 U.S.C.A. 183).

In examining subsection A of section 2 it is found that the last sentence of paragraph 2 is unduly restrictive. That sentence could be construed to mean that the shipowner would not have the right to limit liability where damage is occasioned by the act, neglect or default of any person on shore for whom the owner is responsible unless that person's act relates to the navigation or management of the ship. This reference in the proposed bill to navigation or management of the ship would in all probability be construed as having the same meaning as under the Carriage of Goods by Sea Act (46 U.S.C.A. 1300-1315) or the Harter Act (46 U.S.C.A. 190-195). As used in these acts the phrase is very narrow of meaning, particularly with respect to the term "management," which has always been confined to situations arising after a vessel has been outfitted for a voyage. Thus it was held in *The J. L. Luckenbach* (D.C. S.D. N.Y., 1 F. Supp. 692, affirmed (2 Cir.) 65 F. 2d 570), that the breaking of a pipe occurring before the inception of a voyage was not mismanagement whereas it would be if it occurred on the voyage. Distinctions such as this have no place in a law limiting liability. Such a restriction is unwarranted by the purpose of the bill and it is, therefore, urged that the last sentence of paragraph 2 of subsection A of section 2 beginning on line 3 of page 3 of the bill be deleted in its entirety.

Subsection B of section 2 purports to save to shipowners the right to limit liability in instances where liability arises without proof of negligence as is the case where the shipowner's warranty of seaworthiness is breached. Under existing law such a warranty is sometimes implied in the shipowner's own personal contract in which event he is not permitted to limit liability (*Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U.S. 82). The shipowner may, however, specifically contract for the right to limit liability in such instances. *The Yungav* (D.C. S.D. N.Y., 58 F. 2d 352). This principle ought to be preserved and, therefore, it

is suggested that subsection B of section 2 be amended by inserting in line 19 on page 3 after the word "arises" the phrase "under contract or" so that said subsection B of section 2 would read as follows:

"An owner shall be entitled to limit his liability in the cases set out in subsection A of this section even in cases where his liability arises under contract or without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody, or control of the ship."

If subsection B of section 2 is amended as above, it will then be clear that where a shipowner includes in his personal contract a warranty of the seaworthiness of the vessel, he may still limit his liability if he so contracts.

Turning next to subsection E of section 2 on page 4 of the bill, it appears to be the purpose of this subsection to prevent shipowners from limiting liability against certain claims which are otherwise exempted from limitation by law. Under American law no such restriction applies except in the case of longshoremen, against whom no shipowner may limit liability (33 U.S.C.A. 948). Thus it seems evident that subsection E was intended to enact into law the rule of *The Vestris* (D.C. S.D. N.Y.; 53 F. 2d 847) which involved a claim for negligent death on a foreign vessel, the law of whose flag gave a right of action therefor. The Court held that the foreign shipowner could not limit liability under U.S. law as against his own seamen because of the provisions of the Death on the High Seas Act (46 U.S.C.A. 764). That act provides that, whenever a right of action is claimed by the law of any foreign state on account of death by wrongful act occurring upon the high seas, the right of action may be maintained in the admiralty courts of the United States without abatement in respect to the amount for which recovery is authorized.

Indeed, the foregoing interpretation of subsection E is substantiated by an examination of the Canadian statute in this respect. The Canadian Act, approved on June 22, 1961, provides that the shipowner may not limit liability in respect of any loss occasioned to a person who is employed under a contract of service "if that contract is governed by the law of any country other than Canada and that law does not set any limit to that liability or sets a limit exceeding that set by this section" (Canada Shipping Act, sec. 657(4) as amended). Since, then, under our law the claims against which the shipowner cannot limit liability are specified by statute, as, for example, in the case of longshoremen, it is suggested that subsection E be reworded so as to read as follows:

"Subsection A of this section does not apply to (1) claims for salvage or for contribution in general average or (2) claims by the master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives, or dependents, if the contract of service between the owner and such servants is governed by the law of any country other than the United States and that law does not entitle the owner to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in section 3 of this Act."

Amendment of subsection E as suggested above will make clear the intended purpose and meaning of that subsection as well as bring it more nearly into conformity with Canadian law and that of other maritime nations.

Section 6 of S. 2314 provides for the release of security in this country if the shipowner has instituted limitation proceedings elsewhere under the principles of the Brussels Convention of 1957. This could mean that the owners of Great Lakes vessels might be obligated to go to foreign countries to prove their claims against foreign vessels.

It should be emphasized that when Canada, in 1961, adopted a new limitation of liability law based on the Brussels Convention of 1957, Canada did not adopt any provision comparable to section 6 of the bill. Consequently if section 6 is enacted it would mean that a Canadian ship seized in this country would have to be released if the Canadian shipowner had instituted limitation proceedings in Canada, but, by the same token, release of an American ship seized in Canada could not be attained on the basis of a limitation proceeding instituted in the United States. Furthermore, it is our understanding that no country which has enacted a limitation of liability law based on the Brussels Convention of 1957 has adopted a provision comparable to section 6. In view of this it is urged that section 6 be deleted from S. 2314.

Finally, it is noted that section 8 dealing with repeal of certain provisions of existing law is not entirely clear in its purpose and meaning. That section makes no provision for the continuation of existing law as to claims, loss or damage, occasioned prior to the effective date of the act. Neither does the section deal with the question of the effect of existing rules of practice in admiralty and maritime cases promulgated by the Supreme Court. It is, therefore, suggested that section 8 be amended by inserting in line 25, page 12 after the word "REPEALS" the following phrase: "Except as to loss, damages, or claims arising prior to the effective date of this Act,".

Concerning the rules of practice in admiralty and maritime cases promulgated by the Supreme Court, it is clear that such rules have the force and effect of statute law. *The General Pershing* (9 Cir.) 84 F. 2d 273; 28 U.S.C.A. 2073. Undoubtedly after enactment of S. 2314 it will be necessary for the Supreme Court to amend some of its existing rules and promulgate others. Until that is done, however, the existing rules to the extent applicable to the proposed act, should be continued. For that reason it is suggested that section 8 be further amended by inserting at the end thereof, line 3, page 13 the following:

"Nothing in this act shall be construed as modifying any applicable rule of practice in admiralty and maritime cases promulgated by the Supreme Court and existing at the time of the effective date of this act to the extent such rule is not in conflict with this act."

Respectfully submitted.

GILBERT R. JOHNSON,
Counsel.

SCOTT H. ELDER,
Assistant Counsel.

MARCH 14, 1962.

Senator BARTLETT. Mr. Kenney has a question.

Mr. KENNEY. Have you had an opportunity to look at the proposed revision of S. 2313?

Mr. ELDER. Yes, I have.

Mr. KENNEY. I just wonder because of the language of—

Mr. ELDER. I believe the redraft removed section 7, and renumbered it 10. The language is not the same. I think the language in the revision is much better in that respect.

Mr. KENNEY. It seems to cover the point you made better.

Mr. ELDER. One other thing about the draft. We do like the provision in section 2 which adds in that no liability shall attach to any vessel unless its fault has contributed to the casualty. I think that more properly should come over in section 4, that particular language. I think it would be clearer in that section.

Mr. KENNEY. Thank you.

Senator BARTLETT. You stayed right within your time limit, Mr. Elder.

Thank you.

Mr. ELDER. Thank you.

Senator BARTLETT. Now Mr. Haight, please.

FURTHER STATEMENT OF CHARLES S. HAIGHT, HAIGHT, GARDNER, POOR & HAVENS, NEW YORK, N.Y.

Senator BARTLETT. When we recessed yesterday afternoon, Mr. Haight, it was with the understanding that Mr. Bourbon and Mr. Kenney might have some questions to ask you.

The acting chairman learns this morning that they have not some but many, so many in fact that the entire morning might well be consumed and devoured if you were to undertake to answer all of them.

So I am going to ask you if it will be agreeable to you if these questions are submitted to you in written form with the understanding that you will reply to the questions in the same manner—in writing, that is to say—and if this is all right with you we will save a lot of time this morning.

Mr. HAIGHT. Yes, that is quite agreeable, of course. I expect that some of the questions will relate to matters where others in the committee of the Maritime Law Association would be more particularly concerned than myself so that procedure would give us the benefit of being able to collectively answer the questions.

Senator BARTLETT. That will be splendid insofar as the committee is concerned.

I am also going to ask the staff to make these questions available to anyone who may be here in opposition to the bill so that they will know what questions are being asked. The replies likewise will be made available to the opponents. That way we will save a lot of time.

Mr. HAIGHT. Thank you.

Senator BARTLETT. Thank you, Mr. Haight. These questions will be handed to you immediately, and copies for the persons here in opposition.

Mr. HAIGHT. Thank you.

(The questions and answers referred to follow:)

Question. Who would determine how the franc specified is to be converted to dollars—at market or Government rate?

Answer. The U.S. district court, in which the limitation fund is constituted, will convert the franc into dollars at the price which the U.S. Government is paying for gold (sec. 3A.4).

The British act provides:

"The Ministry of Transport may from time to time by order made by statutory instrument specify the amounts which, for the purpose of this section, are to be taken as equivalent of 3,100 and 1,000 gold francs respectively."

The gold franc was adopted as the most effective yardstick to keep different currencies in the proper relation to each other.

Question. If a passenger vessel is a casualty, the ship ton rating under U.S. procedures would be radically less than in some other countries. Would this encourage "shopping around" by passenger vessels of other nations figuring in collision?

Answer. Tonnage is defined in the convention and in S. 2314 as follows:

"'Tonnage' means (1) net tonnage plus the amount deducted from gross tonnage for engineroom space in computing net tonnage, or (2) 300 tons, whichever is greater."

It is a fact that the ship ton rating of a passenger vessel under U.S. admeasurement rules is somewhat less than under the admeasurement rules of some other countries. If there were no other considerations this fact might tend to direct the limitation proceeding into the American courts rather than into a foreign jurisdiction.

QUESTION 3

Question. There are three possible locations cited in the bill for establishment of the limitation fund. If one or both funds are established elsewhere, would claimants in the United States be at a disadvantage?

QUESTION 10

Question. Must all claimants proceed in the forum of the shipowner's choice? With U.S. shipping such a small percentage of the world total doesn't this prejudice claimants who are U.S. citizens?

JOINT ANSWER TO QUESTIONS 3 AND 10

No. The bill provides adequate safeguards so that U.S. claimants need not press their claims abroad in the forum of the shipowner's choice except under circumstances where it is fair and to their advantage to do so.

If the limitation fund is established in one of the three locations specified in the bill, this would, in most instances, in terms of available witnesses and other important factors, be the best forum for all parties, including the American claimant. If the fund is established in the United States, this would presumably not be to the disadvantage of American claimants. The question is therefore really narrowed to this: If the fund is established in a foreign jurisdiction, but not in one of the three specified in the act, would U.S. claimants be at a disadvantage?

In the first place, it must be remembered that under present law a shipowner may file a petition to limit liability in any jurisdiction. He cannot force into concourse in that jurisdiction claimants of other countries. There is under present law no internationally effective injunction to enforce concourse, and none is provided under the convention or under the proposed bill. Thus, under the convention and the proposed bill, as under present law, there is nothing to prevent an American claimant from commencing and prosecuting to judgment a suit in the United States, whether or not a limitation fund has been established in a foreign jurisdiction.

What the convention and the proposed bill do add to present law are certain provisions to relieve the shipowner of the burden of putting up double security—but only under circumstances carefully and fully protecting the rights of the American claimant.

Thus, under section 3E, once a fund is established which the U.S. court finds is "actually available for the benefit of the claimant," other assets of the shipowner cannot be attached or levied on. Thus, it does mean that American claimants may have to go abroad to obtain payment of their claims—but only under circumstances determined by the U.S. court to be fair to the U.S. claimant as making available to him the foreign limitation fund.

Similarly, under the provisions of 6A permitting release of double security in jurisdictions other than that of the limitation fund, the U.S. courts have absolute power and discretion to refuse to release the U.S. claimant's security in an American suit, where the limitation fund has not been established in one of the three jurisdictions specified in the bill. And in any event the court must in all cases before releasing the American claimant's security determine that the shipowner is one of those entitled to limit liability under the act, that he has put up security to the full limit of his liability, and that such security is actually available for the claimant.

U.S. claimants have thus, under the proposed act, very strong safeguards which the U.S. courts have power to enforce before remitting the U.S. claimants to a foreign forum.

Question. Would abolishing legal presumptions of fault, affecting all claimants, death, personal injury and cargo, deprive innocent third parties of benefits that are afforded to claimants in all other situations?

Answer. It is considered that the only presumption of fault which would be abolished by section 2, lines 10 and 11, of S. 2313 would be the presumption in the Standby Act. Since, however, others are apparently apprehensive that the language of this section would have a broader effect, we have no objection to eliminating the following language in lines 10 and 11:

"There shall be no statutory presumption of fault in regard to liability for collision."

Question. Would abolition of the rule that joint tortfeasors are jointly and severally liable for cargo damages depart from normal principles? Couldn't this be prevented by abolishing instead the present rule which permits the non-carrying vessel to recover over against the carrying vessel in cases where the carrying vessel would not be liable?

Answer. As to the first sentence: No, because most other maritime nations have the principle that as to cargo damage the vessels in a both-to-blame collision are not jointly and severally liable.

As to the second sentence: No, because this would contravene the basic purpose of the Collision Convention by requiring the noncarrying vessel to pay more than the amount determined by her actual degree of fault.

At common law not only was there joint and several liability in tort cases but there was a rule against contributions between joint tortfeasors. Contributory negligence also barred any recovery. This has been changed. Contributory negligence is a pro tanto defense. Contribution is permitted between joint tortfeasors in many jurisdictions by statute. The old rule was based upon the theory that it was necessary to keep individuals careful. That no longer applies because the people who pay are rarely those who are personally negligent.

The general maritime law has an origin which is different from common law. In collision cases there has always been contribution between joint tortfeasors.

The right of the noncarrying vessel to recover contribution from the carrying vessel is abolished by section 4-C. This alone will not solve the problem because it would leave the noncarrying vessel liable for 100 percent of the loss and it would destroy international uniformity.

Everyone has admitted that the division of damages in proportion to fault is equitable. The only question is whether the joint and several liability should be abolished. It is retained for death and personal injury claims. The only persons who will suffer will be cargo owners or underwriters.

The abolishment of the joint and several liability so far as cargo is concerned, will make effective in all cases the provisions of the Harter Act and the Carriage of Goods by Sea Act. It will provide that where there is no direct liability of the carrying ship to his cargo, there will be no indirect liability. The liability of the noncarrying ship to cargo on the carrying ship will be limited to the degree of fault of the noncarrying vessel. This rule makes fully effective the intent of the Harter Act and the Carriage of Goods by Sea Act as to the carrying ship, and imposes no undue burden on the noncarrying ship.

Question. Isn't it more equitable to place 100 percent of the loss on one joint tortfeasor than to prejudice the recovery of an innocent third party?

Answer. No, because this would contravene the basic purpose of the Collision Convention by requiring the noncarrying vessel to pay more than the amount determined by her actual degree of contributory fault.

Cargo is innocent only to the extent that its owner has not been an active participant in the errors which led to the collision. However, the owners of the two ships are themselves equally innocent. The errors of navigation are those of the crews of the vessels—their servants. Cargo is not entitled to recover against the carrying ship under the provisions of the Harter Act or the Carriage of Goods by Sea Act. Cargo should not be permitted to recover indirectly that which they cannot recover directly.

Question. Are you satisfied that S. 2313 and S. 2314 are so drafted that they need no improvement? If not, what point or points do you feel should be revised?

Answer. We are satisfied with the language of both bills, with the exception of the changes, suggested in these answers, regarding section 2 of S. 2313, and sections 2B and 6 of S. 2314.

Question. Does the burden rest on the claimant of establishing that the occurrence giving rise to his claim has resulted from a cause within the actual fault or privity of the shipowner?

Answer. No. The owner has to establish his right to limit and has the burden of proving his freedom from actual fault or privity. Section 4-G provides:

"The claimant shall first proceed and go forward with evidence to establish the liability of the petitioner. If the liability of the petitioner is established, by any claimant, the petitioner shall have the burden of proving absence of actual fault or privity."

Question. Are vessel owners in non-Convention countries excluded from the benefits of the Convention?

Answer. No. Under our existing statutes the courts have repeatedly held that a foreign shipowner may file a petition in our courts to limit his liability in accordance with the provisions of our law, and that in determining the limit of his liability the courts will apply the law of the United States. *Ocean S.S. Navigation Co. v. Mellor*, 233 U.S. 718, 58 L. Ed. 1171 (the *Titanic*).

Under S. 1314 a shipowner would be entitled to limit liability in accordance with our law whether or not his own country has adopted the convention.

Question. Is limitation a privilege that must be acquired in the United States and Britain, while it is acknowledged as a right in the Latin law system?

Answer. There is no doubt that limitation is a privilege in the United States and in Britain. If the rule is different in the Latin law system, the adoption of the convention will assist in bringing their law into line with ours.

Question. Why are all the small vessels, barges, etc. that are excluded by present law, included when they are not included in the Brussels Convention?

Answer. These vessels have the right to limit under our present law, but the Sirovich amendment which fixes a minimum limitation fund for death and personal injury claimants of \$60 per ton does not apply to such vessels. If these vessels are included in S. 2314, they should be on the same basis as ocean-going vessels.

The purpose of the convention was to reach only such vessels as are involved in international trade. It would be in the interests of fairness and justice to

have the same rule apply to our inland craft and provide that the minimum tonnage shall be deemed to be 300.

S. 2314 repeals the existing limitation statutes. If inland craft are excluded from this bill, they will have no right to limit.

Question. Did the U.S. delegation to the Brussels Conference in 1957 sign the limitation convention? If not, why not?

Answer. We understand not. We presume that the State Department can answer this question. Two of the representatives of the United States, Clarence G. Morse and E. Robert Seaver, have been strong supporters of the convention.

Question. Are not the provisions of section 7-B relating to charterers much broader than those in present U.S. law? Why?

Answer. Yes. To meet modern conditions it is desirable to broaden the list of persons who may limit liability. This should include all types of charterers, and all those who have some part of the responsibility of an owner in connection with the operation and management of the ship.

It increases the number of persons who may limit their liability. This is necessary because functions of ownership which were once performed by the owner are now divided between a number of persons.

Question. Will you explain the meaning of the provisions of section 7-C? Could a master who is patently guilty of gross negligence and fault still limit his liability under this section? How does this compare with liability, for instance, in automobile cases?

Answer. Section 7-C provides that where an owner takes part in the navigation of a ship, his error or negligent act in connection with that navigation shall not defeat his right to limit. In other words, he should be in the same position that he would be in if that error or act of neglect had been performed by a third person who was acting as master, pilot, etc.

On the other hand, if the owner's error or negligent act is in his capacity as owner, then such error or such negligent act will defeat his right to limit.

There is no difference between the case of a master who is guilty of what might be called ordinary negligence and one who is guilty of what might be called gross negligence. The two have the same meaning so far as the maritime law is concerned.

The automobile case is not comparable. A number of statutes are involved which impose liability upon the owner for the negligence of any one driving the car with his permission.

Question. Please explain section 2-B.

Answer. Section 2-B provides:

"An owner shall be entitled to limit his liability in the cases set out in subsection a of this section even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody, or control of the ship."

Our courts have construed the present limitation law as not applying to the situation where the liability of the shipowner is based upon his personal contract, such as a charter party signed by the owner.

As to bills of lading it is the practice for American shipowners to have them signed for the master. They are actually signed by a clerk under authority of the master. This is to prevent the bills of lading from becoming personal contracts and enable limitations statutes to be applied to claims of cargo.

This provision is to change this rule which no other maritime nation has, and will enable a shipowner to act personally with respect to charter parties and bills of lading. In this respect, the language of section 2-B should be clarified by adding at the end thereof the following additional phrase "or by reason of his personal contract."

Question. Has Canada ratified the 1957 convention, or passed legislation like S. 2314?

Answer. Yes. In June 1961, Canada amended her Shipping Act, so as to conform her maritime law to the 1957 Brussels Limitation of Liability Convention.

Question. What are the prospects for the "coming into force" of the 1957 convention? It only requires 10 ratifications to become effective, but these have not yet been forthcoming. Why?

Answer. The prospects are excellent for the convention being ratified by the requisite number of countries.

The Scandinavian countries, West Germany, and the Netherlands have legislation in process. There are other countries which are awaiting action by the United States. We believe that if the United States enacts the basic principles

of the convention, then the convention will probably receive universal acceptance. If the United States does not enact the convention, it will nevertheless be accepted by all the European countries, in our opinion, and very likely by the other maritime countries.

Question. Our present law speaks of "privity or knowledge" while the bills speak of "actual fault or privity." Is there any difference? Is the change in wordage likely to provoke unnecessary litigation?

Answer. The change in wording, from "privity or knowledge" in our present law to "actual fault or privity" in the convention, is a change in form made solely in the interests of international uniformity. It is not intended as a change in the substantive law of limitation, and we believe that it has no such effect. It should provoke no unnecessary litigation whatever. Indeed, the same language in the British act is applied in British courts with the same scope and effect as the present U.S. law is applied in this country, as witness the recent case of the *Anonity* in which acts both of commission and omission were expressly held encompassed by the words "actual fault".

In the *Anonity*, 1961 Lloyd's List Law Reports, volume 2, page 117, limitation was denied by the English Court of Appeal and that court construed the words "actual fault or privity" as used in the British act. In that case a fire broke out on the *Anonity* which spread to the pier causing substantial damage. It was found that the fire was caused by the negligence of those on board the *Anonity* in leaving the galley stove burning or smoldering at a time when it ought to have been turned off completely, thereby causing or allowing sparks to escape from the galley stack onto the jetty. Lord Justice Pearce said:

"The words 'actual fault' are used in contradistinction to vicarious fault, and 'fault', of course, includes both commission and omission."

We do not believe there is any difference between "privity or knowledge" in our law and "actual fault or privity" in the convention.

Question. The principle of apportioning liability in accordance with the degree of fault has not been challenged, insofar as I am aware. Would it not be desirable to enact that portion of S. 2313 without getting into the involved arguments on joint liability?

Answer. No. Elimination from this bill of the provision of 4-C "without joint and several liability toward third parties and without recourse against the other vessels", would destroy international uniformity. It would also permit indirect liability to cargo in those cases in which there is no direct liability under the provisions of the Harter Act and of the Carriage of Goods by Sea Act.

Question. While cargo may have special circumstances because of the Harter Act, the COGSA and so forth, what about shore damage? Why should it not be entitled to joint liability?

Answer. Damage to shore structures presents a situation quite different from cargo. These do not involve any obligation of the Harter Act or Carriage of Goods by Sea Act. Where the vessel is in collision, either with another vessel or with a stationary object, the principles upon which liabilities are based should be the same. In the case of a collision between a vessel and a bridge, the bridge may be at fault either because not properly constructed or because the draw was not properly opened. Both parties to the collision should be on the same basis.

In the case of shore damage, establishing liability in accordance with the degree of fault does not deprive an innocent third party from recovering 100 percent of his damages, because such third party has a right of recovery against each of the two wrongdoers and by recovering from each wrongdoer an amount corresponding to the degree of fault of such wrongdoer, the third party recovers a total of 100 percent of his damages.

Question. If you favor Mr. Colby's draft, would the substitution of "collision or casualty" for "casualty" serve to meet the Freedman objection?

Answer. Mr. Freedman apparently does not object to the term "collision and related casualties", and if this term were used instead of "casualty" we believe that Mr. Freedman's objection would be met.

Question. While U.S. owners might prefer establishing the fund in the United States, could the foreign owners, now greatly in the majority, be depended upon to avoid "shopping around"?

Answer. In almost all cases it can be expected that the limitation fund will be constituted in one of the three equitable and logical jurisdictions specified in 6B.

If a shipowner wants to be relieved from the burden of putting up double security he is restricted in his choice of a forum. If the United States has the

same rule of law as do the other maritime countries, the only consideration that would influence a shipowner in selecting a forum will be the availability of witnesses and the prospect of getting the greatest number of claims into one court.

Question. To allay small boat, etc., objections, could the courts be given discretion as to amount of limitation fund required? Or is this provision a "must" in the bill?

Answer. Small boats and inland craft are covered by the present limitation statute, except that the minimum \$60 per ton under the Sirovich amendment does not apply to them. They should be included for reasons of uniformity of domestic law with international law and because the minimum 300 tons is a reasonable one. However, it is not by any means a "must" that small boats and inland craft be included in the bill.

It should not be left to the discretion of the court as to what rules should be applied. Such a provision would be of doubtful constitutionality. If there is a limit of liability, Congress must fix the rules for determining that limit.

Question. To meet the possibility that a collision of two new vessels might make possible a fund under the present value basis in excess of one based on possible a funder under the present value basis in excess of one based on tonnage, would it be feasible or desirable to offer a choice between the two systems?

Answer. It is believed that it would be neither feasible nor desirable to offer a choice between the two systems of calculating the limitation fund. Experience has shown that the inclusion of a choice only causes difficulties. In the 1924 Brussels Limitation Convention a choice was given between the tonnage amount and the value of the ship, the choice to be exercised by the shipowner. The 1924 convention was not adopted widely by the maritime nations, and this was one of the reasons for the development of the 1957 Brussels Limitation Convention on a definite tonnage system, with the currency amount per ton very substantially increased over the £15 per ton maximum fund under the 1924 convention.

In the discussions at Madrid in 1955 and at Brussels in 1957 the American system of calculating the limitation fund upon the value of the vessel was fully considered and, upon final vote, was not accepted by the other maritime nations. It is believed that there is no chance that other maritime nations will depart from the tonnage system worked out in the 1957 convention.

If the U.S. limitation system were to be based upon any such choice between the two systems, then the inevitable result would be to promote "forum shopping."

The \$207 amount per ton provided in the 1957 convention is a reasonable and fair adjustment between all of the interests concerned, for the reasons set forth in the testimony before the subcommittee. The limitation fund at \$207 per limitation ton will provide a fund which in most cases will enable all claimants to be paid in full. Maritime casualties where the claims would exceed a limitation fund based on \$207 are the very cases in which limitation is such a compelling economic necessity.

Question. To what extent will these bills have an effect on State laws? Will they supersede State law? If so, under what circumstances? How far inland does the admiralty and maritime jurisdiction of the United States extend? In other words, will the owner of a rowboat, if otherwise qualified, be able to limit liability if his boat is on Chesapeake Bay? On an inland lake in New Hampshire? On the Yukon River?

Answer. When Congress legislates in this field, such congressional legislation will supersede any State laws in conflict therewith and State courts would have to give effect to the congressional act.

The jurisdiction of Congress to legislate under its admiralty jurisdiction covers all navigable waters of the United States which are navigable from the ocean. This covers our rivers and the Great Lakes. It covers other lakes which are navigable from the sea, such as Lake Champlain. Under the commerce clause, Congress has jurisdiction over landlocked lakes partly in one State and partly in another, such as Lake Tahoe. *Davis v. U.S.*, 185 Fed. 2d. 938. Congress would not have power to legislate over landlocked lakes not navigable from the sea and wholly within one State, such as Lake George or Great Salt Lake.

Question. Please explain section 6B of S. 2314. What effect will this section have on forum shopping?

Answer. Section 6B of 2314 provides that when the limitation fund is constituted in one of the three logical places mentioned and security has also been

obtained in the United States, the latter security shall be released, but only if the owner is entitled to limitation and the limitation fund constituted at one of the three locations is actually available for the benefit of the claimant. This should go a long way toward eliminating forum shopping.

It is believed that the effect and operation of section 6 A and B can be stated more clearly by some revision of the wording, and a suggested revision will be submitted in the near future.

Senator BARTLETT. I understand that Mr. Burke and Mr. Rault have brief statements. Is that correct?

Mr. RAULT. I have. I do not propose to read my statement but just summarize it.

Senator BARTLETT. Mr. Rault, come on up then.

Is Mr. Burke here?

Mr. BURKE. Yes.

Senator BARTLETT. Is yours brief likewise?

Mr. BURKE. Yes.

**STATEMENT OF JOSEPH M. RAULT, ATTORNEY, ON BEHALF OF
LYKES BROS. STEAMSHIP CO., INC.; MISSISSIPPI SHIPPING CO.,
INC.; AND GULF & SOUTH AMERICAN STEAMSHIP CO., INC.**

Mr. RAULT. My name is Joseph M. Rault. I am a lawyer who has practiced law in New Orleans principally in admiralty in the Federal courts for nearly 40 years.

Senator BARTLETT. Since you come from New Orleans, according to precedent, you will be expected to give half your statement in French. [Laughter.]

Mr. RAULT. I am here as the attorney for three steamship lines operating out of the gulf coast of the United States to all continents of the world except Australia. They are Lykes Bros. Steamship Co., Inc.; Mississippi Shipping Co., Inc.; and Gulf & South American Steamship Co., Inc.

Senator BARTLETT. Pardon me right there. Is the spelling of Mississippi Shipping Co. that is in the mimeographed statement the correct spelling of the company itself?

Mr. RAULT. That is correct spelling.

Senator BARTLETT. "Missississipp" is the correct spelling? [Laughter.]

Mr. RAULT. I beg your pardon. May I correct my testimony?

Senator BARTLETT. Yes.

Mr. RAULT. And I will say that that spelling in the statement is incorrect.

All three of these companies own and operate a total of approximately 72 dry-cargo vessels in the trade routes on which they serve.

These companies, like all American steamship companies, are deeply concerned with the cost problem, the competitive cost problem, with their foreign-flag competitors, and that is one of the reasons why they favor this legislation.

I am authorized by them to state that they favor, in basic principle, both of the bills that are before this committee and that are under consideration at the present time.

I am also here as a member of the special committee of the AMMI that studied these bills for some 2 or 3 years.

In my statement I have outlined the care with which these bills have been considered over the period of the last 3 years.

I may say that the first study of these bills was invoked by Mr. Morse, who was then Chairman of the Federal Maritime Board, Mr. Clarence Morse, who wrote the presidents of all the major steamship companies in the United States suggesting that the Brussels Convention of 1957 be given serious consideration with an open mind both from the viewpoint of shipowners and claimants.

That was done. The special committee, after study of some year and a half, unanimously recommended to the board of directors of the AMMI that the bills be approved in basic principle and that the convention be approved in basic principle in accordance with the general provisions of a draft prepared by it and also that the proportionate fault convention be approved as a companion measure; that it was in the interest in the opinion of our committee that both bills should be considered together.

The board of directors of the AMMI gave unanimous approval to the recommendations and directed this committee, which was composed mostly of lawyers, one insurance man, and one steamship man, to continue its study and to continue its work of endeavoring to implement its recommendations.

Now, my statement gives the reasons why in basic principle we favor these bills. What is said in my statement has been repeated by others and I therefore will not attempt verbally to repeat all of it except to make one or two general comments.

I want to say that I am not wedded to every phrase, sentence, or paragraph in either of these bills. I believe that the drafts of the bills, including the draft of S. 2313 prepared or presented by Mr. Colby, could stand some revision. I think they need clarifying amendments here and there.

I do think, since you may ask me the question, that the draft of S. 2313 prepared by Mr. Colby is an improvement over the draft that presently is before the committee.

I think that S. 2313 does exactly what the Congress intended. The Congress specifically by law, by the Harter Act and by the Carriage of Goods by Sea Act, has exempted the carrying vessel from liability for its own negligence. Unfortunately, through the decision of the *Chattahoochee* case many years ago, the Supreme Court permitted the cargo not only to collect in full from the noncarrying vessel but to recoup back one-half from the carrying vessel, thus doing indirectly what the cargo could not do directly.

I feel that this is flying in the face of the declaration of Congress, a declaration of Congress made first in 1899 in the Harter Act and then a declaration of Congress in 1936 when the Carriage of Goods by Sea Act was passed.

I have quoted pertinent provisions in my statement, and I will not repeat them here.

Something has been said of the difficulty of our courts in apportioning fault in various degrees, that they are not capable of doing that. I reject personally that suggestion very much.

We lawyers who have been practicing admiralty over the years are constantly doing that very thing in the form of compromises.

During my professional career, and I know during the professional

careers of all the lawyers sitting in this room, we have compromised cases the entire gamut from 10 to 90 percent.

Many of the Federal judges have been admiralty lawyers. Others have had admiralty experience, and, if they have not, the admiralty bar is quite capable of expressing to these judges what their ideas are about proportionate fault, and the problems are no more and no different basically than the problems constantly confronting our Federal judiciary in new laws that are constantly coming before them.

I feel both of these bills are fair. They are not intended to injure anyone. They are give-and-take measures. They promote international uniformity in the fields that they cover, and they protect claimants, shipowners, and cargo.

Thank you.

(The full text of Mr. Rault's prepared statement follows:)

STATEMENT OF JOSEPH M. RAULT ON S. 2314, LIMITATION OF SHIPOWNER'S
LIABILITY, AND S. 2313, PROPORTIONATE FAULT

My name is Joseph M. Rault. I am a lawyer who has practiced law in New Orleans, principally in the Federal courts in admiralty, for some 40 years. I am a member of the firm of Terriberry, Rault, Carroll, Martinez & Yancey.

I am here as attorney for Lykes Bros. Steamship Co., Inc., Mississippi Shipping Co., Inc., and Gulf & South American Steamship Co., Inc. These three Louisiana corporations own and operate some 72 American-flag dry-cargo vessels from the gulf coast of the United States in the foreign commerce of the United States, under the provisions of the Merchant Marine Act, 1936. The essential trade routes on which these vessels operate include every continent except Australia.

On these routes these American ocean carriers compete with the vessels of practically all the leading foreign maritime nations. They are, accordingly, deeply concerned with the problem of their costs in their competition with foreign-flag vessels.

I am also here as a member of the special committee of the American Merchant Marine Institute, which for more than 2 years has been studying S. 2314 and S. 2313 and the companion bills H.R. 7912 and H.R. 7911.

My clients and I are heartily in favor of the basic principles embodied in these two bills. They are long needed, remedial legislation in the interest of the American merchant marine, which needs every possible assist if it is to carry its fair share of the waterborne foreign commerce of the United States.

S. 2314 liberalizes the present U.S. limitation of liability law and brings it into conformity with the law of Great Britain and of other maritime nations. This bill and previous drafts have had serious study for several years. On April 7, 1959, Clarence G. Morse, then Maritime Administrator and Chairman of the then Federal Maritime Board, addressed a letter to the presidents of all of the major steamship companies in the United States, urging consideration of the 1957 Brussels Convention on limitation of liability and of implementing legislation. Mr. Morse is now president of the Pacific Far East Lines, an American-flag steamship company. In that letter Mr. Morse pointed out that a reasonable liberalization of our limitation act was badly needed. He wrote:

"I am sure you will agree that, even aside from humanitarian considerations, in order to be acceptable any recommendations for legislation must take into consideration the welfare of innocent victims of marine casualties as well as the interests of shipowners. The convention seems to serve both purposes."

It was obvious that the problem was industrywide and should receive the study of a committee of an organization that represented the majority of the shipping interests of the United States. Accordingly, the directors of the American Merchant Marine Institute authorized the appointment of a study committee consisting mostly of lawyers, but also having a steamship man and an insurance man in its membership. I am a member of that committee.

During the course of its study the committee concluded that it was desirable also to study the Brussels Convention of 1910 dealing with proportionate fault in collision and other casualties, since probably a majority of the disasters in

which a shipowner is called upon to take limitation of liability proceedings are collision cases.

The committee held conferences with Mr. Morse and with the then General Counsel of the Maritime Administration, E. Robert Seaver. It also conferred with attorneys for other interested Government agencies.

After a year and a half's consideration, the eight members of the committee on December 8, 1960, unanimously made the following recommendations to the board of directors of the AMMI:

"Your special committee, having given consideration to all aspects of the question of limitation of liability with particular reference to the 1957 Brussels Convention, now submits its recommendations as follows:

"1. The American Merchant Marine Institute should actively support legislation basically in the form of the May 12, 1960, draft prepared by this committee, and should also actively support whatever collateral or implementing ratification or legislation is deemed necessary or desirable to make such legislation effective.

"2. Parallel action could also be taken to ratify/implement the Collision Convention of 1910 which action your committee considers essential in order to accomplish the desired international uniformity.

"3. Your special committee should be continued and should be authorized to collaborate with representatives of the Maritime Administration, other Government departments and agencies, and with other interested groups. Your committee should be instructed to keep the institute informed and to recommend further action by the institute in this field."

The Board unanimously approved the recommendations and instructed the committee to endeavor to implement its work.

S. 2314 and S. 2313 are the work product of our committee, drafted in close collaboration with the Maritime Administration and the Department of Justice.

The measures were then considered by the limitation of liability committee of the Maritime Law Association. This committee in the fall of last year approved the limitation of liability bill by a vote of 10 to 3 and approved the proportionate fault bill by an identical vote.

On the basis of the majority and minority reports the measures came before the general meeting of the Maritime Law Association held in New York on November 3, 1961. After considerable discussion, the basic principles of both bills were approved by the following vote:

Limitation bill: For, 157; against, 111.

Collision bill: For, 166; against, 84.

Both S. 2314, the limitation bill, and S. 2313, the proportionate fault bill, have been fully analyzed and reviewed in statements and testimony by those who have preceded me and, accordingly, I will only summarize briefly the arguments in favor of each bill.

S. 2314—LIMITATION OF SHIPOWNER'S LIABILITY

(1) At present, when as a result of a marine casualty an oceangoing vessel is a total loss, or severely damaged, the only limitation fund available for property damage claimants is the value, if any, of the damaged vessel plus the pending freight on the voyage—generally an amount relatively insignificant compared to the sound value of the vessel. As to death and personal injury claimants, the amount available is the value of the ship in her damaged condition or \$60 per ton, whichever is the greater. In the case of the average freighter, the latter figure would amount to about one-half million dollars.

S. 2314 increases the amount exclusively available for death and injury claimants to \$140 per ton. If this is not sufficient to pay all such death and injury claims, an additional \$67 per ton is provided, to be prorated between death and injury claimants on one hand and property damage on the other. If the property damage is nonexistent or insignificant, the whole \$207 is available for death and injury claimants. Thus, in the case of the average freighter, \$1,120,000 would be exclusively available to cover death and personal injury claims, with an additional \$536,000 to supplement the original sum, pro rata.

Under the proposed legislation, limitation of liability, under proper circumstances, would be extended to charterers, operators, managers and underwriters of the vessel, as well as to the owners and bareboat charterers as provided under present law. The basic procedure of filing a petition for limitation of liability with the right of concourse is retained. Of course, if the vessel is only slightly damaged and if she is of large size, the fund made available by the proposed

legislation could be less than the amount to which the vessel can limit under present law. But after weighing the pros and cons, the pluses and minuses, I submit that this proposed legislation is beneficial and fair to vessel owners, to cargo, to property damage claimants, and particularly to death and personal injury claimants.

(2) Enactment of this bill will promote international uniformity in connection with limitation laws, a feature most desirable in maritime matters. It will largely eliminate "shopping" for favorable forums. It will bring our law into conformity with the law of Great Britain. It is my information that other maritime nations are awaiting action on our part and that if we adopt the principle of this bill, they will enact similar laws.

(3) A fund of a fixed sum per ton will eliminate the controversy with respect to the value of the ship as to which limitation is sought. These values vary not only from year to year but from country to country, and those of us who have had experience in limitation litigation know the sharp differences of opinion that exist among the appraisers and lawyers as to the value of a particular ship at a given time. Under S. 2314 the limitation fund would be a matter of a simple computation.

The law as to under what circumstances a shipowner may limit his liability, in my opinion, remains unchanged. Under existing law a shipowner in order to limit must establish his lack of "privity and knowledge." Under the proposed law the language is that the owner must not be guilty of "actual fault or privity," and must carry the burden of establishing this.

S. 2313—PROPORTIONATE FAULT IN COLLISION CASES

We believe this bill to be much fairer than the present law for the following reasons:

(1) Under present American law in a collision between two vessels if both are at fault, the damages are equally divided, irrespective of the fact that the fault of one may be small compared to the gross fault of the other. So unjust is this principle that in certain "hardship" cases the courts, in order to attempt to do some equity, have closed their eyes to the fault of a vessel guilty of only "slight fault" and imposed sole liability on the other vessel if she is guilty of "major fault." This rule, however, is not applied frequently and certainly not uniformly.

In his dissenting opinion in *National Bulk Carriers, Inc. v. United States of America*, 183 F. 2d 405-410, 1950 A.M.C. 1293 (2d circuit, 1950) the late Chief Judge Learned Hand wrote:

"I do not mean that I should divide the damages equally, if I were free to divide them proportionately to the relative fault of the vessels. An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as 5 to 1. And so they could be but for our *obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations* * * *. Nevertheless, so long as our antiquated doctrine prevails, I think we should apply it unflinchingly, and in the case at bar I would divide the damages." [Emphasis mine.]

It seems perfectly clear to me that each vessel should be called upon to pay in proportion to her fault contribution to the accident or disaster. This is the law in Great Britain and in most of the maritime nations of the world. The Brussels Convention of 1910 (the direct ancestor of this bill) had in 1955 been adhered to by 45 maritime nations, including countries in the British Commonwealth of nations, such as Canada, Australia, etc. Since 1955 other nations may have adhered to the Convention, but I do not have this data available.

The argument that any attempt to apportion fault will result in difficult and new perplexing problems for the courts is not valid. Those of us who have practiced admiralty over the years are well aware that in numerous collision and other tort cases we as lawyers work out settlements in percentages that run practically the entire gamut from 10 to 90 percent. Many judges have had admiralty experience as judges or lawyers; and if they have not had such experience, the admiralty bar is quite capable in brief and argument of explaining apportionment to them. The decisions of the British courts would furnish many precedents and guideposts.

(2) What I have said in discussing the fairness of the rule of proportionate fault as compared with the rigidity of the present law also makes it plain that international uniformity in collision law will be greatly advanced by the enactment of this bill.

(3) The bill will rectify the serious inequity that oppresses the owners and operators of American oceangoing cargo vessels. Under legislation in other countries that have adopted the rule of proportionate fault, the cargo being transported on such foreign vessels and damaged in a collision and the underwriters of that cargo cannot collect anything from the carrying vessel, and collect from the noncarrying vessel only in the proportion in which she is in fault.

In this country the public policy of the United States is declared by the Carriage of Goods by Sea Act (1936) and the Harter Act (1893). Under section 4(2) of COGSA:

"Neither the carrier nor the ship shall be responsible for loss or damage (to its cargo) arising or resulting from—(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Thus, if the carrying vessel is guilty of sole fault and her cargo is damaged or destroyed, her cargo and its underwriters collect nothing from the carrying vessel. (Of course, the cargo owner under his policy of insurance collects from his cargo underwriters.) If, however, both vessels involved are at fault, then the cargo and its underwriters can collect 100 percent of their damages from the noncarrying vessel and she in turn, under existing law, as declared by the decisions of our courts, can recoup one-half from the carrying vessel. Under these circumstances anomalously the cargo underwriters are permitted to do indirectly what by the express declaration of Congress they cannot do directly.

In Gilmore and Black's "The Law of Admiralty" (1947) page 153, this "anomaly" is recognized:

"Thus, the 'anomaly' arises that the carrying ship—immunized by section 4(2) (a) against claims of its cargo for damages attributable to negligent navigation—actually ends up paying half the damages so suffered by its cargo. And the anomaly is sharpened by the fact that, if it alone had been negligent, it would have paid nothing on account of its own cargo, for that cargo would have had nobody to sue."

It was clearly the intention of Congress to exempt a carrying vessel from all liability to her cargo arising from errors in navigation or management of the vessel. The inevitable corollary is that under the public policy declared by Congress the cargo on the carrying vessel should be entitled to recover only from the noncarrying vessel in the proportion that the noncarrying vessel is at fault, that vessel to have no claim over against the carrying vessel. This is one of the purposes of this bill. The ability of the cargo in a mutual fault case to impose half liability on the carrying vessel is an unjust and inequitable burden on the American merchant marine, a burden that has existed too long, and that in this present day when our merchant marine so badly needs help should be removed as promptly as possible.

Competition with foreign merchant marines and rising liability insurance rates on American vessels—for a kind of liability that is not imposed on the vessels of 45 other leading maritime nations—as well as simple justice and the recognition of the declared intention of Congress require the passage of this bill.

(4) S. 2313 completely protects death and personal injury claimants in that such claimants may recover in full from any one of the two or more vessels involved in a casualty even though the particular vessel as to which recovery is made is guilty only of fractional fault. The bill leaves it to the vessel that has assumed 100 percent of the death and injury claims to make recovery over from other vessels at fault if and when she can.

I am not wedded to every sentence or phase in these two bills. Doubtless editorial and clarifying changes can be made, and I am sure that the staff of this committee, with such assistance as can be given by the proponents of the bills, can do whatever redrafting may be necessary.

However, my clients and I are convinced that the basic principles of the bills are desirable, are fair, and are needed for the good of the American merchant marine. I urge that the bills be enacted into law.

Senator BARTLETT. If these bills are enacted, Mr. Rault, will it mean that a much greater share of litigation—

Mr. RAULT. I am sorry. I am not hearing you.

Senator BARTLETT. If these bills are enacted, is it possible that one consequence would be that a much greater part of the litigation would take place in foreign courts?

Mr. RAULT. That is a matter of personal appraisal. My answer would be no.

Senator BARTLETT. Thank you. Mr. Bourbon?

Mr. BOURBON. No questions.

Senator BARTLETT. Mr. Kenney?

Mr. KENNEY. One brief question. If I can presume on our brief conversation we had yesterday after the hearings, you made some comments on the phrase or the provision in S. 2314 which indicates that the judges in this country would not have to release bailment unless they determined that the limitation fund was actually available to the claimant. Would you comment?

Mr. RAULT. You mean on section 6?

Mr. KENNEY. Yes; I think that is it.

Mr. RAULT. My interpretation of section 6—which, by the way, in my opinion needs redrafting for clarification purposes—is that if security has been obtained before a limitation proceeding has been filed in some foreign country, security in New York or New Orleans or what will you, by seizure of the ship itself or of other assets of the vessel owner, and the petitioner filing his petition in some other country comes in and attempts to have that seizure released, then the American court must determine, if it can, that the petitioner, the shipowner, is entitled to limit his liability and that the fund as constituted in the foreign country is satisfactory and is “actually available” to pay the claimant who is before the American court.

Now, “actually available” in most instances could not be determined until the termination of the litigation, the petition for limitation in the foreign country, because it would include not merely the awarding of money in some such foreign currency but its conversion into American dollars at a proper rate of exchange, an open rate of exchange, a rate of exchange under which the claimant could convert his pesos, francs, or pounds, or whatever it might be, into American dollars at the world rate.

You could not determine whether that could be done until the limitation proceeding was finished.

Thus, I think that the U.S. judge would stay the proceedings and not release the security until he had a chance to look at what was done in the foreign proceeding and what the outcome was.

I may be deviating slightly from your question, sir, but it has been my observation that the courts of the United States have been most rigorous and impartial in enforcing the rights of foreigners as well as of American citizens, and I feel that if the American court felt that the American citizen in the limitation proceeding abroad was not getting a square deal he would give the widest possible interpretation to the words “actually available.”

Mr. KENNEY. Thank you.

Mr. BOURBON. Following that up, who would determine the basis on which the francs should be converted into U.S. money? Would it be at the U.S. Government rate or the world rate?

Mr. RAULT. I think it would be the world rate.

Now, I do not profess to be an expert in foreign exchange, but all I am trying to say is this: In the limitation proceeding abroad this American claimant is awarded a given number of thousands of pesos, we'll say. Now, what he wants is to get American dollars. There

may be a block rate of exchange in the country in which the proceeding was held. It may be that if he got them there he could not spend them anywhere but in that country, because I have been up against that in Turkey. Thus, the court would have to determine at the world rate.

In Turkey, for example, when I was there, the internal rate was 2.9 to the dollar and later 5 to the dollar, later 9 to the dollar, and the world rate was 17 to the dollar. So, if you could get them out of Turkey, you would lose half of the money if you could not get it at the world rate.

Mr. BOURBON. How did you make out?

Mr. RAULT. I made out all right.

Senator BARTLETT. I am very disillusioned by your testimony, Mr. Rault. From what had been said previously I was hopeful that a successful American claimant in a foreign court, for example, could come home with gold francs. [Laughter.]

Mr. RAULT. I think the committee had better not base its conclusion on that. I do not think they can.

Senator BARTLETT. I would hope and expect, Mr. Rault, that before the record is closed individual attorneys who are interested and organizations of attorneys who are interested would submit in writing comments as to the proposed substitute and further comments on proposals they might have for changes in existing language in these two bills.

Thank you very much for your testimony. Your prepared statement will be printed in full text at the conclusion of your verbal remarks.

Mr. RAULT. Thank you very much. May I thank the committee for being here and permitting me to express my views.

Senator BARTLETT. We appreciate your appearance.

Mr. Burke, please.

Mr. BURKE. I am Terence G. Burke. My statement is tied in with Mr. Greene's, and I should like permission to give my statement later.

Senator BARTLETT. You may have it.

Mr. Freedman, are you ready?

Mr. FREEDMAN. Yes, sir.

Senator BARTLETT. All right, Mr. Freedman.

STATEMENT OF ABRAHAM E. FREEDMAN, OF FREEDMAN, LANDY & LORRY, PHILADELPHIA, PA., ON BEHALF OF AFL-CIO MARITIME COMMITTEE

Mr. FREEDMAN. My name, sir, is Abraham E. Freedman, of the firm of Freedman, Landy & Lorry, in Philadelphia.

I appear here on behalf of the AFL-CIO Maritime Committee, which includes the National Maritime Union, the American Radio Association, the Industrial Union of Marine & Shipbuilding Workers, the United Steel Workers Marine Division.

I also appear here as the chairman of the admiralty section of the National Association of Claimants' Counsel of America.

I represent various other maritime unions, too, in whose behalf I speak now. I would include the International Longshoremen's Association in the latter category.

Senator BARTLETT. What was the last, please?

Mr. FREEDMAN. The International Longshoremen's Association.

Senator BARTLETT. Who is the head of that?

Mr. FREEDMAN. Captain Braddock; William B. Braddock.

I would ask Your Honor's permission to file my statement and simply summarize the remarks.

I would like, instead of just reading the paper, to cover the highlights of what I have to say and put the emphasis perhaps on the points which I think may be of most interest to you gentlemen.

If that is all right, I think I would like to proceed that way, sir.

Senator BARTLETT. That will be very agreeable, and the understanding is that your prepared statement will be printed.

Mr. FREEDMAN. Thank you, sir.

I also would appreciate the opportunity to respond to the various questions which have been propounded and are going to be answered by Mr. Haight and his committee, too. I think that would be a splendid way to handle it. I think the committee's way of handling that will certainly unearth all sides of the questions and give both parties opportunity to reach what questions are in the mind of the committee.

Senator BARTLETT. We want to hear anything we can about this, and I am confident our hope is going to be realized.

Mr. FREEDMAN. Thank you, sir.

Now, if I may, sir, I would like first to touch on the collision convention. That is S. 2313.

I had planned previously to start with S. 2314, the limitation statute, but in view of the suggested amendments that have been offered, that were offered yesterday, I think, it might be more appropriate if I start with that one.

Senator BARTLETT. Very well.

Mr. FREEDMAN. In principle, we think that the basic notion or the basic purpose of S. 2313 is excellent. That is that, where two ships are in collision, or even beyond that where there is any question of liability between two tort-feasors for any accident for that matter, that their liability should be dependent upon the degree of negligence which they were guilty of.

As it stands now, it is divided 50-50, whether one tort-feasor is guilty of 90-percent negligence and the other one only 10, or maybe even less than that.

Some excellent illustrations were given yesterday in the case of the *A. C. Dodge* and the *Mission San Francisco* where, in both of those cases, the one vessel was terribly, grossly negligent and the other just slightly negligent, but both were held guilty for 50 percent.

So, we think basically the purpose behind that legislation is good and it should be enacted into law.

However, the bill as it is presented now, before the suggested amendment yesterday, has a number of what we think are very bad provisions which go outside the purpose of the law itself.

If the enactment were limited solely to the division of damages as between the tort-feasors, there would be no objection from my side of the fence.

But there are, as I said, a number of provisions which I would like to touch on now.

First of all, it discusses or it practically wipes out all of the presumptions. Some of the presumptions arise out of the law, but they

are based on statutory provisions, and the presumptions based on statutory provisions are all wiped out. This would nullify many presumptions which are not only good provisions, good theories of law, but which came about by reason of many, many cases and in the development of the various theories of the law by the courts themselves.

For example, the Pennsylvania rule is one of the rules which came about in cases where one party is at a loss to discover what really happened on the other ship, and so on.

Wherever there is a violation of a statute, for example, the party who violates the statute has got to show not only that he could not have been the proximate cause or was not the proximate cause but could not have been the proximate cause of the accident. In other words, the presumption places on the violating party—that is, the party violating the statute—a grave burden of absolving himself from fault in a particular situation.

Now, this and other presumptions will be wiped out, and we think improperly so. This is something which has nothing to do with the basic purpose for which this statute provides, and we therefore think that this should come out of the proposal entirely.

Then, in its present form there is one other provision that I would like to comment on, and that is the 2-year statute of limitations which this act contains and which would require all claimants to bring their actions within 2 years.

Under the present law, under the Jones Act, for example, seamen have a right under the Jones Act to bring their actions within 3 years.

This would pretty much nullify that.

In addition to that, the rule in admiralty with respect to limitation of action is governed by what we call laches. That means unreasonable delay and prejudice resulting from the delay. And wherever that can be demonstrated, no matter what the period, then the party can be barred.

This is a rule which the courts themselves adopted in admiralty over the many years, and it has worked very, very well and equitably for all parties concerned.

Therefore, this 2-year statute of limitations which would now be imposed would be a great burden in many, many instances.

I think you gentlemen will appreciate that in many instances where suits are brought they may be brought against vessels which are not in port for a long time, or perhaps they may not come back for years. Foreign vessels, for example, tramp steamers, may not come back into the jurisdiction or may not even touch the country for many months and possibly years.

This particular statute would impose a great burden or, as a matter of fact, would nullify cause of action in many instances.

Of course, the statute has a provision in it which says the court upon showing of good cause can extend the time, but then here we get into the area of discretion, and, undoubtedly, because of the lack of proof in many instances many just claims will be defeated because of this particular provision.

We would therefore urge that this provision likewise be stricken out of the act as it now stands.

I trust at this point—

Senator BARTLETT. May I interrupt you?

Mr. FREEDMAN. Surely, sir.

Senator BARTLETT. How is this handled in the other principal maritime nations?

Mr. FREEDMAN. Maritime countries?

Senator BARTLETT. Yes.

Mr. FREEDMAN. In many of the other maritime countries, some of them have codes and some of them go back to the old continental codes. I think in some of the countries laches may be the rule. I think in most of them there are statutes of limitation. I am not prepared to say how long they extend.

Senator BARTLETT. But are you, in effect, saying that the language in S. 2314 goes beyond the provisions in the Brussels Convention?

Mr. FREEDMAN. S. 2313?

Senator BARTLETT. S. 2313, I mean.

Mr. FREEDMAN. No; I do not say it goes beyond, sir. As I recall the original Brussels convention, it may be that there is such a limitation in it, but I say that that would so modify the American law as to put claimants in a very undesirable position. We think it would be bad.

Senator BARTLETT. Go ahead.

Mr. FREEDMAN. Now, as I say, those are the principal objections that we would have—in other words, the wiping out of the presumptions and the 2-year statute of limitations which would change our existing law.

However, I examined the proposal which was submitted yesterday as a substitute and I find that this changes the whole complexion of the statute completely. We no longer, if we adopt this new proposal—

Senator BARTLETT. This is to say the proposal from Mr. Colby?

Mr. FREEDMAN. Yes, sir. We no longer have a collision statute.

If Your Honor looks at the very first sentence, if I may read it, it says:

To unify the law relating to apportionment of liability in cases of collision and other casualties. * * *

Here they included this language “and other casualties.”

Excuse me just a minute. Perhaps it would be well if I read it the way it is in the present proposal and then read it as they would change it.

Originally it read:

To unify apportionment of liability in cases of collision between vessels, and related casualties.

Now they would change that: “To unify”—and the words “the law relating to” are added—“apportionment of liability in cases of collision”—and then they add “and other casualties,” and then they strike out “between vessels, and related casualties” and add “and for other purposes”.

In other words, we no longer have a collision bill. We have a bill which relates to every type and every conceivable type of accident which may involve only one vessel. It may be a man falling down in the hold on a particular vessel. Or he may be injured on a vessel and the accident does not relate to more than one vessel at all.

Now, in that kind of a situation there would not be any necessity for apportionment of damages between two vessels or between two tortfeasors.

So, we look to the next section to see what is to be accomplished by that. In the very next paragraph we find the answer. If you gentlemen have the text before you, that is the proposal starting on line 7. There is added language which reads:

arising from death or injury of persons or from loss or damage to vessels or their cargoes or freights or to other property.

No—it is in the next section. Section 2 is what I have in mind, and here is where we find our answer. Starting on line 11 we find the word “casualty” inserted, and on line 13 we find the word “collision” taken out. Then on line 14 there is this significant language:

and no liability shall attach to any vessel, or its owners or operators, unless its fault has contributed to the casualty.

Now, in other words, assume an accident happens on board a ship. A man is injured by a defective cable or a jerky winch or falls down into the hold because something breaks under him, and it is due to a defect in the equipment itself which constitutes an unseaworthy condition. This man could recover under existing law under the warranty of seaworthiness. This would bar that.

Here he would have to show that, or, in other words, he can only recover if he could show negligence, in other words.

With this sort of way of wiping out the warranty of seaworthiness which was never intended to play a part in this collision situation at all, I would say this is an insidious bill if that is the intention of this paragraph.

Now, running all through this whole provision, this whole substitute, you find the term “collision” taken out completely and the word “casualty” substituted. And then there are other provisions where it specifically provides that where there are two or more vessels involved or two or more tortfeasors involved, then the liability shall be apportioned among them in respect to their relative or proportionate fault.

Now, as to that, we would not have any objection. In other words, we think that the original purpose of this act is good, very good, and it should be enacted, but to use this kind of an act or purpose to destroy the warranty of seaworthiness which grew up at admiralty law since time immemorial, a very wholesome, very necessary doctrine, is I think something that should be rejected summarily.

I do not think this committee should be used to enact, under the guise of a collision convention, a provision which would wipe out the warranty of seaworthiness in any case.

Senator BARTLETT. Just one moment, please.

Mr. Kenney has a question.

Mr. KENNEY. I just wondered if I could ask a question at this point relating to the meaning of the words in lines 5 and 6, chiefly on page 1 of this bill.

Does not the fact that the bill leads off by saying:

That where a collision occurs between vessels, the compensation due for damages—

and so forth—

shall be settled in accordance with the following provisions—

condition all the following sections of the bill so that the things in section 2, for instance, are deemed to refer to the situation arising from a collision between vessels?

MR. FREEDMAN. If the first paragraph or the first few lines remained as they were originally I would agree with you, sir.

MR. KENNEY. You mean the title? You are referring to the title now?

MR. FREEDMAN. Well, the title and—

MR. KENNEY. Lines 1, 2, and 3, of course, are the title of the bill—

MR. FREEDMAN. Yes, sir.

MR. KENNEY. Rather than the text of the statute itself.

MR. FREEDMAN. Yes, sir, but they are very descriptive, and I think the court would immediately go to the title to see what it is the act is intended to do.

MR. KENNEY. Do you think many of your fears would be allayed if the words "and other casualties" were stricken out of the title—

MR. FREEDMAN. No, sir.

MR. KENNEY. Or back to the original title even?

MR. FREEDMAN. I would say the words you read are susceptible of the interpretation you put on it, of course, sir, but not necessarily so. I think the court would have to look at all four corners of the act to determine intention.

As you go through this proposal, in section after section you find "collision" stricken out and "casualty" substituted. Then you find two different sets of circumstances which the act deals with, one where there is a single vessel in which fault shall be the only basis for recovery, and you wipe out the warranty of seaworthiness on that basis.

Then they go to the second provision which deals with the liability where there are two or more vessels.

Now, this very clearly spells out that the act contemplates all casualties, not just casualties between vessels, not just collisions. And I think if they are talking about collisions I think they ought to say it—I think we ought to say it—so there will be no doubt.

I think if we accept this, particularly in view of the fact that the original bill had in it "collision" and it was stricken out and that the original bill said nothing at all about fault as to any particular vessel, which would wipe out the warranty of seaworthiness, the courts then would have to conclude that it was the intention of this Congress to wipe out the warranty of seaworthiness, to assume that it did not intend to apply only to collision cases.

MR. BOURBON. You think, therefore, this substitute bill would get away from the original intent of the convention?

MR. FREEDMAN. Exactly, sir—as far away as the two poles are apart, sir.

Because now the big thing in this new bill when I read it, the big thing now that would come out of this bill, would be the abolition of the warranty of seaworthiness, which by far transcends in importance anything else in this bill.

Senator BARTLETT. Proceed, if you please, Mr. Freedman.

Mr. FREEDMAN. I think that pretty substantially covers my remarks.

I have set forth a good deal more comment in my paper, but unless there are questions I do not think it is necessary for me to cover any more about the collision bill.

Senator BARTLETT. If your views might be summarized, I interpret them to be these:

(a) S. 2313 as presented to the committee, as introduced, is satisfactory to you with the exception of those points noted;

(b) The substitute language proposed by Mr. Colby is completely unsatisfactory.

Mr. FREEDMAN. Yes, sir; most unsatisfactory, sir.

I would like before I conclude on the collision bill to say that I am in full accord with my friends who also oppose the bill where they refer to cargo damage. While I am primarily here interested in personal injuries involving passengers and involving seamen and long-shoremen, and so on, so far as we are concerned we think that any rule which would adopt a provision whereby liability shall be severally and not jointly, for example, as you have in this bill now where the cargo interests are involved—where personal injury is involved it is true that the liability is joint and several. That means that if you get a judgment you can recover the full judgment from any one of them. But where cargo is involved you can only recover the proportionate share against any particular tort-feasor that he is guilty of.

I think that is bad law. I think it is a bad premise to start with. I think the principle on which it is based is bad, and I think that once we put it into the law it is going to creep further into every other phase of the law, once this Congress puts the stamp of approval on it.

Therefore, I think that because it is a bad principle to start with it should not be adopted, even though it does not affect personal injury, as I say.

I think probably I can look at that objectively from the outside. I would say that that is a very bad principle for this Congress to approve.

Getting to S. 2314, the limitation bill—

Senator BARTLETT. Just one moment; Mr. Kenney has a question.

Mr. KENNEY. Before you leave S. 2313, I wondered if you could comment very briefly specifically with respect to the status of statutory presumptions in the revised S. 2313. Do you see any improvement in that language?

Mr. FREEDMAN. Frankly, I am confused; I read it. I intended talking about it, and then I did not know exactly how I should deal with it because I just do not know what their language does.

It is susceptible of a number of different interpretations. As you can see on line 16, they have wiped out—

There shall be no statutory presumptions of fault in regard to liability for collision.

Now, one interpretation that I would put on it would be that they wiped it out because they do not want this bill to be a collision bill, because it is no longer a collision bill.

In other respects they may accomplish the same objective. I do not know. But my guess is, and I am strictly speculating here now, that they took this out because if they left it in it would indicate that this is a collision bill, and that is something else. If they take it out, then it is really personal injury bill directed against personal injuries.

Senator BARTLETT. Thank you.

Mr. FREEDMAN. Before getting into the limitation bill, S. 2314, I think it might be helpful if we briefly reviewed the background of this situation so that we can see why they presented the bill and how it came about, and I think we can probably interpret it a whole lot better.

The limitation-of-liability laws are nothing new. They have been on the books for a long time—in America since 1851. But the limitation laws around the world have been most, most inadequate, unconscionably inadequate, and, as a matter of fact, while not quite that bad in the United States, they have been pretty bad, as I think you gentlemen will conclude after you have heard the entire record.

As a result of the recognition of the unconscionable, inequitable aspects of the limitation statutes around the world, the interested parties in England and on the Continent—and I speak now from history which was developed in the course of the proceedings in the various committee meetings in Maritime Law Association and elsewhere and which was developed even in the various conventions in Brussels and part of that in Madrid.

The British, for example, recognized that unless they did something to liberalize this very bad situation the Parliament in England and various other legislatures in different countries were going to do something themselves either to wipe it out or to liberalize it themselves.

So they held these conventions for the purpose of liberalizing the existing law.

They came up with figures—taking the Brussels Convention—increasing the amount of the so-called fund.

On the Continent they have what they call the tonnage fund, a fund based on tonnage, while in America we have always had the fund based on value of the vessel.

If I may break that down a little bit, regardless of the value of the vessel under the tonnage theory the fund is constituted by a specific, arbitrary figure. Here it would be \$207 per ton. And that would be it. That is the maximum. It is not only the minimum but the maximum. That is the maximum which a shipowner would be liable for under any circumstances in connection with a casualty or catastrophe at sea or any place else for that matter.

The American system provides that where a vessel suffers a casualty or where there is an accident and the shipowner sees fit to surrender his vessel in lieu of his liability, then it is the value of the ship which prevails.

Of course, before the Sirovich amendment, if a ship was in a casualty with another vessel and went to the bottom of the ocean, it would be worth nothing, and, therefore, there would be nothing in the limitation fund.

However, a research of the cases will show that by far the vast number of cases that you will find on the books involve not these casualties at sea where you have a collision and one ship goes to the bottom but you find that the limitation statutes have been taken advantage of by the smaller, mostly the inland craft, where there is not any casualty at sea really.

You find it mostly in the harbors, and you find it even where there is no collision involved at all.

You find it where a man may even fall on the deck or fall down in the hold on a particular barge, for example, and they plead the limitation of liability statutes because the injured man's recovery in most instances will exceed the value of the small craft which they are operating.

They may have a craft which is worth \$5,000. These barges which are operating in and around the harbor may be worth \$5,000, maybe \$10,000, maybe \$15,000.

Or if you take a small tugboat, it can be worth maybe \$150,000 to \$200,000. It may be in collision or a man may, as I said, suffer an injury, or five or six men may suffer injuries so that the total liability of the tug, we will say, could be half a million dollars if there are several deaths or very serious injuries—with lights off.

In these cases you find these tugboats, these barges, and all of these other craft coming in and pleading limitation on liability.

Now, the original purpose of the act was never intended to reach this kind of situation.

Originally the statutes were adopted in order to encourage the investment of private capital in the merchant marine. That was because in the old days there was no corporate device and there was no insurance or at least no adequate insurance, and if a vessel put to sea and it came into collision or suffered casualty, then the shipowner could be wiped out completely, and his whole fleet could be wiped out on the basis of the damages that he might have to pay in connection with a single casualty.

As a result, the limitation statutes were passed because of the absence of the present-day protections that he can get in order to protect a shipowner whose ship was involved so that his damages would be limited to the value of the vessel which was involved in the disaster, if he could prove limitation or if he could sustain limitation.

That was, as I said, for the purpose of encouraging private investment of capital.

If they did not pass these statutes, Congress was afraid the private people would be loath to put money into a venture which might wipe them out completely.

When you consider that purpose, you see that the local situations do not even fit into the picture, and yet somehow they got into the picture and have remained in it.

As a matter of fact, they even got a windfall from the Sirovich amendment.

After the *Morro Castle* disaster, Congress adopted the Sirovich amendment which provided where personal injuries and death are

involved then the limitation fund—that is, the shipowner cannot plead limitation without putting up a fund which would be the equivalent of \$60 per gross ton of his vessel.

So that after that we had a minimum of \$60 per gross ton. But if you could show that the vessel was itself after the accident more valuable than what the limitation fund would consist of, then you would take the higher.

Thus, if you have a tugboat, for example, or a small craft, which would be worth say \$150,000 or \$250,000 or more but it was only, say, 100 tons or 50 tons, you could readily see that the limitation value even at \$207 a ton would be far less than what the actual value of the fund would be if based on a value theory rather than a tonnage theory.

I think I may digress at this point from the history and simply point out it is undoubtedly for this reason that the shipowners find themselves in a very favorable position—that is, favorable position in a sense that what they get under this new law, proposed law, would cost them less than what it is costing under the original law—that is, the existing law.

Even with a \$60 minimum, and since in most cases the limitation fund has got to include the real value of the vessel and since in most cases the vessels are very little damaged proportionately or not damaged at all in cases such as I have adverted to before, the limitation fund by far exceeds anything that you could get out of this \$207 fund, this new proposal.

Getting back to history, as a result of the unconscionable state of the law, they had this convention in Brussels, and the United States was, of course, invited to attend along with the other maritime countries.

At that time the United States called on the Maritime Law Association to appoint a committee to assist in the drafting of what is known as a position paper, the position the United States should take.

A committee was appointed by the Maritime Law Association to study it, and it included a representative of the Maritime Administration, the very able General Counsel from the Maritime Administration.

Then certain theories were evolved, and a subcommittee was appointed to draft a position paper for the State Department.

As a result of all those discussions and long and arduous studies under the chairmanship of an extremely able man, Stanley Wright, who is in the committee room here now, a new plan was worked out for a position paper which would involve simply an increase of the limitation fund, leaving the remainder of the American law intact, since everyone concluded that, all things being equal, if the limitation fund could be increased that would take care of the biggest objection and satisfy everybody.

The position paper which the Maritime Law Association submitted to the State Department and the position which the State Department took ultimately at the Brussels Convention was pretty much exactly that. The State Department, its representatives, and the representatives of the Maritime Law Association who accompanied

them, did not agree with the group at the Brussels Convention and rejected it summarily.

After the Brussels Convention was adopted, it then came back to the United States. A proposal was then made by the General Counsel for the Maritime Administration in what he called the interest of worldwide uniformity, of which I will have something more to say in a few moments, that America should adopt this same provision which was adopted at the Brussels Convention—the same provisions.

It was referred to quite a substantial committee in the Maritime Law Association which studied it, and studied it not just for a week or a month or a couple of months but studied it comprehensively over a substantial period of time.

The committee wanted to see the original notes of the Brussels Convention. This is how carefully they did it.

The committee met very frequently and even appointed a sub-committee to study all of the intimate details of the convention, looking at it from the standpoint of all the interests of the American community.

As a matter of fact, the committee, I think, probably for the first time, represented not only the shipowners—the Maritime Law Association consists primarily, I would say, of shipowners. The biggest, the greatest majority of the members of the Maritime Law Association consists of shipowners and their representatives, but you also have cargo people and you also have some personal injury people involved, too.

The association—and it is to the credit of the Maritime Law Association that they did it this way—elected a committee which included a representative from the personal injury group, including for passengers and all other seamen and so on and longshoremen, and a representative of the cargo interests and also a representative of the hull underwriters, and so on. There were about 12 men on the committee.

This committee made, as I say, most comprehensive study which extended over, I would say, close to a year, perhaps a little bit more, and then came up with a report which I would think would be very helpful to this committee.

With your permission I would like to offer it so it would be printed in the record.

Senator BARTLETT. How long is it, Mr. Freedman?

Mr. FREEDMAN. It is 42—it is not too long, sir, not much longer than some of the papers that have been delivered here.

Senator BARTLETT. Let me see it.

Mr. FREEDMAN. You will notice that report is really four reports.

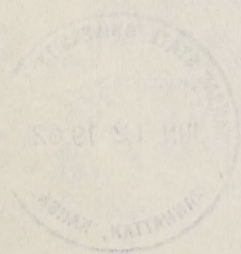
Senator BARTLETT. This will be included in the record.

Mr. FREEDMAN. Thank you.

(The document referred to follows:)



Handwritten text, mostly illegible due to fading and bleed-through. The text appears to be organized into several paragraphs, with some lines starting with capital letters. The handwriting is cursive and somewhat slanted.



DOCUMENT No. 418
July, 1958

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

**REPORT OF THE COMMITTEE TO CONSIDER
PROPOSALS RELATING TO THE LIMITATION
OF LIABILITY OF SHIPOWNERS**

Your Committee, after extensive study of the proposed Brussels Convention, concludes that as a whole it is not acceptable to or in the best interests of American shipowners, passengers, maritime labor or shippers. Accordingly, we are unable to recommend that the United States adhere to the proposed Convention, although certain provisions are or may be beneficial to various branches of the shipping industry.

Changed conditions may make it reasonable to revise the Sirovich amendment providing, among other things, for increase of the sum provided for injury and death claimants. If legislation to that end is considered, we think it should further prevent direct action against the hull or P & I underwriters as in the *Cushing* case, which could defeat limitation by indirection.

Your Committee has considered the following documents and submits them as appendices:

- (1) A comparative analysis of present United States law, English law and the Convention proposals;
- (2) A statement on the part of one member of the Committee expressing opposition to the Convention;
- (3) A statement representing the views of those representing personal injury claimants and death claimants, and
- (4) A dissenting opinion put forward by a member of the Committee (this is in the form of a speech made at a symposium on April 17, 1958).

Your Committee recommends that it be continued with power to act on behalf of the Association in connection with any new proposals or proposed legislation.

Respectfully,

STANLEY R. WRIGHT,
Chairman.

May 2, 1958.

APPENDIX 1

COMPARISON OF U. S. LAW, ENGLISH LAW, AND PROVISIONS OF BRUSSELS 1957 CONVENTION WITH RESPECT TO LIMITATION OF THE LIABILITY OF SHIPOWNERS

<i>U. S. Law</i>	<i>English Law</i>	<i>Convention</i>
Liability incurred "without the privity or knowledge" of the owner. In the case of seagoing vessels, in respect of death and personal injury claims, privity or knowledge of master at beginning of voyage is attributed to owner.	CONDITION OF LIMITATION Occurring without "actual fault or privity" of the owner.	Occurrence without "actual fault or privity" Art. I(1).
On the owner.	BURDEN OF PROOF OF CONDITION On the owner.	To be determined by <i>lex fori</i>. In many countries burden will be on claimants. Serious question where it would be placed in this country under language of Art. I(1) if adopted here.
All claims for personal injuries, loss of life or damage to property on the ship or elsewhere arising out of the operation of the ship. Does not include negligent acts of stevedores or shore-side personnel. Includes liability for removal of wreck under local statutes. No other liability exists.	NATURE OF CLAIMS SUBJECT TO LIMITATION Same. Does not include statutory liability to remove wreck.	Same, but adds claims due to negligence of persons not on board ship in navigation or management of ship or in loading, carriage or discharge of cargo or passengers, for whose negligence shipowner is responsible, e.g., stevedores, dock handlers, etc. Art. I(a) (b). Includes statutory liability to remove wreck but with leave to exclude this liability by reservation Art. I(c).

U. S. Law

All claims arising in course of the voyage even though more than one occasion of liability.

Value of the ship at the end of the voyage plus gross freight and passage money earned on voyage.

With respect to "seagoing vessels" only, share of personal injury and death claims must be increased up to \$60 per gross ton without deduction of engine space, if required for full payment.

NOTE: The U. S. system is based on the conception that a shipowner sending his ship on a voyage, considered to be a venture of unusual hazard, having performed his personal duties in providing a well found ship, should not be required to risk more than his investment in the venture. This system stems from prior European systems permitting abandonment some of which still exist at least in modified form. These systems have at least a rational foundation.

English Law

CLAIMS INCLUDED

Claims arising on each distinct occasion.

AMOUNT OF LIMITATION

In case of loss of life or personal injury, either alone or with property damage, £15 (\$42) per registered ton plus engine space. In respect of property claims, whether also personal claims or not, £8 (\$22.40) per ton. Loss of life and personal injury claims paid primarily out of £7 and share in £8 after exhausting £7.

NOTE: The English system of limitation is unrelated to the earlier continental systems of abandonment. See Marsden on Collisions, 10th Ed., p. 172 et seq. Prior to 1862, the system was based on sound value plus freight, with a minimum of £15 for loss of life and personal injury. By the Act of 1862 the present limits were established as a rough average value of all ships, to save the difficulty of individual valuations. With the passage of time all relationship to value has disappeared and the figures have become arbitrary and ridiculously low. They were never based on any theory other than the abridgement of the "natural right of justice" * * * for political reasons". Dr. Lushington in *The Amalia* (Brown & Lush, 151).

Convention

Claims arising on each distinct occasion, Art. 2.

Same as English except amounts increased to 3100 fcs. (£74-\$207.20) and 1000 fcs. (£24-\$67.20) respectively. Art. 3.

NOTE: Like the present English figures the Convention figures have no relation to value, are purely arbitrary, and justified only by "political" considerations. They would place a great hardship on the owners of low value ships and discriminate unreasonably in favor of the owners of high value ships. Being arbitrary, with the passage of time they would require reconsideration as do the present English figures, and for that matter the Sirovich floor figure.

U. S. Law

PERSONS OTHER THAN OWNER ENTITLED TO LIMITATION

Charterer who "mans and victuals"
i.e., bareboat charterer.

*English Law**Convention*

Charterers "by demise" i.e., bareboat
charterers.

- (a) "Charterer, manager and operator of ship",
 (b) "Master, members of crew," * * *
 "even if * * * actual fault or privity",
 (c) "Other servants of the owner, charterer, manager or operator".
 Total limits of liability of owner and all such other persons not to exceed limits in Art. 3.

Art. 6.
 (No definition or limitation on interpretation of meaning (a) or (c). Probably room for widely differing interpretations in different jurisdictions and confusion in administration.)

JURISDICTION WHERE LIMITATION MAY BE INVOKED AND FUND ESTABLISHED

Court of U. S.

Court of Great Britain.

Court of any Adherent Country regardless of nationality of ship or claimants or place where liability is incurred.

ADEQUACY OF SECURITY REQUIRED OF SHIPOWNER INVOKING LIMITATION

Surrender of vessel and earned freight,
or furnishing of Surety Company bond
for value thereof.

Adequate.

No provision whatever. Left to discretion of court where fund is constituted. Might be totally inadequate and unacceptable by U. S. or English standards. Since this is clearly a matter of procedure and to be determined under the *lex fori*, it would appear that it would be improper for a court of any other adherent country to question the adequacy of security accepted by the court having jurisdiction. Such consideration would in any event be impractical.

U. S. Law

AVAILABILITY OF FUND TO FOREIGN CLAIMANTS (EXCHANGE CONTROL)

No controls with respect to nationals of friendly nations, nor likely to be.

English Law

No practical interference, nor likely to be.

Convention

Quite possible in some countries regulations might interfere from time to time with transfer of recoveries by foreign claimants out of country or allow transfer only at a great sacrifice. This is sought to be guarded against by provision of Art. 2(4) "if the limitation fund is actually available for the benefit of the claimant", and a similar provision in Art. 5(1). But there is no definition of "availability" and who can say a recovery is "unavailable" because it can only be expended in a foreign country or what restrictions on transfer resulting in loss constitute unavailability. Moreover, conditions change. What is available at one stage of the proceedings may not be available at another.

EFFECT OF DEPOSIT OF SECURITY ON CLAIMS OR SUITS

Court will issue injunction preventing further prosecution of claims or suits except in limitation proceeding. Injunction will have effect only on persons within the jurisdiction.

Substantially the same.

Probably the court would issue injunction against all persons having claims forbidding prosecution of claims or suits except in the limitation proceeding.

Query: Would not the courts of any adherent (contracting) country be bound to give effect to such injunction and forbid the prosecution of suits within their jurisdiction.

Is there not a mutual obligation created to recognize and give effect to all orders, injunctions, decrees of limitation, etc. of a country in which limitation of liability is properly invoked under the Convention.

If so prosecution of claims in any other adherent country will be prevented. It seems the courts of at least some countries would so rule and there is opportunity for wide divergence in practice.

*U. S. Law**English Law**Convention*

EFFECT OF DEPOSIT OF SECURITY IN A LIMITATION PROCEEDING ON SECURITY OBTAINED IN AN ACTION ELSEWHERE

None.

None.

If shipowner or other entitled to limitation gives security:

- (a) at port where accident occurs,
- (b) next port of call after an accident at sea; or
- (c) at port of disembarkation or discharge in case of personal claims or damage to cargo.

(NOTE: Under (c) there may be several such ports with consequent confusion.)

No other security in any other jurisdiction may be required and any security obtained *must* be released.

(NOTE: Advantage to shipowner of this provision may make it imperative to constitute fund in some strange and impractical jurisdictions and agreements on more practical jurisdictions could not be readily made.)

If security is filed by the shipowner in any jurisdiction other than (a), (b) or (c), courts of any other country "may" order release of ship or any other security.

(NOTE: Discretionary authority may lead to wide variance in practice—and in any event it will be impractical, if not improper, for a court to which application is made for release to question the adequacy of security accepted by court of another adherent country.)

*U. S. Law**English Law*

RIGHT OF CLAIMANT TO SUE IN ANOTHER JURISDICTION

No interference except on persons subject to jurisdiction of the court.

No interference except on persons subject to the jurisdiction of the court.

Convention

If the injunction of the court having jurisdiction of the limitation proceeding is recognized by Courts of other contracting nations (see above) suit by claimants elsewhere will be prevented. The serious possibility that claimant will be prevented even from bringing suit in another jurisdiction to establish their claims is emphasized by the opposition to, and defeat of, Mr. Houston's clarifying amendment to make the right of claimants to sue elsewhere to establish their claims clear.

See Minutes of Brussels Conference pp. 711, 721, 731-40, 741 and 743.

Moreover, the provisions for release of security obtained elsewhere would severely handicap and in some cases prevent the prosecution of suits elsewhere; and

Further, while there is provision for holding the limitation proceeding open for a shipowner to prove a claim based on a possible foreign liability not yet adjudicated Art. 3(4), there is no similar provision for the benefit of claimants.

Neither is there any provision which would require the court entertaining the limitation proceeding to recognize a foreign judgment as establishing a claim either as to liability or amount.

Consequently even if a claimant obtained a judgment in another jurisdiction if he desired any benefit from the limitation fund, he might have to prove his claim a second time in the court entertaining the limitation proceeding, subject to the law of that jurisdiction both as to liability and amount—and he might be too late.

PROSPECTIVE EFFECT OF RELEASE OF SECURITY UNDER ARTICLE 5 ON SUITS IN OTHER JURISDICTIONS

In the United States

1. Suits in rem against the offending vessel will lapse, since the prosecution of such suits, which are truly in rem, is contingent on the vessel, or security as a substitute therefor, being within the jurisdiction.
2. Suits in personam, where the security released is the basis of jurisdiction would probably also lapse.
3. Where jurisdiction is not contingent on the security released:

(1) Collection of any judgment would be contingent on the shipowner having other assets within the jurisdiction on which execution could be levied at the time the judgment is entered, but

(2) There is doubt that collection of judgment would be permitted in any event in view of provisions of Art. 2(4) reading:

"After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant".

Under this provision it might well be held that a claimant obtaining a judgment in an independent suit, *ipso facto* becomes a "claimant against the fund" within the meaning of this prohibition. If it is not so held and the claimant is allowed to collect his judgment by independent action it is clear that he will become a preferred creditor not subject to limitation which would be contrary to the whole scheme of the Convention. Consequently, it seems highly probable that in any adherent country he would be held subject to this prohibition and referred to the fund for his further relief, with the possibility that he might have to prove his claim a second time, subject to different law, and might even be too late to share in that fund. The provisions of Art. 3(4) protecting the shipowner in case of payment of a foreign liability are not inconsistent with this view since they may and would apply to liability incurred in a nonadherent state, and may also apply in the event a court of some adherent state might take a view at variance with the above. There is clearly a possibility of wide variance in interpretation and decision in the courts of adherent states.

In Great Britain

All that is said above with respect to U. S. Law is applicable under English Law except that in Great Britain suits in rem are not true suits in rem as in the United States and arrest of even the offending vessel is permitted only as a means of obtaining security, a situation comparable to the situation in the United States described in paragraph 2, above.

U. S. Law

PROVISIONS WITH RESPECT TO PAYMENT BY SHIPOWNER OF LIABILITY SUBJECT TO LIMITATION RESULTING FROM SUIT IN ANOTHER COUNTRY

None—but if the question ever arose in U. S. our courts might well adopt rule of English courts. Question has never arisen.

English Law

Convention

Convention adopts English Rule but with express limitation that claim may be proved only "to the extent that the claimant would have had a right of recovery against him under the national

English courts allow shipowner to prove claim against own fund based on liability incurred in a foreign court and receive pro rata credit against his statutory limitation. The *Crathie* (1897) P. 178;

*U. S. Law**English Law*

The *Coaster* (1921) 38 T. L. R. 511; but see *The Kronprinz Olav* (1921) P. 52.

Convention

law of the State where the fund has been constituted." Art. 3(3). (N.B. It seems a shipowner liable for 100% of property damage in a both to blame collision case, as in *U. S.*, could prove against his fund established, for instance, in Great Britain, for only 50% of his foreign payment.)

EFFECT IN COLLISION CASES

System has worked satisfactorily. Usually in collision cases litigated here both owners are subject to suit here and both file limitation proceedings in our courts. For instance, *Andrea Doria*-Stockholm.

The filing of a claim by a foreign owner in a limitation proceeding instituted here by the other owner subjects the foreign owner to the jurisdiction for all purposes.

The Duke of York-Haiti Victory, 1957 A. M. C. 1151, 354 U. S. 120.

In many cases proceedings instituted here voluntarily or by agreement.

The provisions of the Convention will make it desirable if not mandatory for each shipowner to constitute his fund in the jurisdiction most favorable to his interests, and agreements on jurisdiction cannot readily be made without loss of some of Convention's benefits. They will probably lead in many cases to filing by shipowners in divergent jurisdictions with consequent conflicts of decision and jurisdiction. In view of the many considerations noted above the resulting confusion and uncertainty would be intolerable for all concerned.

COMMENT

My personal conclusion based on the foregoing is that the proposed Convention, so far from obtaining international uniformity of law and practice relating to shipowners limitation of liability, would produce exactly the opposite. There would result intolerable confusion and conflict of interpretation and decision, and in administration. Litigation over doubtful points would continue for many years and it is probable that no substantial degree of uniformity would ever result.

The provisions of the Convention are disadvantageous and entirely unacceptable to claimants and shipowners alike.

Dated, New York, N. Y.,
April 24, 1958.

LEONARD J. MATTESON

APPENDIX 2

THE PROPOSED BRUSSELS CONVENTION— BACKGROUND AND COMMENTARY

Background

(1)

On June 14, 1957 at a meeting of the Executive Committee of the Maritime Law Association the Committee was advised that invitations had been issued by the Belgian Government to various maritime countries to send delegates to an international diplomatic conference to be held at Brussels, Belgium, September 30 to October 10, 1957, to consider, among other things, the Madrid proposed draft relating to limitation of shipowners' liability. On July 3, 1957 the President of the Maritime Law Association appointed a committee to consider this subject.

On August 9, 1957 the State Department issued a Position Paper declaring in substance that the representatives of the United States should oppose the adoption of the Madrid Convention because (1) the vessel owner was permitted to choose the limitation forum, (2) claimants should not have the burden of proof of actual fault or privity, (3) the fixing of an arbitrary sum per ton discriminated in favor of fine ships against less valuable ships, (4) the proposal to exclude from the benefits of limitation any non-contracting state or owners domiciled in non-contracting states or flying the flag of a non-contracting state was unnecessary and would breed chaos; and (5) the benefits of limitation should be confined to persons whose interest relates primarily to the vessel as representatives of the owner.

Upon the return of the American delegation various press releases were issued. One by Mr. Clarence G. Morse dated October 28, 1957 expressed the view that the Brussels Convention as adopted might be found to be acceptable to the United States. Two salient beneficial features mentioned by Mr. Morse were (1) an amendment which would "leave with the shipowner" the burden of proof that he was free of fault or privity; and (2) one which would "permit claimants to sue in the courts of their own country rather than be compelled to bring their action in the jurisdiction where the shipowner chose to file a proceeding to limit his liability". Mr. Morse also praised

the adoption of a limitation fund based upon \$207 per gross ton, saying that this was "a reasonable liberalization over our present rules, mainly because the amount of the fund is fixed at a certain, uniform, figure even though the vessel may be lost or badly damaged as a result of the casualty".

(2)

At this point it became obvious that unless the shipping industry as a whole were given the opportunity to study the proceedings of the Convention and the result accomplished, legislation might be quickly introduced which would have a very serious impact on present American law. Accordingly, representations were made to the Maritime Administrator that it was desirable to allow the interests concerned an opportunity to study the record and make recommendations before any decision to sign the Convention or before the introduction of any legislation implementing the Convention (e.g., letter of American Merchant Marine Institute, Inc. to Hon. Clarence G. Morse, November 15, 1957). On November 22, 1957 Mr. Morse pointed out that his Board had no control over the timing of the introduction of legislation. It is to be emphasized that at this point *no one* had an authoritative copy of the record at Brussels. There was available only a stenographic transcript partly in French which even now (February 10, 1958) has not been officially translated.

On December 3, 1957 the State Department assured the American Merchant Marine Institute that it had no intention of deciding on a course regarding the Convention before the draft record had been made available and the interested government departments and private associations had a reasonable time within which to study the record.

(3)

The official report of the American delegation dated November 18, 1957 recapitulates the history of the Convention. Concerning limitation of shipowners' liability draft Convention, the report states that the Brussels Convention is more in line with the present United States statutes than the Madrid Draft Convention, mentioning the fact that under Brussels the shipowner would still have the burden of proof, that claimants could sue in the courts of their own country, and that a tonnage (rather than a value) formula would be "a reasonable liberalization over our present rules". On December 10, 1957 the President of the Maritime Law Association wrote the

Federal Maritime Administrator assuring him that the Association and its committee would proceed with utmost diligence in the consideration of the Convention and would cooperate fully, particularly asking that if the Maritime Administration either drafted or knew of any legislation, it should give it to the Association for study.

On December 9, 1957 Mr. Mann, speaking for the State Department in a letter to the Chairman of the Maritime Law Association's Special Committee, pointed out the desirability of having an all English version of the transcript of proceedings at Brussels. He said that some time would be required to make an official translation.

On December 26, 1957 counsel to the Maritime Administration stated in a letter to the President of the Maritime Law Association that the State Department had requested the Maritime Administration to draft legislation and that it would be made available to the Association for possible "refinement".

(4)

Thus the position in January, 1958 was that although the final transcript of the Brussels proceedings was not yet available, the Maritime Administration at the request of the State Department was drafting implementing legislation. On January 17, 1958 the President of the Maritime Law Association was advised by our State Department that the British Government had instructed its Ambassador at Brussels to sign the Convention although the British Government then had no translation of the "provisional transcript of proceedings of the Conference" ("Although such a translation would have been extremely useful, those who have studied the Convention in the United Kingdom have had to do the best they could without one.") It was also said that the British Government had published or will publish a "white paper" on the subject.

Enough has been said to show that at present the position is this: (1) Nobody in this country has yet seen an official record of the proceedings at Brussels. (2) Although assured by the State Department that opportunity would be given to interested parties to study any proposed legislation, legislation is now being prepared by the Maritime Administration at the request of the State Department. (3) The Maritime Administration has not agreed to furnish draft legislation to interested parties for study but has merely said that after such legislation has been prepared it will entertain any sugges-

tions looking toward "refinement" and "placing it in final form for introduction", if it is decided to propose such legislation.

The writer of this memorandum has reviewed those portions of the unofficial transcript of the Brussels Convention which deal with the proposed Convention on limitation of liability. It is no exaggeration to say that many delegates convincingly demonstrated throughout the proceedings complete confusion as to how their proposals would work out in practice. For example, many of the Scandinavian delegates were preoccupied with the possible interrelationship of bankruptcy and proceedings to limit liability—a possibility which no American lawyer would consider of any importance at all. But even putting to one side the confused nature of the debates, it is quite impossible to agree with our British cousins that a transcript is in effect unnecessary. (* "Although such a translation would have been extremely useful, those who have studied the Convention in the United Kingdom have had to do the best they could without one.") It is simply impossible to do *anything* without a transcript because there was so much tinkering with language that the proposed Brussels Convention is just not understandable unless one reads the relevant portions of the debate and discussion in conjunction with the text. It is against not only the text itself but the record of the proceedings that the following commentary is made. (References to the resumé of the transcript are furnished.)

Commentary on the Draft Convention

(5)

The Impact of the Convention

The press releases and the report of the American delegation at Brussels clearly indicate that the conclusion of our delegation was that the Brussels Draft Convention is superior to the Madrid Convention, that the former will bring about uniformity, that salutary amendments were adopted in respect of burden of proof and the right of claimants to sue if they wished in a forum other than the limitation forum, and that the net tonnage formula was a liberalization of existing rules, i.e. that the American value formula was properly discarded in favor of the British tonnage formula. Parenthetically, it is of course true that under the American formula provision *is* made for personal injury and death claimants on a tonnage basis in

the event that the value of the vessel after the disaster does not reach \$60. per ton. This amendment of pre-existing law was clearly based upon ethical and moral considerations. At Brussels, however, the British delegation argued that the tonnage formula has in fact been at least partially adopted by American law, the implication being that it was only an inconsequential further step entirely to discard the value formula.

Much has been made of the fact that twenty-nine out of thirty-one nations "signed" the Convention, the implication being that everybody but the two who did not sign (The United States of America and U. S. S. R.) were completely out of step with modern trends. It is submitted that neither one of these suggestions is valid.

The fact is that the Convention produces drastic (not inconsequential) changes in American law, changes which will be noted in greater detail at a later point. The implication that the United States stands alone or almost alone against the Brussels Convention is completely unfounded. The states which signed did so *ad referendum*. And it was clearly pointed out in the minutes of the Convention that signatures were not equivalent to an adherence. Moreover, when the Convention as a whole was put to vote, nine states abstained (Argentina, Austria, Denmark, United States, Greece, India, Japan, Russia and Venezuela). Further, the twenty-one states which voted in the affirmative included many states which have no substantial merchant fleet or none at all (e.g. Vatican City, Switzerland, etc.).

It is not the purpose of this commentary to provide an exhaustive analysis of all the changes in American law which would be brought about by adherence to the Convention or by implementing legislation following the principles of the Convention. It is, however, proper to note a few.

The Tonnage Formula Versus the Value Formula

It was indeed properly urged by the American delegates at the beginning of the Convention that the value-concept in limitation is fundamental in the American system. As has been pointed out by Mr. Leonard Matteson⁽¹⁾ "this system is defensible to a degree on the theory that the shipowner, having fully performed his duties of

(1) Wherever the statements or opinions of Mr. Matteson are quoted or referred to it is to be clearly understood that he speaks as a member of the bar and not in his capacity as President of the Maritime Law Association.

providing a seaworthy ship and competent crew, should not be required to risk more than the value of his venture when the ship puts to sea". Any humanitarian arguments against the American system are fully met by the Sirovich amendments or, if necessary, by increasing the amount necessary per ton under that amendment in order to entitle the shipowner to limitation. And of course the humanitarian argument is inadmissible so far as property damage is concerned, as the leading delegate from the United Kingdom in effect admitted during the debates.

The fact is that the value formula, whether the value be taken at the beginning or the end of the voyage, is a mere corollary to the basic idea and purpose of limitation of liability, namely, that public policy favors this type of protection for shipowners against ruin, and that absent such protection, no one will be attracted to invest in any shipping venture whether his own, or that of others. After the enactment in the United Kingdom of the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104), Dr. Lushington said in *The Amalia* (Brown & Lush 151):

"The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons."

In a speech made to the Association of Average Adjusters on May 8, 1953, Mr. Dawson Miller quoted this passage, and took occasion again and again to point out that not humanitarian considerations but public policy gave rise to the system of limited liability. This sounds like a very harsh statement. And indeed, after the *Vestris* and the *Morro Castle* the Congress of the United States did, in the Sirovich amendment, ameliorate some of the harshest results of limitation of liability. But to ameliorate it is one thing; to destroy it is another.

It is conceded on all sides that if the basic figure of \$207. per ton be the measure of limitation, there is pronounced discrimination against low cost ships—the workhorses of the sea. Their value is nothing like \$207. per ton and to exact any such figure is to reverse the public policy that originally protected the owners of such ships under American law. As has been said, our American delegation at Brussels at the outset stated very clearly through its spokesman that the value formula was an inherent and necessary feature of the

American system. How it came about that after the Convention the same delegation arrived at the conclusion that the adoption of a limitation fund based upon \$207. per gross ton was "a reasonable liberalization over our present rules" it is impossible to say. The fact is that our present rules were simply liberalized out of existence once the value principle was wholly abandoned. It is well to emphasize at this point again that nobody opposes a reasonable revision of the tonnage formula of the Sirovich amendment. It is also well to reiterate here that no humanitarian principles can properly be invoked in favor of property.

(6)

Uniformity

Uniformity was the watchword at Brussels for all the delegations, including our own. Does the end product justify the conclusion that uniformity was achieved or even approached?

By "uniformity" persons who employ that word must be talking about a system which will not vary, no matter where the right to limit is invoked. They must mean that no matter what forum is used the shipowner and the claimants will have the same equal protection.

Of course on the procedural side, the Brussels Convention did not even attempt to achieve uniformity—such matters were left to the *lex fori*. Therefore, subject to a possibility which will be mentioned later, a shipowner who attempts to limit in the United States will have the burden of proof, whereas if he attempts to limit in any one of several other jurisdictions the burden will be upon the claimants to establish "actual fault or privity". It can, of course, be said that it would be foolhardy to expect uniformity in "procedural" matters. But it can also be pointed out that after long debate the courts of the United States have come to treat burden of proof as something more important than a minor matter of procedure. Since the location of the burden of proof may seriously affect the outcome of the litigation, our federal courts in diversity cases treat the burden of proof as substantive, and so it really is. ⁽²⁾

But if we turn to matters which are demonstrably substantive in any view, we find that in practice the Convention will surely pro-

(2) See *The Norwalk Victory*, 336 U. S. 386, 397 where similar reasoning is suggested in a limitation proceeding.

duce not uniformity, but chaos. This can be very simply shown. The Convention practically invites claimants to sue in a jurisdiction of their own selection. But it goes on to provide (Article 3 [3]) that where an owner has been cast in judgment at the suit of a claimant in a forum other than the limitation forum and has paid, he is subrogated to the claimant's right against the fund, "but only to the extent that the claimant whose claim he has paid would have a right of recovery against him under the national law of the state where the fund has been constituted". Under these circumstances the following results are bound to ensue.

Where both ships are to blame in a collision the cargo interest will, if they can, naturally sue in the United States, or some other state which does not adhere to the 1910 Convention. Under American law the cargo in a both-to-blame decision will collect 100% of its loss. The shipowner will be compelled to pay—he will have no choice. If we then assume that the limitation fund is in the United Kingdom, the owner in an equal fault case and under (Article 3 [3]) already quoted, will receive his proportion in the United Kingdom not of 100% of the paid judgment, but of 50% of it.

Passengers who sue the carrier here for injuries sustained on a voyage to or from the United States will recover unhampered by the ticket negligence exemption, which is invalid in this country. The carrier, having paid the judgment, will then repair to the limitation forum. He will be told there that since under British law the ticket exemption is valid, he can share to no greater extent than the limitation.

(7)

Extension of the Right of Limitation to Persons Other than Owners

Although neither at Brussels nor Madrid were there any arguments advanced for extending the right of limitation to persons other than owners (or demise charterers) the Brussels Draft (Art. 1, Sec. 1b) extends the right of limitation to cover "neglect or fault of any persons on board the ship for whose act, neglect or fault the owner is responsible or any person not on board the ship for whose act, neglect or fault the owner is responsible". There follows a proviso that the act, neglect or fault must be one "which occurs in the navigation or the management of the ship or in the loading, carriage, or discharge of its cargo or in the embarkation, carriage, or disembarka-

tion of its passengers". It seems clear beyond any doubt that a proviso of this sort will lead to endless debate and confusion. Indeed, the discussion at Brussels proves that it was quite unclear to many delegates what was meant by the words which have been quoted. This is understandable, for there is no uniformity among the nations on questions of vicarious responsibility. In the United States (and probably in Canada) further complications will arise. If the "act" of the shore-side person occurs in the territorial jurisdiction of a state serious constitutional arguments might be advanced against any treaty or statute which limited recovery in such a situation. Perhaps other "contracting states" also have a federal system involving dual sovereignty. Other troublesome questions will no doubt arise, e.g., the application of the Article to stevedores' liability. None of these and similar questions were thought through.

(8)

Burden of Proof

Article 1, Sec. 1 of the Brussels Convention will inevitably give great difficulty to the courts of the United States. It provides in relevant part that an owner may limit "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". It is of course familiar learning that the United States courts have, in suits to limit liability, placed upon the shipowner the burden of proving a negative i.e. absence of privity or knowledge (46 U. S. C. A. 183; *Coryell v. Phipps* (The Seminole), 1943, 317 U. S. 406, 409 1943 A. M. C. 18, 21). But in various other statutes bearing upon shipowners' liability the Congress has made use of other statutory tabs (i.e. "design or neglect", "due diligence", and "actual fault or privity". Unfortunately the statutory label "actual fault or privity", which is identical in language with Brussel's Art. 1, Sec. 1, is to be found in one of our statutes (46 U. S. C. A. 1304). And in dealing with that statute our courts have held that the burden of proof is on the *claimant*—undoubtedly because the judges, whether they say so or not, are influenced by the connotation which most lawyers would give to words like "actual fault". Under the Brussels Convention questions of burden of proof have to be decided according to the *lex fori* (Article 1, Sec. 6). Only one prediction is safe concerning what the future holds: there is sure to be a considerable amount of confusion and conflicting decisions not only among the

contracting states but perhaps even within the courts of the United States themselves, should this country adhere to the Brussels Convention or implement it by legislation.

(9)

Choice of Forum

Without seeming to oversimplify the matter, it is yet true that after the Madrid Convention there was considerable feeling that it was wrong to permit shipowners to choose a distant and obscure forum for a limitation suit and that the convenience of claimants ought to be taken into consideration. This led to an effort at Brussels to provide a choice of *fori* all of which seemed to have some normal and natural relationship to the place where the disaster happened. All of the Madrid provisions relating to forum were stricken out and Article 5 substituted. Sections 1 and 2 of that Article should be read together. Section 2 provides for three choices: (a) the port "where" the accident occurred, (b) the first port of call after the accident if it did not occur in a port, and (c) the port of disembarkation or discharge if the claim is a personal claim or one for cargo damage. If the owner chooses any of the ports listed in Section 2, he "shall" be given credit for any security that he has furnished elsewhere in the jurisdiction of a contracting state. If he does *not* choose one of the *fori* listed in Section 2, but instead petitions for limitation within the jurisdiction of some other contracting state, under Section 1 of Article 5 the release of the ship or other property or of the security theretofore given or exacted is permissive. And it depends upon whether "satisfactory" bail or other security has been furnished and also whether that bail or other security is "actually available" for the benefit of the claimant. One shudders to think about the changes that various courts throughout the world will inevitably ring on the meaning of "satisfactory" and "actually available". Again one thing is sure, i.e. that neither the shipowner nor the claimants will have the slightest notion in advance what the result of these collateral inquiries will be.

(10)

Concursus

In earlier papers and memoranda comment was made by the writer, and by others, to the effect that the Brussels Convention if adopted will destroy what is left of the benefits of *conkursus*. And recently, speaking for four members of the court (*Maryland Casualty Co. v. Cushing*, 1954, 347 U. S. 409, 415, 417, 1954 A. M. C. 837, 842, 843), Mr. Justice Frankfurter said of the American limitation statute:

"The heart of this system is a *conkursus* of all claims to insure the prompt and economical disposition of controversies in which there are a multitude of claimants."

In answer to the criticism mentioned above the proponents of the Brussels Convention indignantly deny that an international concourse had ever been or could be possible, and that even within continental United States grave inroads have been made by the courts upon this very salutary phase of the limitation procedure. This is really no answer to the criticism made of the action taken at Brussels.

While it never was possible to *enforce* an international concourse, and while even on the domestic scene it was and is under some circumstances permissible for claimants to proceed in courts other than the limitation forum, it is nevertheless true, as the State Department itself has pointed out, that the limitation system in the United States really worked. Perhaps foreign claimants were not ever *compelled* to file in the limitation forum, but in point of fact they did. For example, in the *Andrea Doria-Stockholm* limitation there are many foreign claimants, including the Vatican, who filed claims, and those claims were speedily processed and wound up in the limitation forum with very few exceptions. Of course personal injury and death claimants would rather try their cases to a jury instead of to a judge. With an eye on the extremely large awards made in recent years by juries, they are quite willing to have a multiplicity of suits and to engage the time of the courts to try and retry the same basic issues. Perhaps this is not true in the United Kingdom. Perhaps ship-owners and underwriters there do not regard as very serious the danger of excessive awards, and in any event the terrific expense of a protracted series of law suits. But shipping interests in the

United States as well as underwriters are keenly aware of these dangers.

Nobody claims that the Brussels Convention will destroy an existing right of compulsory international concurrence. But it does destroy concurrence, or the possibility of it, in the sense that it actually *invites* claimants to bring suits wherever they please. This invitation is instinct in numerous sections (e.g. Article 3, Secs. 3, 4; Article 5, Sec. 1, *et passim*). Indeed almost the first press release issued upon the return of the American delegation took credit for amendments permitting claimants to sue in the forum of their choice.

It is very difficult to see how any judge, assuming that the United States should adhere to the Convention, could fail to hold that all of the existing provisions for concurrence had gone down the drain with the limitation statute, now to be superseded by the Brussels Convention. Under the federal system in the United States and in Canada, surely claimants would have standing to sue in any one of the United States where jurisdiction could be obtained. This is obviously the meaning and the result of the scheme set up at Brussels—that even domestic concurrence is destroyed.

(11)

The Reservations

Perhaps one final word should be said about the reservations. At Brussels a French-British proposal was made that all possible reservations should be listed, and that no others could be made by nations subsequently adhering or enacting reservations (Resumé, p. 56). Therefore, if the United States adheres to the Convention it must swallow it whole except on two points: (1) the wreck liability section may be modified, and (2) the limitation statute may not be applicable to ships of a burden less than 300 tons.

(12)

Conclusion

No discussion of this subject would be complete without at least passing mention of the very obvious fact, proved at Madrid and Brussels, that there never can be uniformity in the matter of limitation of liability *unless the maritime states are willing to bring into conformity the provisions of substantive maritime law and thus in a*

measure yield a portion of their sovereignty. The Rules of the Road, the Hague Rules and the York-Antwerp Rules point the way to the achievement of uniformity if it is desirable. Thus we in the United States still adhere to the outmoded British half damage rule. This single disparity in substantive rules leads to a multitude of diverse results of the most important character. Our own judges have criticized many times the failure of the United States to adhere to the 1910 Convention, and have used vigorous language on the subject. Our damage formula has been called an "archaic rule" (*Tank Barge Hygrade v. Tug Catco and Tanker Hayes*, 1957, 250 F. 2d 485, 488). The use of the rule has been called a "sop to Cerberus" (*National Bulk Carriers v. United States*, 2 Cir. 1950, 183 F. 2d 405, *cert. den.* 340 U. S. 865. "Vestigial relic" is another term of opprobrium used by the judges (*Oriental Trading & Transportation Co. v. Gulf Oil Corp.*, 2 Cir. 1949, 173 F. 2d 108, *cert. den.* 337 U. S. 919).

It seems to the writer completely ludicrous on the one hand to talk about adhering to the Brussels Convention which injects new confusion into the law of limitation, concededly discriminates against ships not in the luxury class and accomplishes nothing except possibly increased insurance costs, and on the other hand to refuse to take one long step in the direction of substantive uniformity, namely, adherence to the 1910 Convention, despite repeated strictures of experienced and able judges on the failure of the United States even to conform to a rule of damage which is now almost in worldwide use. (See *Tank Barge Hygrade, Inc.*, *supra*, Maris, C. J., p. 486.)

Respectfully submitted,

HAROLD M. KENNEDY.

March 12, 1958.

APPENDIX 3

MEMORANDUM ANALYSIS OF 1957 BRUSSELS CONVENTION ON LIMITATION OF SHIPOWNERS' LIABILITY FROM THE STANDPOINT OF THE PERSONAL INJURY AND DEATH CLAIMANTS

This memorandum is intended to supplement the memorandum heretofore submitted by the Hon. Harold M. Kennedy and the comparison of United States and English law and the provisions of the 1957 Brussels Convention as submitted by the President of the Maritime Law Association, Leonard J. Matteson. Much of what has been said in those able and comprehensive papers applies with equal force to the personal injury and death claimants.

The expressed purpose of the 1957 Brussels Convention was to "liberalize" and make uniform the laws of the various maritime nations governing limitation of shipowners' liability. From the standpoint of the personal injury and death claimants, the convention would accomplish exactly the opposite.

The sole liberalization which the Brussels Convention is stated to afford to personal injury and death claimants is found in Article 3, which provides for a fund computed at \$207.00 per "net" ton of the vessel, of which sum \$67.00 per net ton is to be shared by the property claims, along with the personal injury and death claims. It is contended that this figure is an advantage over the present legislation which provides for a fund computed at \$60.00 per gross ton. This analogy between the existing legislation and the proposed convention is misleading because under the existing legislation (46 U. S. C. A. 183b) the claimants have the option to take a fund computed at \$60.00 a gross ton *or* the value of the vessel immediately after the disaster, whichever is higher.

Thus, under the existing legislation in the United States the increase per tonnage as provided in Article 3 is not a liberalization of our law, but on the contrary will actually result in a reduction of the limitation fund in the vast majority of cases.

Other provisions of the convention tend to restrict and curtail the existing rights of personal injury and death claimants. Article 1, Sections 1 and 3, would extend the right to limit in all cases except where there is actual fault or privity. This would permit limitation

of liability in cases involving breach of the warranty of seaworthiness and breach of a regulation, which heretofore have been held to be defenses against a petition to limit liability. These provisions of the convention would very substantially prejudice the existing rights of personal injury and death claimants.

Article 6 of the proposed convention would give the right to limit not only to owners and charterers, as provided in existing American law, but also to all other forms of representatives, charterers, managers, operators, vessel officers and other crew members and even to shore personnel. This provision would extend the benefits of the limitation of liability statutes to an entirely new group of entities and individuals never contemplated or intended by the United States statutes, and would restrict the existing rights of personal injury and death claimants, aside from the fact that the constitutionality of these provisions would be seriously questioned.

The limitation statutes originally were designed to encourage the investment of *private* capital in the merchant marine. The Government does not fit into that category and should not seek or obtain immunity from liability at the expense of personal injury or death claimants. The provisions of the Brussels Convention would extend the benefits of limitation proceedings to an entirely new group of entities and individuals who have no investment in the vessels but who operate vessels as agents or who perform some services in connection with the vessel's business. We are unable to justify any extension of limitation benefits to the Government on the basis of the original express purpose of the statute, even though such benefits already exist in American legislation. To now extend these benefits to agents of the Government who make no investment merely gives to these agents and others involved an undeserved and unjustified windfall.

There are other provisions in the proposed convention which further cut down existing rights of personal injury and death claimants.

The 1957 Brussels Convention should be unequivocally rejected.

Respectfully submitted,

ABRAHAM E. FREEDMAN.

May 1, 1958.

APPENDIX 4

**COMMENTS REGARDING THE 1957 BRUSSELS
CONVENTION ON LIMITATION OF SHIPOWNERS'
LIABILITY**

E. ROBERT SEAVER,* APRIL, 1958.

When the draft Convention on Limitation of Shipowner's Liability was under consideration at the 1957 Conference on Maritime Law at Brussels, the one thread of unanimous opinion that was woven through the debates was the belief that there should be world-wide uniformity in the rules with respect to limitation of shipowners' liability. The subject is international in scope, and the rights and liabilities of the participants in foreign commerce should not depend upon the location of the court that decides a particular case. Shopping about by litigants for the most advantageous court would be discouraged by uniformity. If uniformity was to be achieved, at Brussels, the divergent views on some of the issues had to be molded into final provisions that would be acceptable to the maximum number of nations. In other words, it would be impossible to draft a convention that would accord exactly with the historical treatment of the subject and the preconceived desires of each of thirty-two countries represented. The Convention that was hammered out through cooperative negotiation represents a significant achievement in international negotiations, and we believe that it should, and hope that it will prove to be, acceptable to the United States.

During the course of the debates the United States delegation was successful in urging amendments to the Madrid draft which brought the Convention more in line with present United States statutes. One of these amendments eliminated the provision that the burden would be on the claimant to prove the fault and privity of the owner. The owner, and not the claimant, is able to prove what steps were taken by the owner to make the vessel seaworthy, etc.; and the burden on this issue should remain with him. The Madrid draft would have permitted the shipowner to choose the country in which the limitation proceeding would be filed and require all claimants to file their claims in that country. Such a provision would have

* This paper represents the personal views of the author as well as those of Mr. Clarence G. Morse and Mr. John Mann, who were three of the four man delegation to the conference.

been entirely unworkable and certainly inequitable, in that it would often cast an impossible burden on the claimant to file a claim in a distant country with whose procedure he would not be familiar. In accordance with its instructions, the delegation successfully urged the elimination of this provision and, at the same time, the adoption of provisions that will protect the shipowner, to the greatest extent possible, from a multiplicity of claims.

The need for liberalization has been recognized for some time.

One has merely to read the debates of the meeting of the Comité Maritime at Madrid in 1955 to see that the shipowners of many countries are aware that unless the limitation formulas of the various countries are liberalized they will be eliminated entirely. It was pointed out that some aspects of the social and economic support for the doctrine of limitation of liability no longer exist. *For example, today, almost all ships are owned by corporations whose liability is limited under corporation laws.* Also, today the vessels are not sent out across uncharted seas without communication from the owners for months and years, but instead are managed much more directly and continuously from the home office. At the same time, it is still necessary to afford a degree of protection to shipowners in order to encourage investment in maritime ventures.

In recent years we have seen growing criticism of the present limitation formula from various sources. The bill introduced in the present Congress by Senator Morse would require that the proceeds of hull and liability insurance be included in the limitation fund.

The Morse bill has the support of powerful interests, and there is reason to believe we would have seen more activity in Congress by this time, in regard to the Morse bill, except that the interested groups have been waiting to see what action would be taken with respect to the Brussels Convention. The effect of the Morse bill would be to practically eliminate limitation of liability. The movement in this direction is so strong that it can only be stopped by a proposal that will effect a reasonable liberalization of our existing limitation formulas. We feel that the Brussels Convention will be deemed to provide an acceptable alternative; and, having behind it the strength and advantages of an international convention, would be more likely than any other proposal to stem the tide of the movement that would, in effect, abolish limitation.

The Courts have also found fault with the present formula.

Justice Black, joined by three other Justices of the Supreme Court in the minority opinion in *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, expressed this concern over the Limitation Act:

"Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons. If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost."

The authors of the most recent text on the Law of Admiralty, Gilmore and Black, state on page 677 in their impressive new book:

"* * * the Limitation Act is one of those statutes which Congress tinkers with every generation or two, adding a patch here and mending a leak there, but never rebuilding from the ground up. The Limitation Act has been due for a general overhaul for the past seventy-five years; seventy-five years from now that statement will be still true, except that the overhaul will then be one hundred and fifty years overdue."

These same authors express the view that there is some reason to believe "that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute * * * will be narrowly and not expansively construed. Such an attitude reflects * * * a recognition of the fact that the limitation act * * * shows increasing signs of economic obsolescence."

This prophetic statement proved to be of almost startling accuracy, because just last November the Court of Appeals for the Ninth Circuit in *The Pennsylvania*, 1957 A. M. C. 2277, refused to permit limitation in circumstances where, in the opinion of many, the owner would have been allowed to limit in times past. The vessel had developed a serious crack on the previous voyage, but had been repaired and given a clean bill of health by the Coast Guard and the American Bureau of Shipping. Nevertheless, on her next voyage

she broke in half, at a different point, with loss of the cargo and crew. The court held that the cause of this casualty was within the privity and knowledge of the owner and broke limitation.

In *The Pennsylvania* case the court was faced with the alternative of casting the burden of the entire loss on the cargo claimants, if it allowed limitation, or to allow full recovery if limitation was broken.

The personal claims had been settled.

It seems quite possible that the Court of Appeals might have been motivated, at least in part, by a feeling that the result of our Limitation Act is unduly harsh. Under the formula of the Brussels Convention, the court would not have been faced with denying any recovery to the claimants if it allowed the owner to limit. Instead, the owner would have been required to constitute a limitation fund amounting to approximately \$67 per ton, there being no personal injury and death claimants involved, providing about half a million dollars to be prorated among about \$2 million of cargo claims, according to the figures carried in the press.

It seems clear that the court would have been more favorably disposed to limiting liability if it could have done so and still allowed a modicum of recovery to the claimants. The case is before the Court on rehearing; but in any event the present opinion is a manifestation of the judicial erosion that can be expected unless a limitation formula is adopted that meets the sense of justice, and if Congress doesn't wholly eliminate the doctrine. The result will follow, *a fortiori*, in cases where extensive personal injury and death claims are involved.

Acting in accordance with the Position Paper that constituted its instructions, the United States delegation urged at Brussels that limitation be based on vessel rather than tonnage. There was some feeling in this country that a limitation fund based on a percentage—say one third—of the ship's value before the casualty would be fair to all concerned.

However, the value formula encountered overwhelming opposition. The supporters of the tonnage rule argued with great persuasiveness that, (1) the tonnage rule would eliminate great fluctuations in the amount of recovery due to the inevitable rise and fall

of ship values; and, (2) it would eliminate from every case the difficult factual issue as to the value of the vessel, often in damaged condition, and the disparity of decisions between the courts of different countries on this issue. They pointed out that this would facilitate the amicable settlement of cases. The argument that our own Congress adopted the tonnage rule the last time it took up the subject, in enacting the Sirovich amendment, was also quite telling.

In appraising the merits of the Convention, the interests of passengers, crew, cargo interests and other potential claimants must be borne in mind, as well as the interests of the shipowners. However, the Convention provides distinct advantages for the shipowner, in many instances. The owner's total liability would actually be less under the Convention than under our statute in any case where the value of his vessel exceeds \$207. per "Convention" ton, and does not sustain substantial damages as a result of the casualty.

The value of any postwar built vessel exceeds this figure. For example, an undamaged Mariner would provide a fund of about \$6,000,000., under our statutes, in times of normal values, while her fund under the Convention would be a maximum of \$1,721,000. It is true that a Liberty would be responsible for a fund of about \$1,381,000. under the Convention, and something between half a million and a million under our statute, depending on the state of the vessel market at the time of the incident. However, the 18 year old America would be responsible for about twice as large a figure under our statute as she would be under the Convention. It is significant, in this connection, that all of our new dry cargo vessels cost from \$10,000,000. upward to build.

An advantage that will inure to all American interests under the Convention stems from the fact that it will bring about a much greater *increase* in the limitation fund in foreign courts than it will in our courts. For example, the present British maximum is about \$43. per vessel ton. Thus, an American shipowner who, for reasons of necessity, sues in England and recovers against a British owner, will be about five times better off under the terms of the Convention if the owner is allowed to limit.

The Convention, which leaves procedural matters to the local law of each country, provides an opportunity to protect the shipowner, while working no unfairness to claimants, in procedural matters.

The concurrence of claims within our borders, so essential to the proper working of the limitation doctrine, and which has been weakened in some of our court decisions, could be given new strength in the implementing legislation. The Convention adopts the salutary principle of protecting the owner against multiple recoveries, in so far as this can be done without requiring claimants to go to a distant country to file their claims in the court selected by the shipowner. This is accomplished by allowing the owner to assert against his own limitation fund the amounts he has been required to pay, abroad, as the result of the casualty. This device was discussed in the *Kronprinz Olav*. (British Ct. of App., 1920), 1921 P. 53, 125 L. I. 684.

The Convention would also protect the owner against multiple arrest of the vessel. It also extends the protection of limitation to masters of vessels, so that claimants can not circumscribe limitation by recovering against a master where the owner is under moral or other extra-legal duty to pay the bill.

We feel that the Convention recognizes and properly satisfies the need, for humanitarian reasons, for a liberalized limitation formula. The drop in the value of the dollar is, standing alone, ample justification. At the same time, the Convention extends fair protection to the shipowner. Some P and I underwriters have expressed the view that it will not even raise insurance rates. It presents an opportunity to shipowners to hold the line at an equitable limitation figure. It may well be the last opportunity.

Mr. FREEDMAN. Now, you will observe that—

Senator BARTLETT. Mr. Freedman—

Mr. FREEDMAN. Yes, sir?

Senator BARTLETT. You have been talking 35 minutes, and, respectfully, I want to suggest it would not have taken you longer than that to read your prepared statement.

Since we do have a very definite limitation of time here, I only want to say if other witnesses are going to be heard you cannot be on the stand too much longer.

Mr. FREEDMAN. Well, I will quit whenever you gentlemen think I ought to.

Senator BARTLETT. Well, the whole point is this: You had a statement of 15 pages prepared, and you said at the outset you were going to summarize your remarks. I just leave it up to you.

Mr. FREEDMAN. Well, unfortunately, sir, one of the things which complicate it and took the time was the proposal which was advanced yesterday by the Department of Justice.

Senator BARTLETT. And we are very delighted to have your views on that. They were helpful. But it all boils down to a time limitation.

Mr. FREEDMAN. I certainly do not want to take advantage of the situation. I do not want to impose on you gentlemen. You have been kind enough to permit me to come up and testify, and if you think I have exceeded the time I will be glad—

Senator BARTLETT. It is no imposition at all, but I did want to point out it is now 10:30.

Mr. FREEDMAN. Well, if you would like me to—

Senator BARTLETT. Why do you not continue for another 10 minutes?

Mr. FREEDMAN. Well, I will do my best. It is a broad subject.

I think this: That the proponents of the bill have already had substantial amounts of time, and we have got to cover not only our views on the bill but in covering it—and this is one of the reasons why I wanted to summarize—we have to answer some of the questions which they pose.

I know you gentlemen want to get all sides of the fence, all sides of the picture.

However, as I say, I do not want to impose. But since there are only two representatives here who are going to oppose the bill, I would think that they should be given somewhat more latitude than the other witnesses since in the overall picture the proponents of the bill have had a considerable amount of time and they have just got to be answered.

Now, you cannot answer it in a paper. We put down what we thought were the good features and the bad features of the bill, but as these things come up, new questions come up, and, as I say, I certainly do not want to take advantage of the situation now that I am here on the stand.

Senator BARTLETT. You are not taking advantage of it at all. I just simply wanted to call your attention to the fact that time will run out.

Mr. FREEDMAN. All right, sir. I will try to cut it down, and I will try to keep within the 10 minutes that you have allotted to me, sir.

Senator BARTLETT. All right.

Mr. FREEDMAN. Thank you.

Very briefly, as I have stated in my paper, the courts have now recognized—and I have also set out quotations from probably the leading textbook in admiralty, Gilmore and Black, which covers the situation, the whole admiralty situation, exceptionally well.

They point out that the limitation of liability statutes are now obsolete since the corporate device came into being and since there is adequate insurance.

And I may say that not only can a shipowner limit his liability under the act today but he can cover himself by insurance.

In other words, if his ship goes down he collects all of his insurance on the ship, and he walks away from the collision or the catastrophe, or whatever it was, whole, without suffering a penny, and the insurance company will only pay the minimum required under the limitation statutes but he collects his and he does not have to put that in the pot.

There was a bill—I think it is still pending before the Senate, the Morse bill, and I am not sure whether it has been dropped or abandoned—which would require the shipowner at least to put into the pot the amount of money which he recovers by way of insurance.

The original purpose of the bill was to limit the liability of the shipowner to the investment that he had in that ship.

Now, whatever it was should have been put in the pot, whether it was in the form of insurance or anything else. But he walks away with that insurance and nobody can touch a nickel of it under the cases.

I would say, therefore, that the general idea should not be to expand the rights of the shipowners. It should be to narrow them.

The general idea when the Brussels Convention was started was to liberalize the limitation laws, the limitation statutes.

Now, increasing the dollars or the amount of the limitation fund in Europe is not the same as increasing it in the United States.

You heard yesterday from Mr. Colby and I think some of the other gentlemen who preceded us that they would not suffer any additional premiums and they would not suffer any additional costs obviously for the reasons I gave before. There not only would not be additional costs, there will be great savings.

So that instead of liberalizing the law they are going to restrict it and add to what is already an unconscionable situation and so recognized.

So far as the forum is concerned, this I think would be an evil thing. A shipowner under this proposed bill could go any place in the world and file his petition to limit liability.

We know today, since a great many of our shipowners have now transferred their vessels to foreign flags—I might say we used to have a merchant marine of over 2,000 vessels of more than 1,000 gross tons. Today we have got a fleet of approximately 1,000—cut in half. And a little country like Liberia, which is receiving the benefits of these vessels, has now got probably a thousand vessels. They have got a fleet as big as ours. It is incredible.

And yet they now seek immunity, these same shipowners. They get a tax advantage. They do not pay income taxes. They do not

meet the labor standards in the operation of their vessels. And yet these same people are operating in American waters, taking advantage of all of the American facilities and then attempting to expand the provisions of the Limitation Act.

Now, I think we can be sure that these people would file their petition in a country where they would be most favorably received, whether it is in Liberia or Honduras or any other country, where they can get away with as little as they can get away with.

Mr. Chairman, you asked Mr. Rault before, "Where do you think most of the shipowners would file their petition?" And I think the answer is where they could get off cheapest.

They are transferring their ships to foreign flags for the purpose of operating more cheaply.

If there is any question about whether they should or should not do it, that is a matter for another congressional committee to hear, but the fact is now that it has been established that they are going to go to these foreign countries, and you can imagine what is going to happen.

Now, they talk about worldwide uniformity. Now, there just is not going to be any worldwide uniformity. There is not going to be any because the laws in the different countries are different than the United States.

We have got different presumptions here. We have got different laws here than they have in every other country.

Even if a claimant should litigate his claim here, even if the statute be construed to mean a man can litigate his claim here, he would still have to go to a foreign country to collect. He may be required to re-prove his whole case in that foreign country. When he comes out, who knows what standard they will set, whether they will take the world valuation of the franc or the country's valuation.

Liberia, Panama, or Italy would probably, my guess is—and that is all it is: a guess, because nobody knows what they are going to do—take the valuation of the dollar or franc, whatever it is, as it stands in the country where the litigation is taking place.

I think that is probably the most reasonable conclusion on that.

Now, when you examine that booklet, if I could just take a moment, Judge Kennedy, who spoke for the shipowners in the original bill—that is, when the original report was made—talked about this so-called worldwide uniformity, and if I may just read a short passage of it I would like to do it. I am not going to read the whole quote. I do not have enough time. I will just read the last paragraph on page 8 so that you can see his conclusion [reads]:

But if we turn to matters which are demonstrably substantive in any view, we find that in practice the convention will surely produce not uniformity, but chaos.

This was Judge Kennedy's conclusion after a careful review of the entire situation, and he was speaking for the shipowners at this time, not for the personal injury claimants, not for the cargo claimants.

Now, I would say, therefore, that, quite the contrary to getting uniformity, it is perfectly obvious, since the laws in every one of these countries is different, we would get just the opposite of uniformity.

Before we can get uniformity, we have got to get down to the grassroots of the laws in various countries, raise standards there,

or change our laws downward to meet theirs or change their laws upward to meet ours.

I do not need to say we would find rebellion over here if we started to change our laws downward to meet lower standards.

The limitation fund I have already touched on very briefly before, and since my time is so limited I would not take but another moment or so.

As I pointed out before, it is suggested that the limitation fund is going to be increased from \$60 a ton to \$207 a ton. But that is a misnomer. Under the present law the valuation is even greater than what it would be under this \$207 a ton.

I listened very carefully to what Mr. Haight had to say yesterday about the *Andrea Doria-Stockholm*. I have a great deal of respect for Mr. Haight, but I think he proved the old adage that you can do almost anything you want with figures.

But the hard, cold facts are that if you were to take the *Stockholm*, which survived, and impose a limitation, or if she filed for limitation, as she did, under the tonnage theory, even on a basis of the \$207 she would not produce anywhere near as much as she would if you took her value as you would have to do under the existing law.

I think, if I recall correctly, Mr. Haight said she was worth \$3 million. Some of the other information I heard was that it was \$5 million. Of course, I would take Mr. Haight's word for it. He is in a position to know, and I would not.

But, in any event, whether it is three or five, it would be in excess.

Now, we are supposed to liberalize this fund because it is unconscionably small or too low. But in any other kind of situation—take it particularly in cases where you have got single vessels or even small vessels—then, of course, the claimants would suffer horribly because the tonnage would be so small and the value of the ships, particularly today, would be so very great, in addition to which the new ships which are worth a great deal more than the old ones would have an advantage by comparison, a terrific advantage.

I would like to say another word. I know my time is just about up. But I would like to just say this: That the act would include within its provisions a number of new beneficiaries. Here we are dealing with a situation which calls for liberalization of the act to the benefit of claimants, and here they come in and not only really cut the fund down, so to speak, and restrict the claimants' rights in other ways, but they want to enlarge the class of beneficiaries who can petition for a limitation.

You see in the act it goes to managers and a whole lot of other people that never were intended by the Congress originally to ever have the benefits of the limitation act.

I could cover a great deal. I think my time is up. And unless you have any more questions of me I will conclude. There is a great deal more I want to say but I think it would take a little bit of time to say it.

Senator BARTLETT. Thank you, Mr. Freedman.

Do you have any questions, Mr. Bourbon?

Mr. BOURBON. No questions.

Senator BARTLETT. Mr. Kenney?

Mr. KENNEY. No questions.

Senator BARTLETT. Mr. Freedman, you are at liberty, of course, to file any supplementary statement you care to.

Mr. FREEDMAN. Thank you, sir.

Senator BARTLETT. I should say, which is unnecessary to say, we will consider your testimony most carefully.

Mr. FREEDMAN. I did not quite hear you.

Senator BARTLETT. We will consider your testimony most carefully.

Mr. FREEDMAN. Thank you, sir.

(The prepared text of Mr. Freedman's statement, supplementary remarks thereto, and the questions and answers referred to at the beginning of the testimony follow:)

STATEMENT ON BEHALF OF AFL-CIO MARITIME COMMITTEE IN OPPOSITION TO
S. 2313 AND S. 2314

This controversy stems from the Brussels Convention of 1957, relating to limitation of liability. Prior to the meeting in Brussels, the State Department representatives met with a committee of the Maritime Law Association, to ascertain the views of the industry and to draft a "position paper" for the American representatives. The committee meetings developed that Great Britain and certain other maritime nations considered the limitation funds under the existing laws to be shockingly inadequate, requiring considerable liberalizing. The committee also recognized that unless something was done to increase the limitation fund under the American law, Congress might take steps to eliminate completely or, at very least, to sharply restrict the limitation of liability laws and substantially increase the fund.¹ After a careful sifting of all the facts, the committee concluded that the limitation fund should be increased, without otherwise materially changing the existing limitation of liability laws. This became the position of the American delegation at the Brussels Convention.

The product adopted by the foreign states at the Brussels Convention would so drastically change the American law, to the great prejudice of American interests, that the American delegation refused to approve. The 1957 Brussels Convention was then submitted to the M. L. A. committee for study and comment. It appeared that certain individuals in the Government most anxiously desired to have the 1957 convention adopted in the interest of "worldwide uniformity". A painstaking study by the committee extending over many months was undertaken, giving consideration to the special interests involved: shipowners, cargo, labor, and personal injury claimants. The study resulted in the unanimous conclusions that the 1957 convention was most prejudicial to all segments of the American industry. Moreover, it was unanimously found that instead of effecting worldwide uniformity, it would, on the contrary, create absolute "chaos". The majority report was written in three parts, one by the then president of the Maritime Law Association, Leonard J. Matteson, Hon. Harold M. Kennedy, and the undersigned. The joint report concluded that the 1957 Brussels Convention "is not acceptable to or in the best interests of American shipowners, passengers, maritime labor, or shippers. This report was overwhelmingly approved by the Maritime Law Association at a meeting on May 2, 1958. Each year, since that time, the committee has adhered to its original position and each time has received approval of the membership. Now, on the eve of the meeting of the association in November 1961, the shipowner representatives, who are also affiliated with the American Merchant Marine Institute, suddenly reverse their position with the result that a majority of the committee approved the bill previously rejected."²

¹ There was then pending in Congress a bill presented by Senator Morse which would require the shipowner to make available and deposit all insurance money into the limitation fund. As the law stands today, the shipowner walks away from the wreck, collects his insurance money, and leaves the death and injury and cargo claimants to divide the limited fund.

² This committee was allegedly constituted to represent all phases of the industry: shipowners, labor, personal injury claimants, and cargo interests. Unfortunately, however, of the 12 members of the committee, 10 represented the shipowners and 1 represented the Government, also a shipowner. The shipowner representatives reversed their previous position and voted in favor of the proposal. The personal injury, labor, and the cargo representatives voted against the proposal. The shipowner representatives thus prevailed and became the majority only because they dominated the committee numerically. The majority and minority reports must, therefore, be examined against this backdrop.

The American Merchant Marine Institute formerly opposed the 1957 Brussels Convention. Recently, however, it changed its position and has been pressing for adoption of the convention, which, to say the least, places foreign shipowners in a position of tremendous advantage over American shipowners. One, therefore, wonders at the change of position by A.M.M.I. The answer appears to be that a large number of American shipowners, affiliated with A.M.M.I., have been transferring their vessels to, or otherwise operating under foreign flags, in order to escape American taxes and American labor standards.³ It may fairly be assumed that the sudden reversal of position of the shipowners' representatives of this committee was due in substantial measure, if not entirely, to the pressures of the A.M.M.I.

The problems presented by these two bills must be approached soberly with the view to enhance the American Merchant Marine, including all of the interests involved. It should oppose those special interests which seek personal advantage to the disadvantage and great prejudice of all other American interests.

The adoption of the 1957 Brussels Convention and of H.R. 7912 will expand a special privilege which no longer serves any useful purpose and will greatly prejudice American interests in favor of foreign interests

The statute which affords shipowners the opportunity to limit the liability was enacted for the "public benefit," in that it was designed to promote the building of ships, to encourage persons engaged in the business of navigation, and to place the shipping industry of this country on a footing with that of England and the nations on the continent. Accordingly, during the incipient stages of judicial determination of this act, the courts construed it liberally in favor of the shipowners. However, by reason of the almost universal use of the corporate device, insulating shipowners against damages, and the advent of full-scale insurance coverage, limitation of liability assumed the role of much less economic importance than it once had.

Gilmore and Black⁴ in this connection write:

"Since approximately 1930 the early enthusiasm, both legislative and judicial, for the limitation principle has cooled. In 1935 the Congress enacted the first substantial amendments to the Limitation Act since the 1880's: These amendments were adverse to the shipowning interests, the most important being a provision setting up in the case of claims based on loss of life and bodily injury, a minimum limitation fund of \$60 per ton. In the early 1930's the Supreme Court limited the freedom with which shipowners, by filing a petition for limitation, could transfer to the juryless forum of the admiralty proceedings which plaintiffs, under the saving to suitors clause, had elected to bring on the civil side. And in 1954, in a case which, without overruling, impaired the authority of one of the earliest landmark cases, Justice Black, speaking for four members of a Court divided 4-4-1, wrote:

"Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons."⁵

"Judicial attitudes are important. There is at least some reason to believe that the judicial attitude in the second half of the 20th century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute, even without further limiting amendments, will be narrowly and not expansively construed. Such an attitude reflects, it is suggested, not so much hostility to the shipping industry as a recognition of the fact that the Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as protection and indemnity insurance) were available, shows increasing signs of economic obsolescence."

Accordingly, the heretofore liberal construction of the limitation of liability statute has been tempered by judicial recognition of the economic realities involved.

³ As of June 30, 1958, the active merchant fleet of the United States decreased from over 2,000 vessels of ships of 1,000 gross tons or over to 1,047 vessels while that of Liberia has increased to 965 vessels, Panama 563 vessels (Britannia Book of the Year, 1959, pp. 426-427). Employment on American-flag ships dropped from 110,820 in 1947 to 49,281 in 1960. (Statistical Abstract of the United States, 1961, p. 596.)

⁴ The Law of Admiralty, 1957, sec. 10-4, pp. 666-667.

⁵ *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437, 74 S. Ct. 608, 623, 1954 AMC 837, 859 (1954).

Since the corporate device and adequate insurance coverage have become commonplace in the maritime industry, there is now no more basis for continuing the special privilege to shipowners than there is for extending it to any other industry. No such special privilege is available in any other field of transportation such as aviation, railroad, motor transport or, for that matter, in any other field of our economy. The rationale for this special legislation has ceased, so that everything must be said for eliminating the limitation of liability statutes altogether, and placing the shipping industry on a par with the others. In any event, the tenor of judicial opinion, textbooks, writers, and all of the authorities on the subject is unanimous that the statutes should, under no circumstances, be expanded, but, on the contrary, should be restricted by the realities of the situation.

The movement to restrict and modernize the limitation statutes was reactivated in this country in 1957, before the Brussels Convention, with the single objective of increasing the limitation fund, in order to stave off threatened legislation which might abrogate the limitation statutes entirely or render them relatively ineffectual. The program has now departed from that objective and seeks to enlarge the benefits to the shipowners at the expense of all other interested parties and categories. We do not think that the Congress should or will permit itself to be misled under these circumstances. It may be assumed, on the contrary, that the Congress will enact legislation based on the realities, in fairness to all of the American interests involved.

The impact of the 1957 Brussels Convention on the presently existing American law

Shipowner under the Convention and proposed legislation may choose his forum anywhere in the world.—If the proposed legislation should be enacted, a shipowner could file a petition for limitation in any country that he desires. A haven has been found in such countries as Liberia and Panama, where shipowners are welcome, upon payment of their registration fees. It may be assumed that shipowners generally will seek these or other similar havens to file their petitions to limit liability. These impoverished countries will welcome the shipowners and their American dollars to be spent in fees and costs. In such cases, the law of the forum would control the procedure, the time for the filing of claims, the manner in which the claims should be adjudicated and, in the final analysis, the extent and validity of the claim itself. The hardship which this would impose on personal injury claimants would be shocking and unconscionable. Seamen or passengers injured in a collision would be compelled to go to such foreign countries to present and litigate their claims. Should they see fit to bring suit against the offending shipowner in the United States, any judgment which might be obtained could be declared invalid in whole or in part and the litigant might even be required to reprove his whole claim. All that the petitioning shipowner need do is "constitute a fund satisfactory in the foreign courts."

The majority report based its position upon the desirability for "worldwide uniformity." We need only refer to Judge Kennedy's careful and penetrating analysis which he made as a member of the Maritime Law Association Committee, as a representative of the shipowners. In completely destroying the myth that the Brussels Convention will create uniformity, Judge Kennedy vigorously and effectively pointed out:

"Uniformity was the watchword at Brussels for all the delegations, including our own. Does the end product justify the conclusion that uniformity was achieved or even approached?

"By 'uniformity' persons who employ that word must be talking about a system which will not vary, no matter where the right to limit is invoked. They must mean that no matter what forum is used the shipowner and the claimants will have the same equal protection.

"Of course on the procedural side, the Brussels Convention did not even attempt to achieve uniformity—such matters were left to the *lex fori*. Therefore, subject to a possibility which will be mentioned later, a shipowner who attempts to limit in the United States will have the burden of proof, whereas if he attempts to limit in any one of several other jurisdictions the burden will be upon the claimants to establish 'actual fault or privity.' It can, of course, be said that it would be foolhardy to expect uniformity in 'procedural' matters. But it can also be pointed out that after long debate the courts of the United States have come to treat burden of proof as something more important than a minor matter of procedure. Since the location of the burden of

proof may seriously affect the outcome of the litigation, our Federal courts in diversity cases treat the burden of proof as substantive, and so it really is. "But if we turn to matters which are demonstrably substantive in any view, we find that in practice the Convention will surely produce not uniformity, but chaos."⁶

Despite his vigorous opposition and his cogent arguments against the Convention heretofore, Judge Kennedy and his colleagues representing the shipowners, now change their position, although the circumstances are the same and the factual picture has not changed. Only the pressures from the AMMI are new.

The fact is that from the shipowners' own analysis, chaos, not uniformity, will result from the adoption of the Convention and the proposed legislation.

It is unthinkable that the Congress should enact legislation which would require claimants such as passengers, seamen, longshoremen, cargo owners and others to file claims in a foreign country which a shipowner has picked after shopping around to find the most welcome haven from his point of view. A personal injury claim might run from only a few hundred dollars to hundreds of thousands of dollars. By the time the litigants paid the expenses of counsel and of traveling to and from the foreign country, a substantial part of the claim would be eaten up. Further, in those jurisdictions, the rules or procedure materially differ from those in the United States, where a body of law has grown up based on substantial justice; presumptions, such as the Pennsylvania rule, *res ipsa loquitur* and others, recognized under the American system, would go by the board. Finally, the realistic fact is that in foreign countries the courts would grant awards commensurate with their local scales of living, which are far below that in the United States.

The net result would be that, no matter how substantial the claim, it would hardly be worthwhile for any personal injury or death claimant, to litigate in many of the foreign forums which the shipowners would undoubtedly choose. In this way, the convention and the proposed statute would very effectively deprive American litigants of their due.

The limitation fund

The great inducement which the proponents of the legislation and convention offer to the personal injury claimants is an alleged increase from \$60 per ton, under the present American law, to \$207 per ton, under the proposed convention. The fact is that this alleged increase will not generally increase the limitation fund except in remote instances, and in many cases the fund will actually be less under the convention than under the existing law. The majority failed to point out that under the present American system we use both the tonnage and the value methods for constituting the fund. The petitioning shipowner must deposit in the fund either the value of the ship after the accident or an amount equal to at least \$60 per gross ton. Thus, the \$60 per ton is a minimum and not a maximum. In most cases, the vessel is not a total loss and its value would by far exceed any fund even at the rate of \$207 per ton. The convention provides for a fund of \$207 of which \$140 would be allocated to personal injury and death and the remaining \$67 divided proportionately among all other claims, including cargo. This is the maximum fund which would be constituted under the new law. It is thus misleading to compare even the \$60 minimum under the present American law with the \$207 maximum under the proposed law. It must also be noted that the \$60 per ton provision under the American law relates to "gross" tonnage while the convention figure relates to "net" tonnage plus the engineroom space. In order to compute net tonnage, all space not used for cargo is excluded from the gross tonnage, such as engineroom, steamroom, space forepeak, etc.

This factor also demonstrates the misleading character of the comparison between the funds under the respective systems. This analysis takes the ground completely from the suggestion in the majority report that the bill is approved out of "fairness to the claimants." In point of fact, the shipowners are well aware that this alleged increase in the fund is in truth a lessening of their liability rather than an increase. The proof of this is found in the report of the strongest proponent of the convention and H.R. 7912, E. Robert Seaver, General Counsel for the Maritime Administration.

Mr. Seaver filed a dissenting report in 1958 for presentation at the Maritime Law Association meeting, advocating adoption of the convention. In consider-

⁶ Report of the committee to consider proposals relating to the limitation of liability of shipowners, Maritime Law Association, Document No. 418, July 1958, pp. 4258-4259.

ing this very point and in advocating to the shipowners that they were, in fact, decreasing their liability by the adoption of the \$207 figure, he said:

"In appraising the merits of the convention, the interests of passengers, crew, cargo interests, and other potential claimants must be borne in mind, as well as the interests of the shipowners. However, the convention provides distinct advantages for the shipowner, in many instances. *The owner's total liability would actually be less under the convention than under our statute in any case where the value of his vessel exceeds \$207 per 'convention' ton, and does not sustain substantial damages as a result of the casualty.*

"The value of any postwar built vessel exceeds this figure. For example, an undamaged mariner would provide a fund of about \$6 million, under our statutes, in times of normal values, while her fund under the convention would be a maximum of \$1,721,000. It is true that a Liberty would be responsible for a fund of about \$1,381,000, under the convention, and something between half a million and a million under our statute, depending on the state of the vessel market at the time of the incident. However, the 18-year-old *America* 'would be responsible for about twice as large a figure under our statute as she would be under the convention.' *It is significant, in this connection, that all of our new dry cargo vessels cost from \$10 million upward to build.*" [Emphasis supplied.]⁷

An excellent example of Mr. Seaver's argument is found in the recent *Andrea Doria-Stockholm* incident where the value of the *Stockholm* by far exceeded any fund which would have been constituted from the \$207 figure.

A study of the limitation proceedings will reveal that in most instances they are brought by the smaller craft, particularly in those cases where there is nearly no casualty to the vessel itself, but where an accident occurs and the owner pleads the limitation statutes. In such cases, a fund constituted under the \$207 per net ton arrangement would be far less than the value of the vessel.

There is a real need to improve the limitation statutes from the standpoint of the personal injury and death claimants. If the statutes are to continue in effect, at the very least, the fund should be increased under the American system to respectable proportions where the claimant will have the option either to require a deposit based on the value of the vessel itself or a fund much larger than the present \$60 minimum based on tonnage, whichever is greater.

It is shocking to behold the spectacle of a number of men, badly crippled or killed because of negligence of the navigator, where they are their widows and children are limited to a small percentage of the damages they suffered. And, where small craft are concerned, they may not get anything because of the exclusion of such craft from the \$60 ton minimum, while the shipowner collects in full for any damage to the vessel and walks away whole from the casualty. He even collects his insurance on the vessel and need not account for it to anyone. The loss falls on the injured, the widows and the cargo damage claimants. This illustration points up the inequity of the limitation statutes as well as their economic obsolescence in these times.

The convention further expands the limitation statutes to new groups they were never intended to reach

Article 6 of the proposed convention would give the right to limit not only to owners and charterers, as provided in existing American law, but also to all other forms of representatives, charterers, managers, operators, vessel officers, and other crew members and even to shore personnel. This provision would extend the benefits of the limitation of liability statutes to an entirely new group of entities and individuals never contemplated or intended by the U.S. statutes, and would restrict the existing rights of personal injury and death claimants, aside from the fact that the constitutionality of these provisions would be seriously questioned.

The limitation statutes originally were designed to encourage the investment of private capital in the merchant marine. The Government does not fit into that category and should not seek or obtain immunity from liability at the expense of personal injury or death claimants. The provisions of the Brussels Convention would extend the benefits of limitation proceedings to an entirely new group of entities and individuals who have no investment in the vessels but who operate vessels as agents or who perform some services in connection with the vessel's business. We are unable to justify any extension of limitation

⁷ Report of the committee to consider proposals relating to the limitation of liability of shipowner, Maritime Law Association, Document No. 418, July 1958, p. 4271.

benefits to the Government on the basis of the original express purpose of the statute, even though such benefits already exist in American legislation. To now extend these benefits to agents of the Government who make no investment merely gives to these agents and others involved an undeserved and unjustified windfall.

Recommendations

1. The limitation of liability statutes should be wiped off the books because there is absolutely no economic need for them in this era of the corporate device and available insurance coverage.

2. If the limitation statutes are not to be abolished:

(a) They should be sharply restricted only to those seagoing commercial vessels which actually go to sea and they should not apply to inland water vessels. They should also be inapplicable to the U.S. Government.

(b) The fund should be enlarged from \$60 per gross ton to \$207 per gross ton or to the value of the vessel whichever is higher as under the existing American rule. In addition, the owner should be required to deposit the hull and liability insurance moneys into the limitation fund. The owner should be required to post adequate security to cover all contingencies at the time of the filing of the petition or otherwise pleading the limitation statutes.

The collision convention and H.R. 7911

This bill was introduced for the sole purpose of changing the present 50-50 damage rule in collision cases to the comparative negligence rule, which would apportion the damages according to the degree of negligence. There would be no objection to the satisfaction of this purpose. Indeed, it would be a desirable change. However, the bill has other extremely objectionable features which go far beyond its purpose.

Section 2 of the bill would wipe out all statutory presumptions of fault. There are a number of legal presumptions which have grown up in the law to protect the victims of reckless or indifferent operators. Thus, where one vessel violates a statute or regulation leading to a collision, a presumption arises that the violation was the proximate cause of the accident and it then becomes incumbent on the violator to show that the violation could not have been the proximate cause, in order to exculpate himself. This is the Pennsylvania rule. There is also the familiar doctrine of *res ipsa loquitur*, long established in our law. These presumptions grew up in our law to offset the advantage which the offender has in such cases because the instrumentality is in his exclusive control. Without such presumptions the victims are at the mercy of the offender. The proposed bill wipes out all these presumptions and, in effect, would thus reward the lawbreakers.

Also included in the bill are provisions as, "if the collision occurs without fault, if it is caused by force majeure, or if the cause of the collision cannot be determined, the damages shall be borne by those who have suffered them" (sec. 2). Such provisions are designed for the protection of lawbreakers who are able to cover up their tortious conduct. Under our American system of law, presumptions have grown up to "smoke out" such tortious conduct and to place the responsibility for the accident where it belongs. The added provisions above referred to and the others contained in the proposed bill would either conflict with our well established wholesome doctrines, or at very least create doubts where there are none.

Another serious inroad into the existing admiralty law is a 2-year statute of limitations. Under our law, the time limitation is governed by the equitable doctrine of laches. This has worked out exceedingly well under our system and has prevented miscarriages of justice in cases where claimants for good reason, either inability to find or arrest the offending vessel or because of physical or mental incapacity, have failed to bring the action within analogous statutory periods. Not only does this proposed 2-year statutory provision violate the admiralty doctrine of laches, but it also conflicts with the 3-year statute in the Jones Act.

All these objections relate to provisions which have no bearing on the basic purpose of the bill which is to substitute the comparative negligence rule for the present 50-50 division of damages. The objectionable provisions are far more important than is the basic purpose of the bill. The bill should therefore be rejected unless the objectionable features are removed.

Conclusion

There is a need to either abolish the limitation of liability statutes or improve them as herein suggested. The relief is needed by the claimants, particularly

the personal injury and death claimants. The shipowners, in an attempt to forestall an anticipated change, which would wipe out or reduce the special privilege which they have enjoyed over the years, now take the initiative and seek to expand these special privileges at the further expense of the victims of their tortious conduct. We are confident that the Congress will not be so easily fooled. Congress should reject the proposed convention and bill, and sponsor instead a new bill which would bring long needed relief to the injured victims and the widows and children of slain victims.

As to the collision bill, it too should be rejected unless the objectionable features are removed.

Respectfully submitted.

ABRAHAM E. FREEDMAN.

FEBRUARY 27, 1962.

Senator BARTLETT. Mr. Matteson.

Mr. SHAPIRO. Mr. Chairman, may I interrupt?

Senator BARTLETT. Mr. Shapiro.

STATEMENT OF ALVIN SHAPIRO, VICE PRESIDENT, AMERICAN MERCHANT MARINE INSTITUTE

Mr. SHAPIRO. My name is Alvin Shapiro, American Merchant Marine Institute.

Mr. Chairman, with the greatest reluctance I find it necessary to rise in objection to references in the statement of the preceding witness to the American Merchant Marine Institute.

That testimony has gone in the record. It contains charge after charge all without substance, all unproven about our organization.

In my opinion, nothing could be more unfair. We do not, in fact, in this connection or elsewhere, represent anything other than American-flag ships, as I believe the chairman and other members of this committee are well aware.

Correction of these objectionable and inaccurate remarks I feel should be made at this time in the record, with your permission. To leave it to a subsequent letter at some future date would not do.

And perhaps most important of all, this type of procedure is out of keeping with the moderation and the reasonableness with which the chairman has seen fit to conduct all hearings at which I have been present and over which he has presided.

Whatever the preceding witness may think of the interests of the American Merchant Marine Institute, he cannot explain away the vigorous support of this legislation by all interested Government agencies or other carrier groups, notably the Committee of American Steamship Lines, the Lake Carriers Association, and the Pacific American Steamship Association. All of these either by statute or by fact could not possibly be accused of representing foreign-flag interests.

Now, as to changing our views, without question we have done this as a result of continuous study, scrutiny, and the passage of time. We have altered our opinion. We are unaware that this action would in anybody's judgment be considered immoral or improper.

Thank you, Mr. Chairman.

Senator BARTLETT. Mr. Shapiro, your remarks will be made part of the record.

At this time the committee will stand in recess for 5 minutes. (Whereupon, a recess was taken.)

Senator BARTLETT. The committee will be in order.

First I want to say that constantly since yesterday I have been referring to the substitute language for S. 2313 as having come from the Department of Justice. I was in gross error, I have learned, in this statement, and that it is not a presentation of the Department at all.

On the other hand, I am informed that it comes from the AMMI and that Mr. Colby did indeed assist in the drafting of this but only as a matter of assistance and he did not purport and does not now purport that this has the blessing in any manner whatsoever of the Department.

Had it been sent to us under the auspices of the Department, it would have come in the manner of a formal presentation with an accompanying letter commenting on it.

The transcript will be corrected throughout by the staff to reflect the correct facts.

Now, I am going to say we are not going to continue any quarrels in this hearing. This is not the place for this. We are going to get down to business here and hear the remaining witnesses if they are going to be heard at all. There are no rebuttals going to be allowed by anyone from now on.

Mr. Matteson.

STATEMENT OF LEONARD J. MATTESON, SENIOR PARTNER, BIGHAM, ENGLAR, JONES & HOUSTON, NEW YORK, N.Y.

Mr. MATTESON. Mr. Chairman, my name is Leonard Matteson. I am a senior partner in the firm of Bigham, Englar, Jones & Houston in New York. I have been engaged in the practice of admiralty law for nearly 50 years.

My experience in disaster cases began with the *Titanic* and more recently the *Andrea Doria* and *Stockholm*, in which case I was leading counsel for claimants.

I am a recent past president of the Maritime Law Association of the United States, and I was president during a period from 1956 to 1958, a period during which the 1957 Convention on Limitation of Liability was in the course of preparation, when it was acted upon at the Brussels Conference, and when it was received and acted upon by the Maritime Law Association.

I am entirely familiar with the preliminaries, including the preparation of the position paper of the United States at that Conference, which was prepared in consultation with our State Department and the Maritime Law Association.

I have been familiar throughout my professional career with the collision convention of 1910, which goes back far beyond my time. In fact, its history goes back 11 years before 1910. But I have been entirely familiar with all developments in connection with that from that time until this.

I speak here as an individual only. I am not officially representing any interest.

My experience in the practice of admiralty has been one of specialization in collision cases, and in those cases I have represented many times the cargo interests, the interests of shippers of cargo, either insured or uninsured, and by no means can it be taken for granted that all cargo is insured. And even if the insured interests are small, it

is the small man who needs the protection of this committee and of Congress.

I have also represented passengers and crew members in their claims for personal injury or loss of life or for loss of property in all these cases.

Naturally, my sympathies and interests are with the claimants.

The shipowners are able here to put on a great show of strength with their various organizations and their representatives. In the nature of things the shippers of cargo are widely scattered. Passengers, of course, are unpredictable. Members of crew are to some extent represented by Mr. Freedman. But it is not possible to gather all these interests into a concentration of a show-of-strength proposition such as the shipowners are able to present.

The enactments here which are requested, the bills, and the conventions have been put forward by steamship interests. The AMMI referred to is the American Merchant Marine Institute, which is the organization of shipowning interests on this coast. The bills were actually drafted, I understand, by a committee of that association and introduced by request, and I understand the same is true with respect to the amendment. But they are definitely a steamship owner project.

Now, with respect to the position of the Maritime Law Association, I will speak on S. 2314, the limitation convention, first.

That is a British project. The fact of the matter is that the British established a limitation figure based on so many pounds per ton back about 1860.

At that time it was established as a rule of thumb to represent the sound value of the average British vessel of the time.

For a time that worked fairly satisfactorily. But with the passage of time that 7 pounds and 8 pounds, totaling 15 pounds, established in 1860 became woefully out of date.

Then came the devaluation of the pound, which cut it in half, and the figure became ridiculous.

The outcry in Great Britain was such that it was absolutely essential that Parliament should do something about those figures. Shipowners begged for time and said they would try to get an international convention arranged, and operating through the International Maritime Committee they proposed originally this convention at a meeting in Brighton in 1954.

All that was necessary for the British shipowners was to increase the pounds per ton, but obviously they decided that if they were going to do that they would like to get a great many fringe benefits along with it, and that is what this convention represents. From its earliest draft the convention met with disfavor in this country.

Following the 1954 meeting at Brighton, a tentative draft was brought back. It was submitted to the Maritime Law Association, and a strong committee headed by Roscoe Hupper, whose name is known to everyone in the maritime field, produced a report condemning the plan of the convention. Now, that was approved by the Maritime Law Association.

Subsequently there was a meeting in Madrid of the International Committee, and there a more definitive draft was drawn which was to be the basis of an international diplomatic conference.

That was brought back to the Maritime Law Association by the delegation, and the international diplomatic conference of 1957 was called.

In preparation for that conference, the Maritime Law Association considered the draft and rejected it in toto so far as they were concerned.

In collaboration with the State Department a position paper was developed which amounted to the instructions to the U.S. diplomatic delegation which met at Brussels. Those instructions included specifically that they should oppose any international convention in form or in substance like that that had been drafted at Madrid, and particularly that they should oppose any convention containing five specific features, some of which I will call your attention to later.

The delegation went to the Brussels Conference. Every single one of the American proposals was slapped down and rejected unceremoniously.

They went ahead with their plans. Any changes that were made in the Madrid draft were for the worse.

But the conference completed the draft, and the U.S. delegation very properly refused to sign it.

However, after the delegation returned to the United States, for some reason which to my mind is inexplicable, Mr. Morse and Mr. Seaver reversed their position and decided that maybe we ought to do this.

However, the matter was considered very carefully by the Maritime Law Association, by a committee of 25 or more, which I myself appointed and in whose deliberations I participated.

Mr. Freedman has shown you a copy of the report. The report says in substance that it is the opinion of the association that the convention is not in the interest of shipowners, shippers, passengers, or crew members or the public.

And that report was adopted by overwhelming vote by the Maritime Law Association.

At that time the AMMI was of the same opinion.

Sometime later—and it is true that they were perhaps pressured by letters from Mr. Morse—they got busy and formed a committee to reconsider their former position, and it was an odd fact that their committee included a number of the members of the Maritime Law Association committee on the same subject as it included those who were steamship representatives.

In the meantime, under a new president, the Maritime Law Committee had been reduced to a committee of 12, 9 of whom were clearly identified with the steamship interests. Working with the AMMI, they decided to go along with the AMMI and drafted these bills.

Only after the bills were drafted and the decisions made were the matters brought back to the Maritime Law Association and the rest of us given an opportunity to speak our pieces. But decisions had been made and it was impossible to outvote the majority.

Consequently, it came before a meeting of the Maritime Law Association last fall, the Maritime Law Association having three times and I think four rejected the principles of the convention.

Now, as far as the convention on collision liability is concerned, that has a longer history which is simpler to tell.

The basic fault in the collision convention is its abolition of the rule of joint and several liability of tort-feasors to innocent persons.

If the shipowners prefer a system by which the courts can apportion fault in collision cases in other degrees than 50-50, it is a matter of opinion or debate as to whether that is desirable or not. There is

nothing earth shaking about that, as long as the effect of it is confined to operation between the wrongdoing vessels.

But when it goes outside of that field and eliminates the rule of joint and several liability, it eliminates the rule that each of two tort-feasors contributing to the harm of an innocent party may be held liable for the whole and that it is no defense to one when sued that negligence of another contributed.

As long as that rule is not disturbed there is no great problem.

But from the beginning that was the rule. Now, it happens that this rule of the joint and several liability of tort-feasors is a universal rule of law. It applies in every other field in this country and throughout Anglo-Saxon law and throughout the continental countries too, I believe.

The only exception when an attempt was made to disturb it has been in connection with this 1910 collision convention, and that came about in a peculiar way.

It goes back to 1873. Due to the fact that, according to historians, some earlier decisions of an admiralty court had been misinterpreted in certain cases, the admiralty court where the carrying vessel had been at fault had not only reduced the recovery of the carrying vessel to 50 percent but had reduced the recovery by cargo.

Going back in the cases, it does not even appear whether the cargo was owned by the owner of the vessel.

But, in any event, an apparent conflict had arisen between the admiralty and the common law courts, and it was accepted that this was the rule in admiralty courts.

Well, in 1873, in their adjudicature act, whether by accident, device, or otherwise, a provision was included saying that hereafter all the courts should apply the rules in maritime cases as heretofore applied in the admiralty courts, which has been interpreted as establishing this rule in the admiralty courts of England reducing the recovery of cargo against a negligent vessel if the carrying vessel was at fault.

Now, that was a great advance to British shipowners sued in British courts, but it was not true anywhere else in the world, and they coveted the idea of spreading that doctrine abroad.

In 1899 the Maritime Law Association of the United States was formed to participate in the deliberations on this conference and sent representatives almost every year, and every time representatives were instructed by the Maritime Law Association to oppose anything which tinkered with the rule of joint and several liability, that that must be preserved.

The leaders of the American bar representing ships and others in those days joined in that position.

However, in 1910 this convention was drawn up by a diplomatic committee. When it was brought back to this country for ratification, the opposition was so great that it was not even submitted to the Senate for advice on ratification until 1937, 27 years later.

Then, at that time, without notice to the public generally, and the shipping board being an operator of ships, and spearheaded by Mr. Haight, the father of the present Mr. Haight, a message was sent to the Senate accompanied by Department report supporting the 1910 convention.

There had been no opportunity for anybody to present views. And actually there were no hearings planned. The matter was on a Con-

sent Calendar when we discovered it at a very late date and succeeded in blocking that and insisted on hearings being held.

Actually, we were not able to stop the committee report supporting it. The committee was already pretty much committed. But we did prevail on the Senate generally not to act, and eventually the President withdrew the convention and it has not been presented since.

Senator BARTLETT. May I interrupt you, Mr. Matteson?

Mr. MATTESON. Yes, sir.

Senator BARTLETT. May I ask if the treaty came on to the Senate floor and was debated?

Mr. MATTESON. I think there was no debate on the Senate floor.

Senator BARTLETT. Thank you.

Mr. MATTESON. This was in 1938. And since then it has not been sent to the Senate.

Getting back to the Maritime Law Association, after that, in 1940, and again in 1947, attempts were made stir up support for the convention in the Maritime Law Association. In each case committees were appointed and studied the matter extensively for months and presented study reports, and the Maritime Law Association reiterated its prior position that it was against this convention.

After 1947 this was considered a dead issue until the AMMI in working on the limitation bill conceived the idea that they would make a package of these two things which they had coveted for so long.

That is why the ratification of the 1910 convention is submitted to you along with the limitation convention as a package, and it has been very clear here that it is a package.

In fact, it has even suggested—by Mr. Colby, I think—that the disadvantage to cargo interests in the 1910 convention would be more than made up for by the supposed generosity of the limitation convention, which we do not agree with at all.

However, what happened last fall in the Maritime Law Association was that this new committee of the Maritime Law Association, dominated by shipowners' representatives, brought in a report, or indicated they would bring in a report, which would recommend reversal of the positions repeatedly taken by the Maritime Law Association on both conventions, which stirred some of us to prepare minority reports.

There is a document here that I would like to submit to you for your inspection and to make part of this record which is the report submitted to the Maritime Law Association last fall on these two conventions, consisting of the majority report, which says nothing except what has been spoken of here in general terms about the desirability of uniformity, and the minority reports specifically dealing with the contents of these bills and the substantial objections to them.

Senator BARTLETT. Can we see that report, Mr. Matteson?

Mr. MATTESON. Yes, indeed.

Senator BARTLETT. This is to be identified as "Document No. 450"?

Mr. MATTESON. That is right.

Senator BARTLETT. I think that should be included too. The other has been.

It is rather lengthy, but this is an important subject.

Mr. MATTESON. Actually that gives you the substance of the argument on both sides. Minority reports are by myself, by Mr. Freedman, and Mr. Russell Mount.

(The document referred to follows:)

DOCUMENT No. 450

October 23, 1961.

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES**REPORT OF THE COMMITTEE ON SHIPOWNERS'
LIMITATION OF LIABILITY AND THE COLLISION
AND ARREST OF SHIPS CONVENTIONS**

Following the last definitive report of this Committee at the Spring Meeting of 1958 considerable work has been carried on by interested Government counsel and by the American Merchant Marine Institute by way of completely reviewing this entire matter with the idea in mind of determining whether or not domestic legislation could be developed which would clarify and/or overcome the many objections which were voiced as to the Brussels Limitation Convention of 1957 but which would at the same time permit the United States to ratify this Convention and thus join with the other leading maritime nations of the world. The Maritime Law Committee was invited to join in this endeavor, which invitation was extended to each and every member of your Committee. Several members of your Committee have worked over the past several years in cooperation with these affiliated groups as a result of which domestic legislation has been proposed which would in effect adopt the principles of the Brussels Limitation Convention of 1957. Companion domestic legislation has also been proposed by way of complementing the aforementioned Limitation of Liability legislation, which additional legislation would adopt the principles of the Brussels Collision Convention of 1910. Your Committee now brings these two pieces of proposed legislation before you for your action.

THE LIMITATION OF LIABILITY CONVENTION

The Comité Maritime International, at its plenary session in Madrid in 1955 adopted a proposed convention dealing with the limitation of liability of shipowners. This was considered at the Ninth Diplomatic Conference on Maritime Law held in Brussels in

October, 1957. The Diplomatic Conference adopted a Convention which your Committee, at the November meeting in 1957, recommended be disapproved. That recommendation was adopted by the Association. The Committee made a further brief report at the annual meeting of the Association in May of 1958, to which were attached the views of four individuals—Leonard J. Matteson, Harold M. Kennedy, Abraham Freedman and E. Robert Seaver. Matteson, Kennedy and Freedman opposed the Convention, each for different reasons which were stated in their respective memoranda. (Kennedy has now reversed his position and is in favor of the Convention. Kennedy now states that conditions have changed so drastically that to him it now seems wise to adhere to the Convention.) Seaver advocated its approval. The American Merchant Marine Institute, following the lead of the Maritime Law Association also considered but did not support the Convention at that time.

In 1958 representatives of the shipping industry requested and obtained from the Maritime Administration an unofficial draft of legislation designed to implement the Convention that had been prepared by the Maritime staff. The A.M.M.I. appointed a special committee to review this draft. This committee has held a number of meetings and has given very careful consideration to the Convention. As a result of their consideration and discussion that Committee recommended that the Convention and the implementing legislation be approved. This recommendation was in turn approved by the Board of Directors of the A.M.M.I. The A.M.M.I. has decided to urge the ratification of the Convention and the adoption of implementing legislation.

Your Committee has given further and careful consideration to the Convention and to the views expressed by the A.M.M.I. and others. It has now voted ten to three to reverse its position and recommend the approval of the Convention and the implementing legislation. The members of the Committee constituting the majority were C. Stewart Anderson, Arthur M. Boal, Joseph E. Doti, Cody Fowler, Raymond T. Greene, Charles S. Haight, Harold M. Kennedy, Edward D. Ransom, E. Robert Seaver and John W. Sims. The three members of the minority were Abraham E. Freedman, Leonard J. Matteson and Russell T. Mount.

THE CHANGES WHICH THE PROPOSED LEGISLATION WILL MAKE IN THE LAW OF THE UNITED STATES

Our original Limitation of Liability Statute limited the aggregate claims arising out of a marine casualty to the value of the vessel and her pending freight at the end of the voyage. In 1936, after the MORRO CASTLE disaster, the Act was amended to provide for a supplemental fund which would provide that the fund available for death and personal injury claims shall not be less than \$60 a ton. The Convention would follow the concept of the 1936 amendment by basing the amount of the limit of liability on tonnage rather than value.

The Brussels Convention of 1957 fixes the limit at \$67 per ton for all claims with an additional \$140 per ton exclusively for personal injury and death claims.

Under our existing law if a ship is a total loss there will be very little available for property damage claims and in most instances only the supplemental fund of \$60 per ton for death and injury claims. Under the Convention there will be in all instances \$67 per ton for all claims plus an additional \$140 per ton for death and personal injury claims.

The Convention is more advantageous than existing law to all claimants (a) in case of a total loss, and (b) in the case of old ships. It may be less advantageous to claimants in the case of a new ship that is not lost or badly damaged. There is however under the Convention a certainty that there will always be a substantial limitation fund.

Your Committee is of the opinion that the Convention would make a desirable change in our law because it will be on balance much fairer to claimants. It will also be an advantage because it will be a step toward international uniformity.

International uniformity is of great importance in connection with transportation. Our Association was formed for the primary purpose of supporting uniformity in the law of Maritime Nations. Because of its great importance efforts have been made to achieve uniformity by common consent and by international convention. Our courts recognize that there has developed over the centuries by common consent a body of law called the General Maritime Law. Any one country can change, so far as it is concerned, this General

Maritime Law, by act of its own legislature. The only way this law can be changed so as to achieve international uniformity is by convention. The recognition of the need for uniformity and its development by common consent is illustrated in the following quotations from opinions of the Supreme Court of the United States:

The Scotia, 81 U. S. 170, 20 L. Ed. 822 at 825:

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea, only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalfitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require."

The Lottarwanna, 88 U. S. 558, 22 L. Ed. 654 at 661:

"No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations

of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations."

In *Queens Insurance Company v. Globe & Rutgers*, 263 U. S. 402, Mr. Justice Holmes said at page 404:

"There are special reasons for keeping in harmony with the marine insurance laws of England—the great field of this business * * *."

Your Committee recommends the approval of the basic principles of the Brussels Limitation of Liability Convention of 1957 and the legislation proposed to carry it into effect. This legislation is not yet in final form. The Committee recommends that it be continued and authorized to support the legislation before the Committees of Congress which have it in charge and to agree to changes and amendments to the proposed legislation as they may deem advisable or necessary to conform to procedural requirements of this country and to make the legislation conform to and carry out the basic principles agreed upon.

THE COLLISION CONVENTION

The 1910 Collision Convention has been under consideration by this Association and other bodies on many occasions. The opinion on it has been sharply divided.

The Special Committee of the A.M.M.I. has given careful consideration to this Convention at the same time that it was considering the Limitation of Liability Convention and has recommended legislation implementing the Convention.

The Convention and the proposed legislation make two basic changes in our law. One, where collisions are due to mutual fault damages are apportioned according to the degree the fault of each vessel contributed, whereas under existing law they are divided equally regardless of the proportion of fault of the two ships.

The other change is that there is no joint and several liability to third persons for property damage. The existing joint and several liability is preserved in cases of personal injury and death claims.

This Convention has been ratified by twenty countries and adhered to by seventeen others. The United States is the only important maritime nation that has not accepted the Convention.

In personal injury and death claims, both under the Jones Act and under the General Maritime Law the damages are divided in proportion to fault. The extension of the rule of comparative negligence for collision liabilities will establish greater uniformity in our own admiralty law. At the same time it will bring us into uniformity with the general maritime world.

The reasons given by your Committee in connection with the Limitation of Liability Convention apply equally here. It is the opinion of the majority of your Committee consisting of C. Stewart Anderson, Arthur M. Boal, Joseph E. Doti, Cody Fowler, Raymond T. Greene, Charles S. Haight, Harold M. Kennedy, Edward D. Ransom, E. Robert Seaver and John W. Sims (Russell T. Mount objects in part to this majority report; Abraham E. Freedman and Leonard J. Matteson voted in opposition), that the passage of legislation to implement the Convention and ratification of the Convention is desirable from the point of view of domestic law and very desirable from the point of view of international uniformity. Your Committee recommends the approval of the basic principles of the Brussels Collision Convention of 1910 and the legislation proposed to carry it into effect. This legislation is not yet in final form. The Committee recommends that it be continued and authorized to support the legislation before the Committees of Congress which have it in charge and to agree to changes and amendments to the proposed legislation as they may deem advisable or necessary to make the legislation conform to and carry out the basic principles agreed upon.

Respectfully,

C. STEWART ANDERSON,
ARTHUR M. BOAL,
JOSEPH E. DOTI,
CODY FOWLER,
CHARLES S. HAIGHT,
HAROLD M. KENNEDY,
EDWARD D. RANSOM,
E. ROBERT SEAVER,
JOHN W. SIMS.
RAYMOND T. GREENE,
Chairman.

MINORITY REPORT OF LEONARD J. MATTESON

The majority report would have this Association reverse its position with respect to the Brussels Convention of 1957 Relating to the Limitation of the Liability of Owners of Seagoing Ships taken at the Annual Meeting of the Association May 2nd, 1958 when it approved by an overwhelming vote (Doc. 420, p. 4306) the report of a large and representative committee of the Association (Doc. 418, pp. 4244-4472) which concluded after many months of study that the proposed Convention

"is not acceptable to or in the best interests of American ship-owners, passengers, maritime labor or shippers".¹

It is not pretended that there has been any factual change in the situation since that time. The majority gives no substantial reason for the Association to change its position.

The majority goes further and proposes support by the Association of domestic legislation by Congress substantially in the form of S. 2314 and H.R. 7912 of the present Congress which would enact the provisions of the Convention as domestic law applicable to all purely domestic situations and all types of vessels. This is proposed to be preliminary to, or concomitant with, ratification of the Convention by the Senate.

In these actions the majority would have the Association follow the action of a special interest group of shipowners, the American Merchant Marine Institute. The Special Committee of that organization shared the views of this Association in 1958 but subsequently changed its position. It not only drafted legislation which would enact as domestic law the provisions of the Limitation Convention but also drafted legislation to enact as domestic law the provisions of the Brussels Collision Convention, 1910, which has been repeatedly disapproved by this Association, which failed ratification by the Senate because of strong opposition, and which was finally withdrawn by the President from further consideration.

1. Prior to this action the Association approved on May 6, 1955, Doc. 390, p. 3916, the extensive report of its Committee chaired by Roscoe H. Hupper (Doc. 388) recommending adversely to any support by this Association of the proposals of this Convention, then in the form of the Madrid draft.

On May 18, 1956 the Association approved the report of its Committee chaired by Walter E. Maloney, that the Association should not support the Convention, with only two dissenting votes. Doc. 398, pp. 4021-4025.

The bills now pending in Congress, S. 2314 and H.R. 7912 to enact the provisions of the Limitation Convention, and S. 2313 and H.R. 7911 to enact the provisions of the Collision Convention² were drawn in their entirety by the A.M.M.I. Committee and introduced in Congress at their request, but without sponsorship, prior to any consultation with the Association Committee, although certain of the majority of the Committee or their alternates may have collaborated. The A.M.M.I. program of legislation is presented as a package to include enactment and ratification of both conventions.³

A further project of the shipowning group, now in the form of the Brussels Passenger Convention, 1960, which would severely limit individual recoveries by passengers for personal injury or loss of life, is being held in abeyance in order not to jeopardize the present program.

The Association Committee met jointly with representatives of the A.M.M.I. Committee on September 13th and 14th, 1961 and for the first time were afforded an opportunity to express their views as committee members of the Association. Most of the majority, by reason of prior relationship to the A.M.M.I. group's activities and program, had prejudged all issues and fruitful discussion of the basic issues was impossible. The discussions related chiefly to details of the proposed legislation. On September 14th your Association's Committee met briefly and took a formal vote. The vote proposed was, perhaps significantly, in the precise language of the report of the A.M.M.I. Committee. It may also be significant that the majority consists entirely of members whose principal representation and interest is that of steamship owners or operators, including the Maritime Administration, or their P & I underwriters and/or,

2. These Bills are not referred to in the draft of the majority report furnished to me and copies are apparently not to be attached to the majority report. That report states that, "This legislation is not yet in final form." Nevertheless the vote of the majority in Committee was to recommend support of legislation substantially in the form of these Bills.

3. One of the reasons given by Judge Kennedy, in the section of the report, Document 418, written by him, why the limitation "Convention will surely produce not uniformity, but chaos" (pp. 4285-9) was the fact that the Collision Convention had not been ratified and was considered a dead issue. That Convention, discussed *infra*, gives shipowners a peculiar advantage abroad which they do not enjoy here and of which they might be deprived under some circumstances under the subrogation provisions of the Limitation Convention. There are many cogent reasons supporting Judge Kennedy's view of which this is probably the least important. A number of other reasons are also set out in Judge Kennedy's document.

themselves or alternates, participants in the activities of the A.M.M.I. group.

Since there are two Conventions involved here, as to which different considerations apply, it is necessary to divide this minority report in two parts.

I

The Shipowners Limitation of Liability Convention and Bill

Adoption of the Convention and the proposed legislation would completely displace the system of limitation of liability based on our law enacted in 1851 and all precedents thereunder. In fact the Bills would specifically repeal the present law. U. S. Code Sections 183, 184, 185, 187, 189. See Bills, Sec. 8.

It would replace this system with a foreign and international system, which is completely different in philosophy and detail, largely based on English law and the language of English statutes. For instance, the English words "actual fault and privity" are used, thereby probably importing the body of English precedent and interpretation as a substitute for our own precedents interpreting the phrase "privity and knowledge." This situation will apply to other provisions of the Convention.

This proposal invites a reexamination by Congress of the philosophy and moral justification of the special privilege of limitation of liability granted to shipowners by our law of 1851, a privilege enjoyed by no others in the field of transportation, neither railroads, nor truckers, nor bus operators, nor air carriers. Other transporters enjoy neither limited liability nor the incidental concursus of claims.

The special privilege of limitation of liability for shipowners is difficult to defend, it has been severely attacked, and it admittedly has incurred the hostility of the courts to the point that it has become most difficult to sustain the right to limit in any contested case.

Limitation of liability is based not on justice but on injustice. "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons." See Marsden, Collisions, 10th, p. 177; Dr. Lushington in *The Amalia* (1863). It has been called "tyrannical" and criticized in a number of English decisions cited in Marsden, *supra*.

Our Act of June 26, 1884, 23 Stat. 57 was entitled—"An act to remove certain burdens on the American Merchant Marine and encourage the foreign carrying trade and for other purposes." The purpose of our Act has been said to be "to encourage shipbuilding and the employment of ships in commerce" *Butler v. Boston*, 130 U. S. 527.

These purposes are achieved by denying to innocent persons the full measure of indemnity from shipowners for losses which they may suffer to their persons or property as a result of the operation of vessels—in this country not limited to seagoing vessels but including small inland craft down to the smallest motorboat.

Mr. Justice Black in his opinion in the *Cushing* case, 1954 AMC 859 properly characterized the limitation system as providing "subsidies paid by injured persons." He also said "later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than" such subsidies at the expense of injured persons. Obviously justice requires that subsidies should be paid out of the public treasury, contributed to by all, and not mulcted from persons who have suffered damage in their time of distress.

Actually the subsidies now provided for American shipping include excess of insurance costs above those for foreign vessels. If premiums for American subsidized shipowners were increased by repeal of our limitation laws the excess cost would be assumed by the public treasury.

Mr. Justice Black also said:

"Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail."

Gilmore and Black state that "the Act was passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity insurance) were available." Admiralty p. 667. The hostility of the courts they say reflects "increasing signs of economic obsolescence of the limitation system."

On May 2, 1957 Senator Morse introduced a Bill to amend the law relating to limitation of liability which would have required the surrender of "all hull and liability insurance," with remarks about

the injustice of the present system. His Bill would have effectively destroyed the system. He was immediately joined by five other Senators as co-sponsors.

Our present law operates with peculiar severity in purely domestic cases. The Sirovich Amendment which provides additional protection to personal injury and loss of life claimants up to a maximum of \$60 per ton applies only to "seagoing" vessels. The Cushing case is an example. There a river tug sank with the loss of five lives. The petition alleged no value and no security was tendered. Naturally the claimants sought the benefits of the Louisiana Direct Action Statute and sued the vessel's insurers. It is reasonable to believe that the decision of the Supreme Court, which increases the difficulties and expense of operating vessels in Louisiana, and jeopardizes the position of vessel underwriters, was to a degree influenced by sympathy for the claimants.

In this atmosphere, for shipowners to promote a completely new and grandiose system of limitation of liability based on foreign law and geared to an International Convention will certainly jeopardize any continuation of this special privilege of shipowners—particularly since one result of such a Convention will be to deprive American citizens of security obtained and the right to enforce their claims in our own courts.

The promotion of the enactment of this Bill which assumes ratification of the Convention is now urged in the interests of "international uniformity of maritime law." It was well said by Judge Kennedy in the 1958 Report that the adoption of the Convention "will surely produce not uniformity but chaos," which is demonstrable.

The Convention System contains many features and provisions of disadvantage to the American public and to American shipowners, crews, passengers and cargo shippers. It is in contradiction to the proposals of the U. S. Delegation at the Brussels 1957 Convention which were summarily rejected. Our delegation acted in accordance with instructions contained in a Position Paper carefully worked out in cooperation with our Association in the light of the preliminary draft of the Convention. Our delegation was therefore unable to sign the Convention.

The philosophy of the majority of the present Committee seems to be that such specious uniformity as can be obtained by adopting the

Convention is desirable however much to our disadvantage the provisions of the Convention may be, however much our views have been disregarded, and no matter down what primrose path we are led by our foreign "friends."

And this foreign system they would also have us enact as domestic law.

Disadvantages of the Convention

Under the Convention the shipowner may constitute his limitation fund in any forum he chooses, that is, in the courts of any Contracting State. He may prefer the courts of his own state, but he may prefer the courts of some strange and inconvenient jurisdiction, and as later pointed out may be under some compulsion to do so. Egypt, India, Greece, Liberia, Panama, Honduras, Japan and many others are distinct possibilities.

Article 2(4) of the Convention (see 4 E of the Bills) provides:

"After the fund has been constituted, no claimant against the fund⁴ shall be entitled to exercise any right against any other asset of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant."

There is no definition of the words "constituted" or "actually available" nor any assurance of their meaning or interpretation.

These are procedural matters.

Under the Convention "questions of procedure" and "time limits" for bringing action are to be determined by the law of the forum. Art. 4 and Art. 5(5).

It would appear that the court of the jurisdiction where the fund is constituted has clear jurisdiction to determine whether the fund is properly "constituted" and "available to claimants."

It is easy to imagine a jurisdiction where such determinations by a foreign court would be wholly unsatisfactory to American claim-

4. The Bills use the words "no claimant or potential claimant" (see 3 E). It is undoubtedly the intention of the Convention that the phrase "no claimant" should include any "potential claimant," and there is hardly any doubt that it would be so interpreted by foreign courts.

ants. There might well be serious questions as to sufficiency of the security accepted, and as to the right of claimants to withdraw recoveries from such country or whether at realistic rates of exchange. It is highly doubtful that such determinations by foreign courts could be legally or practically reviewed by our courts. But if our courts disagreed, we would no longer have uniformity but an aspect of "chaos."

On the other hand, there are jurisdictions where there could be no question but that the constitution and availability of the fund would be adequate. In such a case after the fund had been constituted no American claimant could enforce his claim except by going to the foreign court with consequent inconvenience and expense, including the employment of such foreign counsel as might be available.

There is no assurance that an American claimant could accomplish anything by prosecuting to judgment in this country his claim against the foreign shipowner, even if permitted, and adequate jurisdiction were otherwise present. At Brussels a motion by an American delegate that a judgment so obtained should be recognized by the court administering the fund as establishing liability and the amount of the claim was defeated. The Department of Justice will confirm that the record on recognition of judgments of U. S. courts in foreign jurisdictions is poor.

As a procedural matter it would be quite in order for the courts of the state administering the fund to provide that claims against the fund can only be established by filing and prosecution in the proceedings there, and probably many or most of them would do so.

This means that claims of American claimants could be established only by procedures in foreign courts and according to foreign law which may be disadvantageous in many respects.

As noted the foreign courts are given express authority to establish "time limits" (Con. 5(5)) for bringing action which may be disadvantageous to American claimants and restrictive of their rights.

Any foreign country may provide that the burden of proof of "the actual fault or privity of the owner" is on the claimant (Conv. 1(6)) and the debate at Brussels indicates that many of them will. The conference refused to adopt a clear provision in accordance with our law that the burden is on the shipowner and Art. 1(6) was the only compromise possible.

There are many variances from our law relating to liability for claims in the laws of foreign countries. For instance, the Collision Convention 1910, Art. 6 abolishes all "legal presumptions of fault" in collision cases. See official text printed in Knauth's, Benedict on Admiralty, 6th Ed., Vol. 6, pp. 4, 5. This probably abolishes the rule of *The Pennsylvania*. The British Maritime Conventions Act, 1911, in enacting that convention did abolish the British equivalent of *The Pennsylvania* rule (Sec. 4(1)) of that Act. The Convention provision probably also abolishes the rule of *res ipsa loquitur* including the presumption against a moving vessel striking one moored or at anchor. The proposed Bill apparently accepts this interpretation and so proposes, see Bills, Sec. 2.

Certain it is that there will not be a provision in foreign jurisdictions for jury trial on any claims, for other countries, including Great Britain, do not have jury trials of negligence cases.

Under the Convention, American claimants will not only be forced to go abroad to enforce their claims but will be subject to all the burdens and disadvantages which the law and procedure of the foreign forum may impose. The very variances between their law and procedure and ours will afford an excellent reason for foreign courts to decline to accept United States judgments as proofs of claim.

These are real apprehensions for it is very clear in this and other connections that foreign countries have a great apprehension of the assessment of claims in American courts, including the Admiralty courts, and are determined to avoid this wherever possible. This is one of the strong underlying motivations for this Convention.

The Convention also contains provisions which would in many cases *require the release of any security obtained by American claimants in our courts*, and in other cases would give discretionary power to the courts to order such release, when the fund has been "constituted" in a foreign jurisdiction and is "actually available" for the benefit of claimants. (My comment *supra* as to the impracticability and doubtful legality of any review of a foreign determination on these points by our courts is again applicable, as well as on the chaos which would result from conflicting decisions.)

The Convention provides in Art. 5 that where the fund is constituted in certain preferred jurisdictions described in subsection 5(2) (a), (6) and (c), other courts of contracting states *must (shall)*

release any bail or security obtained elsewhere. These provisions are incorporated in the Bills, Sections 5A and B.

If the fund is constituted in any other jurisdiction other courts "may" release such security, Art. 5(1), and in many cases probably would.

These provisions do not take into account the possibility that the shipowner may be denied the right to limit liability in which case claimants might need to fall back on security originally obtained for recoveries in excess of the limitation fund. In fact, there is no provision in the Convention for the protection of the rights of claimants when the shipowner's claim of right to limitation is denied.

The provisions of the Convention would certainly lead to "chaos" and to the great disadvantage of claimants in collision cases where foreign vessels are involved such as, for instance, the *ANDREA DORIA-STOCKHOLM* case. In that case jurisdiction over both owners was promptly established by suit of claimants in New York, including libels *in rem* against the *STOCKHOLM*. The fact that such claims were enforceable here compelled the filing of limitation proceedings by both owners here. The proceedings were consolidated as usual and were in a single court where the entire matter was speedily and satisfactorily disposed of. In fact an all time record for quick disposition of a major case was established.

If the Convention had been in force, the Swedish American Line would probably have constituted its fund in Sweden and that fund would probably have been beyond criticism on grounds of adequacy and availability. Similarly, the Italian Line would have constituted its fund in Italy. All suits here would have become illusory and any security given here released. There would have been no compulsion to establish a common form.

Here indeed chaos would have resulted. It would have been quite possible for the Swedish courts to have absolved the *STOCKHOLM*, and the Italian courts the *ANDREA DORIA*, or they could have disagreed as to degree of fault. Claimants, deprived of rights here, would have been compelled to go to two widely separated foreign forums and could easily have been whipsawed. The prospective hazards and expense could easily have forced inadequate settlements and there would have been endless confusion and delay.

A similar situation could arise in a case of collision between an American vessel and a foreign vessel.

It is not only claimants who will be placed at a disadvantage by the provisions of the Convention for compulsory foreign jurisdiction.

Shipowners may feel compelled to select one of the preferred jurisdictions described in 5(2)(a), (b) and (c) in order to obtain the benefit of the mandatory release of other security, and such jurisdictions may be strange and inconvenient. Moreover, (b) and (c) are so badly drawn that one jurisdiction may be "preferred" as to some claimants, and other jurisdictions "preferred" as to others. The corresponding confusion and inconvenience to all concerned is another element of "chaos."

The A.M.M.I. Bills in Sections 6A and 6B not only enact verbatim the provisions of Articles 5(1) and 5(2) of the Convention but specifically make them applicable when the shipowner limits liability under the Convention as well as when he limits liability in this country. They thereby clearly subject American claimants to all the disadvantages and handicaps of compulsory foreign jurisdiction when chosen by the shipowner, as outlined above.

When these features of the Convention and the Bills are understood it is difficult to believe that Congress will consider this new, and essentially international and foreign, system of limitation of liability a desirable improvement, particularly since its enactment would be detrimental to the interests of infinitely more United States citizens than would be assisted thereby. On the contrary, it is more probable that the basic principle of limitation of liability will be called into question.

The majority report takes no note of these seriously objectionable features of the Convention, and speaks only of the desirability of "uniformity" which it has been demonstrated the Convention will not produce, and of the limits of liability which it would establish.

The Limits of Liability

The amounts established in the Convention and adopted in the Bills as the limits of liability have received more attention than they deserve. Under English law they represent a substantial improvement from the figures of £15, divided £7 and £8. Those figures established

in 1862, and representing the then average sound value of all ships (Marsden, Collisions, 10th, p. 178), were nearly 100 years out of date and correspondingly ridiculous. The new figures put forward by the British do not purport to represent anything, and certainly not the average sound value of ships in that country or this. As arbitrary and fixed figures they constitute a great boon to newer and higher valued ships and impose a penalty on older, low-valued ships. The stating of the limits in a foreign currency (hardly an endearing factor), although related to gold, does not protect against fluctuations in the value of money. The gold value of U. S. dollars has not changed since the Sirovich Amendment of 1935, but the \$60 provision there is at least 100% too low on the basis of purchasing value of the dollar today, and must be changed.

The Convention figures are no bargain to claimants. The majority report indicates that they may be of some value in cases of total loss and of old ships. The fact remains that in the case of the STOCKHOLM, which had a million dollars of damage, her limitation fund would have been at least cut in half under the Convention figures. The most that can be said is that they are something of a stand-off, the advantages of which are debatable. They are certainly arbitrary and not related to the value of the vessel before or after the disaster. They are completely unrelated to the conception heretofore put forward in justification of the system that the shipowner's risk should be limited to the amount of his investment, provided he has not been guilty of personal negligence.

The Extension of the Benefits of Limitation of Liability

Heretofore the "subsidy" of limitation of liability has been strictly confined to the owners of ships and to bareboat charterers who are in the position of owners *pro hac vice*.

Now we are being asked also to subsidize large numbers of other persons by giving them the benefits of being included in the owner's limitation of liability. In other words, in cases where the owner is entitled to limit they will in effect have no liability whatever.

These added persons to be so benefited are described in the Convention, Art. 6(2), the text of which is included in the Bills. Sec. 6B and include—

1. All "charterers" of any type and description. "Charterer" is a broad term and "charter" may include even a freighting contract or an informal arrangement. An amendment proposed by the American delegation at Brussels to insert the word "demise" before the word "charterer" was rejected. Minutes, Oct. 8, 1957, afternoon p. 16.

2. All "managers and operators." This is indeed a wide classification, the exact scope of which can only be determined after years of interpretation by the courts.

3. "Masters and members of the crew."

4. All "other servants of the owner, charterer, manager or operator acting in the course of their employment. This specification opens the door as wide as possible and will include all manner of persons performing all manner of functions.

These broad extensions are entirely inconsistent with the principles of limitation of liability heretofore recognized in this country.

Furthermore, the owner's right to limit liability is extended to loss, injury or damage whether on land or on water and to "*the infringement of any rights caused by the act, neglect or default of any person on board the ship * * * or any person not on board the ship for whose act, neglect or default the owner is responsible*" (Art. 1(b); Bills 2(2)), and this broad language is extended for the benefit of the broad classes of persons enumerated above to whom the right of limitation would be extended (Art. 6(2)).

How broad the effect of these extensions may be can only be a subject of speculation and the final results can be known only after years of litigation. It is certain that shipowners will modify their operating practices so as to bring within the scope of the benefits of the Convention as wide a range of persons as possible. Aside from the merits, it is obvious that chaotic conditions will exist for many, many years, while the breath of these provisions is being interpreted by the courts. Certain it is that these provisions offer the strong probability of conflict in decision in the different countries.

The temerity of the shipowners in proposing this grandios program for bigger, better and broader limitation of liability, so full of objectionable features, and so disadvantageous to American interests, at a time when limitation of liability, as it has heretofore existed, is under strong attack and in jeopardy, is difficult to understand.

The Bill contains an additional provision in Section 7B which would include the insurers of all persons to be benefited by limitation of liability within the benefits of that limitation. This is to override the proposal of Senator Morse, and to overcome the handicaps placed on owners and their underwriters by the decision in the *Cushing* case. We would agree that owners and bareboat charterers who are presently entitled to benefits of limitation and their insurers are entitled to this protection, *if* limitation of liability is to be preserved. However, it is not necessary to use a Bill adopting all provisions of this objectionable Convention as a vehicle to accomplish this result, as I shall point out below. The inclusion of the pilot, master and members of the crew while acting in the navigation of the ship, has some debatable merit but I would not too seriously object to a limited provision to this effect.⁵

Obviously a generous approach to liberalization of our limitation laws for the benefit of claimants is called for if the right of limitation of liability is to be to any extent preserved. The Convention and the proposed legislation enacting its provisions do not have this approach. Shipowners would be grabbing much more than they give.

I would propose an alternative program which, in general, was proposed by me in 1958 to the then members of this Association's Committee on the Convention and which at that time was received favorably by many members of the Committee. It was in part referred to in the Committee's Report, Document 418. My alternative program can be summarized as follows:

Alternative Program

My alternative program would include the following:

1. I would amend the Sirovich provision of \$60 per ton to meet the Convention figure available for death and personal injury claimants. This should probably be so worded that the figure named would not be a maximum as at present but would allow for participation in the fund otherwise provided in the event the specified figure were insufficient to pay such claims in full, as is done in the Convention, and has been traditional in English law, from which the Sirovich conception was in part borrowed.

5. The advisability of this provision was doubted in the Hupper Report Sec. 23, p. 3838, and has been elsewhere criticized.

2. I would further amend the Sirovich Act to make its provisions applicable to all inland vessels as well as to seagoing vessels. This would offset the impact on the present limitation laws of inland disasters, such as that in the *Cushing* case.

3. A bill containing these provisions could readily contain a further provision similar to that contained in the proposed Bills which would protect vessel underwriters from liability in excess of that of their assureds when their assureds are entitled to limitation of liability. Unless this is done, it is obvious that vessel owners operating in direct action states will be subjected to premium costs based on the unlimited liability of their underwriters and will consequently lose any benefit of limitation.

4. There could well be included in this Bill also a specific provision comparable to those contained in the Convention Arts. 3(3) and 3(4) and Sections 5B and 5C of the Bills allowing the shipowner to be subrogated to the claim of a claimant whose claim he has paid in respect to that claimant's rights against his limitation fund.

This legislation could even include a provision that the liability of pilot, master and crew be included in the owner's limit of liability when the owner is entitled to limitation.

This program, I believe, includes all that requires or is desirable to be done. I believe that all interests could present a united front in support of such a program and that, presenting a united front, the appropriate legislation could be easily accomplished.⁶

I am strongly opposed to the ratification of the Brussels Convention on Limitation of Liability of Shipowners 1957, and the legislation proposed to enact the provisions of that Convention as our domestic law to displace completely the system of limitation of liability which has been in force for 110 years. I am completely opposed to a Convention or legislation which would have the effect of depriving our nationals of their rights to redress in our courts and compel them to go to foreign jurisdictions to enforce their claims subject to the provisions of foreign law.

6. I have in fact drafted a Bill which would include these provisions which I shall be glad to produce at the appropriate time. I do not, however, wish to extend this report by including its text here, nor to divert attention from the main issue by discussion of its details.

I see no merit in the plea for international uniformity. I agree wholeheartedly with the opinion expressed by Judge Kennedy three years ago when he said that the Convention will surely "produce not uniformity, but chaos". The Hupper report agreed with the "concept of uniformity" but said that this "Convention does not qualify" Sec. 10, p. 3835. This Association agreed.

The Convention has not improved with the passage of time. The question resolves itself into this,—Do we lead, or do we follow—and do we follow into the trap that has been laid for us by our foreign confreres?

The Brussels Collision Convention, 1910

The majority of the Committee would have the Association reverse its position taken consistently since its organization in 1899 in opposition to the basic principle of this Convention. They do not discuss this principle and say only that in their "opinion" ratification of the Convention is "desirable from the point of view of domestic law and very desirable from the point of international uniformity".

The adoption of the Convention and of domestic legislation incorporating its provisions would be another instance of class legislation in the interests of shipowners. Only shipowners would be benefited thereby. After standing firm against this special privilege to shipowners on grounds of right and justice for more than sixty years, it would hardly become this Association to reverse its position without discussion and full understanding of the question of principle involved.

The text of the Convention is not supplied but the official text can be found in Knauth's *Benedict on Admiralty*, 6th Ed., vol. 6, pp. 3-7.

It is only incidental and relatively unimportant that the Convention would permit the division of damages and liability between negligent shipowners in other degrees than equal in collision cases, thereby overriding the principle of equal division established by the Supreme Court in the case of *The Catherine* (1854), 17 Howard (58 U. S.) 169, 177, and consistently applied ever since. That rule was established as a matter of policy to enforce respect for the rules of navigation. The Supreme Court has recently refused twice, after full briefing, to consider modification of the rule, in spite of

derogatory comments by judges of the Court of Appeals, Second Circuit. *The Melrose-Sandcraft*, 352 U. S. 971; *The A. C. Dodge*, 352 U. S. 928.

It is debatable whether a modification of the equal division rule would produce desirable results under our judicial system in which we have more than 300 district judges who are potential triers of collision cases, very few of whom have or can have the opportunity to become well qualified in matters of navigation, and under which there is no provision for advice to the court by impartial nautical advisers as in England. But a statute which did only this would not raise the storms of objection which the 1910 Convention has repeatedly encountered.

The basic question of principle involved in the Convention is whether vessel owners should be relieved in collision cases from the operation of the elsewhere universal principle of the joint and several liability of joint tort feasons *towards innocent parties, i.e., parties not guilty of any contributing fault.*

This goes far beyond the reduction of damages recoverable by a person whose own fault has contributed according to his degree of fault, and the analogy of the Jones Act which incorporates this principle is to that degree false.⁷

The Convention would limit the recoveries of innocent persons according to the degree of fault of someone else for whose negligence those persons are not responsible.

This is done by providing that the liability of each vessel shall be only "in proportion to the degree of the faults committed * * * without joint and several liability to third parties". Conv. Art. 4, par. 2.

Death and personal injury claims are excepted and the rule of joint and several liability is expressly continued as to such claims. Art. 4, par. 3.

There is no rational distinction between these classes of claims on this point. The explanation lies only in the fact that the British shipowning group which promoted the Convention did not dare to push their luck so far for fear of public outcry. This was candidly admitted by their spokesman at the time.

7. The reference in the majority report to the "General Maritime Law" is unsubstantiated and unwarranted.

The Convention limits its abolition of the rule of joint and several liability to third parties to claims for damage "to vessels, or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board."

Claims for loss of personal property of officers or members of the crew, and of passengers, as well as claims for loss or damage to cargo can be substantial.

Claims for damage to innocent vessels such as vessels moored or at anchor are affected.⁸

The A.M.M.I. Bills go further and provide that the provisions of the Act shall apply to "damages in all cases to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damages are done or consummated on land." Sec. 10.

This deprives the owners of piers, wharves and all shore structures and all property thereon of the benefit of the rule of joint and several liability which is their right against any other tortfeasor. How this, or the other effects recited, would contribute to domestic uniformity is unclear.

The result of these provisions would be to largely destroy our practice of impleading under the 56th Rule in Admiralty which is in fact based on the joint and several liability of joint tortfeasors.

Heretofore, the owner of a pier, or an anchored or moored vessel struck by a moving vessel could with confidence sue that vessel or her owner. If the owner of that vessel considered that the fault of another contributed to the collision, he was under some compulsion to implead that other, for otherwise if he were held to be at fault in any degree he would be liable for the entire damage. If the Collision Convention were adopted or enacted as proposed, he would be better off not to implead. It is obviously easier to place some blame on a vessel or owner or other party not before the court and required to defend himself. If the party sued can succeed in placing a part of the blame on the absent defendant, his own liability will be correspondingly reduced.

8. As noted, *supra*, any presumption of fault against the moving vessel is also abolished. Conv., Art. 6 and Art. 2; Bills Sec. 2.

This could happen in any collision case where a third vessel is blamed as in the *George W. McKnight*, 1951 AMC 2012.

Under such conditions the use of the impleading procedure will be discontinued and the innocent sufferer will be compelled at his peril to undertake all the burdens of suing and obtaining jurisdiction of *all* persons who may possibly be blamed and held liable for a part of his damages. By the time he learns of the contentions of the first defendant, the other vessel may have escaped the jurisdiction. Or it may be that the attempt will be to transfer a substantial part of the blame and corresponding liability to an irresponsible person or vessel or even an unidentified vessel.

That an innocent claimant should not be put to such disadvantage is a basic and unquestioned tenet of the common law. This principle is stated in Restatement of the Law—Torts, Vol. IV, Sec. 879 as follows:

“Except as stated in § 881 [dealing only with cases of nuisance], each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable *for the entire harm* in the absence of a superseding cause.”

Under “Comment a,” it is pointed out that:

“It is immaterial that the conduct of one was seriously wrongful while the conduct of the other was merely negligent * * *.”

In the introduction to this volume it is explained that “The accuracy of the statements of law made rests on the authority of the Institute” (p. xl). They represent “an orderly statement of the common law of the United States” (p. X). The members of the Institute (American Law Institute) include “the Justices of the Supreme Court of the United States, senior judges of the United States Circuit Court of Appeals, the chief justices of the highest courts of the several States,” etc. (p. IX).

While a number of Judges have in their opinions criticized the American rule of equal division between vessels at fault in collision cases, their pronouncements do not include adoption of the 1910 Convention and the abolition of the rule of joint and several liability.

The rule of joint and several liability of joint tort feorsors to third parties in collision cases has always been the rule in this country. *The Atlas*, 93 U. S. 302.

It has been the proposed abolition of this rule by the Convention that has engendered insurmountable opposition to it. During the years when the Convention was being promoted by British shipowning interests this Association registered disapproval at meetings June 28, 1899, May 2, 1902 and December 8, 1905. After the formulation of the Convention in 1910, the individual opposition of members was instrumental in its being withheld from the Senate. At meetings held on May 20, 1927 and May 2, 1930 resolutions were adopted opposing the Convention. On May 6, 1940 the report of a Special Committee consisting of Messrs. Hupper, Keating and Englar was received again opposing the Convention and any implementing legislation and no further action was deemed necessary.

In 1946 a special committee was appointed to study the Convention, review prior actions and report. The Committee consisting of Messrs. Griffiths, Henderson, Matteson, Rault and Williams, and W. E. Collins dissenting, presented its report approving prior actions of the Association and again opposing either ratification or legislation in the terms of the Convention.

In February 18, 1928, Hon. John M. Woolsey, submitted to the Assistant Secretary of Commerce, at the latter's request an extended report on the Convention in which he recommended against ratification on the grounds we have outlined.

In all reports on the Convention, and in particular that of Judge Woolsey, and in the actions taken by the Association, the position of cargo in a collision case has been taken into account. It is well understood that in collision cases cargo usually has no right of recovery against the carrying vessel because of provisions of the contract and/or the Harter Act or the Carriage of Goods by Sea Act, giving the carrier protection against liability arising from errors in navigation.

Obviously neither Act restricted or reduced the rights of cargo against any other vessel. *The Delaware*, 161 U. S. 459.

The rights of an innocent party to recover *in solido* from either of two joint tort feorsors is not restricted by the fact that one of them

may have the benefit of an exemption. This corollary of the rule of joint and several liability is as well established as that rule itself. Sec. 880 of Restatement of the Law—Torts reads as follows:

“Where two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the person harmed.”

Judge Woolsey had this principle in mind when he said in his report—

“The Convention is wrong in principle because under cases of mutual fault it only allows cargo to recover from each vessel such proportion of the damages as the vessel’s fault bears to the whole damage * * *.”

That the provisions of the Convention and the proposed legislation would curtail the rights of cargo and other property owners based on fundamental principles which are the “inherent rights of justice” of all innocent property owners, in a manner which no other statute has done cannot be gainsaid.

The British common law principles are the same as ours. The British admiralty precedents restricting the rights of cargo in both to blame collision cases were probably the result of a mistake but became the law of England by legislative inadvertence (?). The legal position thus established has been severely criticized by textbook writers as “not logically satisfactory” and “historically unsound”, Roscoe on Damages in Marine Collisions, 2nd, pp. 20, 21; and working “positive injustice”, Marsden on Marine Collisions, 9th, p. 136. For criticisms of the British rule by the British Courts, see *The Drumlanrig* (1910) Prob. 249, 260, 269, and *Stoomvaart, etc. v. P & O Nav. Co.* (1882) 7 App. Cas. 795, 819. The fact that the British are content with an unsound, illogical and unjust law, or that others may have followed them in the Convention, is no reason why we should adopt this rule in this country or agree to an international convention based on that rule, to the prejudice of the great majority of our citizens.

Spokesmen for the shipowning group who would be the sole beneficiaries if the Convention were adopted have in their efforts to support the Convention frequently attempted to confuse the issue by

dragging in an entirely extraneous consideration with a completely spurious argument. They say that our present law permits cargo to recover indirectly from the carrying vessel damages which cargo cannot recover directly because of the Harter Act or Cogsa. They urge that the Convention be adopted to prevent this.

This assertion was again made in Committee but is not included in the majority report. The assertion is untrue and had been rejected by the courts.⁹ Its continued reiteration by proponents of the Convention can only be evidence of irresponsibility.

The fact is that the vessel owner joint tortfeasor is better off than most. At common law there is no contribution between joint tortfeasors and one who has paid the entire claim of a third party has no right against the other to share his loss.

In admiralty the strict common law rule has been ameliorated and contribution between joint tortfeasors is the rule in collision cases only.¹⁰

The result is that when the non-carrying vessel owner tortfeasor has paid in full the damages of cargo on the other vessel, or the damages of any other third party, he is entitled to claim contribution from any other joint tortfeasor. In the case of the *Chattahoochee*, 173 U. S. 540, the non-carrying vessel owner, being liable *in solido* for the loss of cargo on the carrying ship, did just this, the carrying ship being also at fault. Naturally he was met with the argument that the carrying ship was protected against liability for cargo damage by the Harter Act. The argument could have gone either way. The Supreme Court, however, decided in the *Chattahoochee*, elaborated in subsequent cases, that the non-carrier's claim was not based on subrogation and that his liability for the cargo damage was merely a part of the damages sustained by the non-carrier as a result of the collision. The Harter Act was not intended to and did not affect rights as between vessel owners to a division of the total of the damages of each as between themselves.

9. *The Ezzo* BELGIUM-NATHANIEL BACON (CA 2) 1957 AMC 1435, 195 F. (2d) 370; (Supreme Court) 1952 AMC 659, 343 U. S. 236. A careful reading of these opinions is advised. In addition to clear statements of the legal situation, it was there held that it was contrary to public policy for the carrier by contract to claim indemnity from the cargo for his liability to the other ship.

10. *Halcyon v. Haenn*, 342 U. S. 282, 284-5.

There is not the least justification for describing this result as an indirect recovery of damages by cargo from the carrying vessel. Cargo can never recover from the carrying vessel damages resulting only from errors in navigation. Cargo can only recover from the non-carrier. If the non-carrier is totally lost or escapes the jurisdiction cargo can recover nothing. If the non-carrier limits liability the cargo gets only a dividend from his fund.

The situation described arises solely out of the exercise of the right of contribution, or division of damages, by one shipowner against the other, which the cargo owner is powerless to control, and which occurs only after cargo has been paid, or its right of recovery from the non-carrier has become fixed.

The shipowner's complaint is only against the decision in *The Chattahoochee* and following cases. If the shipowner prefers that the right of contribution in respect of such claims be abolished there would be no objection. The British Maritime Conventions Act, 1911, does abolish the right of contribution in respect of any claim as to which the contributor would not have a direct liability. A substitute Bill has been prepared which will do just this, and deal also with other objectionable features of the Convention and the proposed legislation, which will be brought forward at the appropriate time.

But let there be no further assertions that cargo under our present law makes an indirect recovery from the carrying vessel. Cargo could not care less whether there is contribution, or division of the damages, between the vessel owners in respect of the non-carrier's liability to him.

The main objectionable feature of the Convention is the abolition of the rule of joint and several liability of shipowners who are joint tort feors in respect of all third party property claims. As pointed out many other property interests besides cargo are affected.

The Convention is wrong and indefensible in principle. The adoption of the Convention and corresponding domestic legislation would be class legislation in the interests of shipowners and against the interests of all others. In fact it would be chiefly in the interests of foreign shipowners, since only 10% of American cargoes are carried in American ships, and the total of foreign ships traversing the seas greatly outnumbers our own fleet.

Other Objections to the Convention and the Proposed Legislation

There are a number of other objectionable features in the Convention and in the proposed legislation.

1. The Convention would abolish all "legal presumptions of fault". Art. 6. This would abolish the rule of *The Pennsylvania* and has been so interpreted in Great Britain. It would probably also abolish the doctrine of *res ipsa loquitur* including the presumption against a moving vessel colliding with a vessel moored or at anchor. Section 2 of the proposed Bills appears to adopt this interpretation.

2. The Convention provides in Article 2 that "If the collision is accidental, if it is caused by *force majeure*, or if the causes of collision are in doubt, the damages shall be borne by those who have suffered them." The effect of the words "accidental" and "in doubt" are doubtful and could present serious handicaps to claimants. This language is adopted in Section 2 of the Bills.

3. Adoption of the Convention would require amendment of the provisions of our Stand-by Act by striking out the provision that in the event of failure to stand by "the collision shall * * * be deemed to have been caused by his [the master's] wrongful act, neglect, or default". The equivalent of our Stand-by Act except for this provision is contained in Article 8 of the Convention, but the final sentence reads—"A breach of the above provision shall not of itself impose any liability on the owner of the vessel". The Bills in Section 7 provide for the repeal of the final sentence of our Stand-by Act. The wisdom of this action is open to serious doubt.

4. The Convention in Article 7 contains a time bar for collision actions of two years from the date of the casualty, and leaves the ground on which that period may be suspended or interrupted to be determined by the law of the court where the case is tried. Obviously there will be diversity on this point. The Bills contain the same time bar and a provision for extension based on lack of reasonable opportunity of arresting the vessel in the country in which the libellant resides or has his principal place of business. These provisions are obviously less favorable to claimants than our present doctrine of laches.

5. The Bills which would enact the provisions of the Convention as domestic law extend the application of those provisions to include—"All cases to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damages are done or consummated on land". This provision has been commented upon *supra* and would considerably extend, as a matter of domestic law, the scope of any abolition of the rule of joint and several liability by limiting damages recoverable from joint tortfeasors to a proportion equal to their respective degrees of fault. The Convention abolishes the rule only in cases of collision between vessels.

How far the extension of this objectionable principle of the Convention goes, and to what cases it may be held to apply, is uncertain. It is clear that it extends the principle of the Convention to cases of damage to piers, wharves, shore structures and all property ashore.

These additional objections are subordinate but do further characterize the Convention and the proposed legislation as special interest proposals for the benefit of shipowners to the detriment of all others, for which there is no justification.

Conclusions

In the opinion of the undersigned this Association should reject and disapprove the report of the majority of this Committee and

This Association should reaffirm its positions heretofore taken opposing the ratification of both Conventions and opposing any domestic legislation which would incorporate the principles and provisions thereof.

I do not apologize for the length of this report.

The report of the majority of this Committee recommending approval by the Association of ratification of both Conventions and enactment of their provisions as domestic law speaks in generalities only. There is no explanation of the basic features of either Convention which have led to this Association's prior disapproval. No new argument to meet those objections has been put forward. The proposals are submerged in a specious plea for international uniformity which has a superficial appeal.

The general desirability of uniformity has entered into all prior considerations of both Conventions by this Association and has been rejected as a basis for support.

It is now three years since the Limitation Convention was considered by this Association on the basis of a comprehensive and detailed report. It is fourteen years since the Collision Convention was last considered. The membership of the Association has increased greatly—and memories grow dim.

I believe no apology is necessary for reiteration at this time of the important factors which led to the prior disapproval of both Conventions by this Association.

Respectfully submitted,

LEONARD J. MATTESON.

September 29, 1961.

MINORITY REPORT OF RUSSELL T. MOUNT

I concur in the foregoing Minority Report of Mr. Matteson, which all members should read.

As to Limitation of Liability of Shipowners, the Majority Report recommends that this Association reverse its opposition to the Brussel's Convention 1957 Relating to the Limitation of the Liability of Owners of Seagoing Ships (and the earlier Madrid Draft, 1955). That opposition was made a matter of record by vote at the Annual Meetings of the Association in May 1955, May 1956 and May 1958. The proposed bills, if enacted, would reverse the principles of our own Limitation of Liability Statute 1851, which, with the amendment of the \$60 a ton minimum liability for death and personal injury claims, has worked so satisfactorily for 110 years.

Mr. Matteson has set forth a detailed analysis of the provisions of the proposed bills dealing with Limitation of Liability. The principal objections are serious.

1. Our present Limitation of Liability Statute would be repealed (Sec. 8 of both bills).

2. Under Section 6 of the proposed bills, in every limitation situation involving a foreign vessel, American claimants could be prevented from litigating their claims against that vessel in United States Courts if the vessel owner "constitutes" its limitation fund in any other contracting State of the International Convention, and the *procedure* in the litigation in that State, would be governed by its law.

3. The rationale of limitation of liability is to protect the (personally) innocent vessel owner, from *unlimited* liability for negligence of those particular servants who are beyond his physical control. The proposed bills, in Section 2A (2) would extend the shipowner's right of limitation to negligence (without his "actual fault or privity") of his servants *on shore* "in the loading, carriage or discharge of its cargo, or in the embarkation, carriage or disembarkation of its passengers."

4. Section 7B extends the right of limitation to every "charterer, manager and operator of the ship, and to the pilot, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment."

5. Section 3, by enacting a fixed limitation fund in all cases, would prevent an aggregate recovery of more than the amount of that fund, even though the value of the vessel, following the "occurrence", exceeded that amount.

International uniformity of the rights and liabilities arising out of marine casualties is a laudable ideal, but not at the sacrifice of our principles of justice, and equity based on 110 years experience with our own Limitation of Liability Statute. Our Statute could very well be amended by fixing the amount of the limitation fund in the case of damage to property, and increasing the amount of the limitation fund in the case of personal injury and death losses, without enactment of the Statutes recommended in the Majority Report.

I recommend disapproval of the proposed bills and disapproval of ratification of the Brussel's Convention 1957.

As to the proposed bill dealing with apportionment of liability in collision cases, I am of the opinion that a statutory modification of our judicially established law, so as to apportion fault, would be in the interest of justice as between vessel owners. The remaining provisions of the proposed bill, however, would expressly limit the *liability* of a vessel in fault for damage to *property*, e.g., cargo on another vessel, piers and property thereon, and any structure on land or on water, to the vessel's proportion of fault. This would abolish our admiralty principle of a joint tortfeasor's liability *in solido*, to the obvious detriment, and, in my opinion, unfairness to innocent American property claimants. This point does not need elaboration to members of the Association. Because of that part of the proposed bill and of the 1910 Collision Convention, I recommend against approval of both the Bill and the Convention by this Association.

Respectfully submitted,

RUSSELL T. MOUNT.

October 9, 1961.

MINORITY REPORT—BY ABRAHAM E. FREEDMAN

The decision of the majority,¹ in the context of the circumstances preceding it is a startling reversal of a most strongly advocated previous position. The reasoning offered in support of the reversal is hardly less than absurd against the backdrop of the majority's previous reasoning to the contrary. This controversy stems from the Brussels Convention of 1957, relating to limitation of liability. Prior to the meeting in Brussels, the State Department representatives met with a committee of the Maritime Law Association, to ascertain the views of the industry and to draft a "position paper" for the American representatives. The Committee meetings developed that Great Britain and certain other maritime nations considered the limitation funds under the existing laws to be shockingly inadequate, requiring considerable liberalizing. The Committee also recognized that unless something was done to increase the limitation fund under the American law, Congress might take steps to eliminate completely or, at very least, to sharply restrict the limitation of liability laws and substantially increase the fund.² After a careful sifting of all the facts, the Committee concluded that the limitation fund should be increased, without otherwise materially changing the existing limitation of liability laws. This became the position of the American delegation at the Brussels Convention.

The product adopted by the foreign states at the Brussels Convention would so drastically change the American law, to the great prejudice of American interests, that the American delegation refused to approve. The 1957 Brussels Convention was then submitted to the M.L.A. Committee for study and comment. It appeared that certain individuals in the Government most anxiously desired to have the 1957 Convention adopted in the interest of "world-wide

1. This committee was allegedly constituted to represent all phases of the industry: shipowners, labor, personal injury claimants and cargo interests. Unfortunately, however, of the twelve members of the committee, only one represented labor and the personal injury claimants, one represented cargo, nine represented the shipowners and one represented the government also a shipowner. The shipowner representatives reversed their previous position and voted in favor of the proposal. The personal injury, labor and the cargo representatives voted against the proposal. The shipowner representatives thus prevailed and became the majority only because they dominated the committee numerically. The majority and minority reports must, therefore, be examined against this backdrop.

2. There was then pending in Congress a bill presented by Senator Morse which would require the shipowner to make available and deposit all insurance money into the limitation fund.

uniformity". A painstaking study by the committee extending over many months, was undertaken, giving consideration to the special interests involved: shipowners, cargo, labor and personal injury claimants. The study resulted in the unanimous conclusions that the 1957 Convention was most prejudicial to all segments of the American industry. Moreover, it was unanimously found that instead of effecting world-wide uniformity, it would, on the contrary, create absolute "chaos". The majority report was written in three parts, one by the then President of the Maritime Law Association, Leonard J. Matteson, Honorable Harold M. Kennedy, and the undersigned. The joint report concluded that the 1957 Brussels Convention "is not acceptable to or in the best interests of American shipowners, passengers, maritime labor or shippers." This report was overwhelmingly approved by the Maritime Law Association at a meeting on May 2, 1958. Each year, since that time, the Committee has adhered to its original position and each time has received approval of the membership. Now, on the eve of the meeting of the Association in November, 1961, the shipowner representatives, who are also affiliated with the American Merchant Marine Institute, suddenly reverse their position.

The American Merchant Marine Institute formerly opposed the 1957 Brussels Convention. Recently, however, it changed its position and has been pressing for adoption of the convention, which, to say the least, places foreign shipowners in a position of tremendous advantage over American shipowners. One, therefore, wonders at the change of position by A.M.M.I. The answer appears to be that a large number of American shipowners, affiliated with A.M.M.I. have been transferring their vessels to, or otherwise operating under foreign flags, in order to escape American taxes and American labor standards.³ It may fairly be assumed that the sudden reversal of position of the shipowners representatives of this Committee was due in substantial measure, if not entirely, to the pressures of the A.M.M.I.

3. As of June 30, 1958, the active merchant fleet of the United States decreased from over 2000 vessels of ships of 1000 gross tons or over to 1047 vessels while that of Liberia has increased to 965 vessels, Panama 563 vessels (*Britannia Book of the Year*, 1959, pp. 426-427). Employment on American Flagships dropped from 110,820 in 1947 to 49,281 in 1960. (Statistical Abstract of the U. S., 1961, p. 596.)

The Maritime Law Association should, therefore, approach this problem soberly with the view to enhance the American Merchant Marine, including all of the interests involved. It should oppose those special interests which seek personal advantage to the disadvantage and great prejudice of all other American interests.

The Adoption of the 1957 Brussels Convention and of H. R. 7912 Will Expand a Special Privilege Which No Longer Serves Any Useful Purpose and Will Greatly Prejudice American Interests in Favor of Foreign Interests

The statute which affords shipowners the opportunity to limit the liability was enacted for the "public benefit", in that it was designed to promote the building of ships, to encourage persons engaged in the business of navigation, and to place the shipping industry of this country on a footing with that of England and the nations on the continent. Accordingly, during the incipient stages of judicial determination of this Act, the courts construed it liberally in favor of the shipowners. However, by reason of the almost universal use of the corporate device, insulating shipowners against damages, and the advent of full-scale insurance coverage, limitation of liability assumed the role of much less economic importance than it once had.

Gilmore and Black⁴ in this connection write:

"Since approximately 1930 the early enthusiasm, both legislative and judicial, for the limitation principle has cooled. In 1935 the Congress enacted the first substantial amendments to the Limitation Act since the 1880's: These amendments were adverse to the shipowning interests, the most important being a provision setting up in the case of claims based on loss of life and bodily injury, a minimum limitation fund of \$60 per ton. In the early '30's the Supreme Court limited the freedom with which shipowners, by filing a petition for limitation, could transfer to the juryless forum of the admiralty proceedings which plaintiffs, under the saving to suitors clause, had elected to bring on the civil side. And in 1954, in a case which, without overruling, impaired the authority of one of the earliest landmark cases, Justice Black, speaking for four members of a Court divided 4-4-1, wrote:

4. The Law of Admiralty, 1957, § 10-4, p. 666-7.

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wish to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.⁵

"Judicial attitudes are important. There is at least some reason to believe that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute, even without further limiting amendments, will be narrowly and not expansively construed. Such an attitude reflects, it is suggested, not so much hostility to the shipping industry as a recognition of the fact that the Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity insurance) were available, shows increasing signs of economic obsolescence."

Accordingly, the heretofore liberal construction of the limitation of liability statute has been tempered by judicial recognition of the economic realities involved.

Since the corporate device and adequate insurance coverage have become commonplace in the maritime industry, there is now no more basis for continuing the special privilege to shipowners than there is for extending it to any other industry. No such special privilege is available in any other field of transportation such as aviation, railroad, motor transport or, for that matter, in any other field of our economy. The rationale for this special legislation has ceased, so that everything must be said for eliminating the limitation of liability statutes altogether, and placing the shipping industry on a par with the others. In any event, the tenor of judicial opinion, textbook writers and all of the authorities on the subject is unanimous that the statutes should, under no circumstances, be expanded, but, on the contrary, should be restricted by the realities of the situation.

5. *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, 437, 74 S. Ct. 608, 623, 1954 AMC 837, 859 (1954).

The movement to restrict and modernize the limitation statutes was reactivated in this country in 1957, before the Brussels Convention, with the single objective of increasing the limitation fund, in order to stave off threatened legislation which might abrogate the limitation statutes entirely or render them relatively ineffectual. The program has now departed from that objective and seeks to enlarge the benefits to the shipowners at the expense of all other interested parties and categories. We do not think that the Congress should or will permit itself to be misled under these circumstances. It may be assumed, on the contrary, that the Congress will enact legislation based on the realities, in fairness to all of the American interests involved.

The Impact of the 1957 Brussels Convention on the Presently Existing American Law

SHIPOWNER UNDER THE CONVENTION AND PROPOSED LEGISLATION MAY CHOOSE HIS FORUM ANYWHERE IN THE WORLD

If the proposed legislation should be enacted, a shipowner could file a petition for limitation in any country that he desires. A haven has been found in such countries as Liberia and Panama, where shipowners are welcome, upon payment of their registration fees. It may be assumed that shipowners generally will seek these or other similar havens to file their petitions to limit liability. These impoverished countries will welcome the shipowners and their American dollars to be spent in fees and costs. In such cases, the law of the forum would control the procedure, the time for the filing of claims, the manner in which the claims should be adjudicated and, in the final analysis, the extent and validity of the claim itself. The hardship which this would impose on personal injury claimants would be shocking and unconscionable. Seamen or passengers injured in a collision would be compelled to go to such foreign countries to present and litigate their claims. Should they see fit to bring suit against the offending shipowner in the United States, any judgment which might be obtained could be declared invalid in whole or in part and the litigant might even be required to reprove his whole claim. All that the petitioning shipowner need do is "constitute a fund satisfactory in the foreign courts."

The majority report base its position upon the desirability for "worldwide uniformity." We need only refer to Judge Kennedy's careful and penetrating analysis which he made as a member of this

very committee as a representative of the shipowners. In completely destroying the myth that the Brussels Convention will create uniformity, Judge Kennedy vigorously and effectively pointed out:

"Uniformity was the watchword at Brussels for all the delegations, including our own. Does the end product justify the conclusion that uniformity was achieved or even approached?

"By 'uniformity' persons who employ that word must be talking about a system which will not vary, no matter where the right to limit is invoked. They must mean that no matter what forum is used the shipowner and the claimants will have the same equal protection.

"Of course on the procedural side, the Brussels Convention did not even attempt to achieve uniformity—such matters were left to the *lex fori*. Therefore, subject to a possibility which will be mentioned later, a shipowner who attempts to limit in the United States will have the burden of proof, whereas if he attempts to limit in any one of several other jurisdictions the burden will be upon the claimants to establish 'actual fault or privity'. It can, of course, be said that it would be foolhardy to expect uniformity in 'procedural' matters. But it can also be pointed out that after long debate the courts of the United States have come to treat burden of proof as something more important than a minor matter of procedure. Since the location of the burden of proof may seriously affect the outcome of the litigation, our federal courts in diversity cases treat the burden of proof as substantive, and so it really is.

"But if we turn to matters which are demonstrably substantive in any view, we find that in practice the Convention will surely produce not uniformity, but chaos."⁶

Despite his vigorous opposition and his cogent arguments against the Convention heretofore, Judge Kennedy and his colleagues representing the shipowners, now change their position, although the circumstances are the same and the factual picture has not changed. Only the pressures from the A.M.M.I. are new.

The fact is that from the shipowners' own analysis, chaos, not uniformity, will result from the adoption of the Convention and the proposed legislation.

6. Report of the Committee to consider proposals relating to the limitation of liability of shipowners, Maritime Law Assn., Docu. No. 418, July, 1958, p. 4258-9.

It is unthinkable that the Congress should enact legislation which would require claimants such as passengers, seamen, longshoremen, cargo owners and others, to file claims in a foreign country which a shipowner has picked after shopping around to find the most welcome haven from his point of view. A personal injury claim might run from only a few hundred dollars to one hundred thousand dollars. By the time the litigants paid the expenses of counsel and of travelling to and from the foreign country, a substantial part of the claim would be eaten up. Further, in those jurisdictions, the rules of procedure materially differ from those in the United States, where a body of law has grown up based on substantial justice; presumptions, such as the Pennsylvania Rule, *res ipsa loquitur* and others, recognized under the American system, would go by the board. Finally, the realistic fact is that in foreign countries the courts would grant awards commensurate with their local scales of living, which are far below that in the United States.

The net result would be that, no matter how substantial the claim, it would hardly be worthwhile for any personal injury or death claimant, to litigate in many of the foreign forums which the shipowners would undoubtedly choose. In this way, the Convention and the proposed statute would very effectively deprive American litigants of their due.

The Limitation Fund

The great inducement which the proponents of the legislation and Convention offer to the personal injury claimants is an alleged increase from \$60 per ton, under the present American law, to \$207 per ton, under the proposed Convention. The fact is that this alleged increase will not generally increase the limitation fund except in remote instances, and in many cases the fund will actually be less under the Convention than under the existing law. The majority failed to point out that under the present American system we use both the tonnage and the value methods for constituting the fund. The petitioning shipowner must deposit in the fund either the value of the ship after the accident or an amount equal to at least \$60 per gross ton. Thus, the \$60 per ton is a minimum and not a maximum. In most cases, the vessel is not a total loss and its value would by far exceed any fund even at the rate of \$207 per ton. The Convention provides for a fund of \$207 of which \$140 would be allocated to personal injury and death

and the remaining \$67 dividend proportionately among all other claims, including cargo. This is the maximum fund which would be constituted under the new law. It is thus misleading to compare even the \$60 minimum under the present American law with the \$207 maximum under the proposed law. It must also be noted that the \$60 per ton provision under the American law relates to "gross" tonnage while the Convention figure relates to "net" tonnage plus the engine room space. In order to compute net tonnage, all space not used for cargo is excluded from the gross tonnage, such as engine room, steam room, space forepeak, etc. This factor also demonstrates the misleading character of the comparison between the funds under the respective systems. This analysis takes the ground completely from the suggestion in the majority report that the bill is approved out of "fairness to the claimants". In point of fact, the shipowners are well aware that this alleged increase in the fund is in truth a lessening of their liability rather than an increase. The proof of this is found in the report of the strongest proponent of the Convention and H. R. 7912, E. Robert Seaver, General Counsel for the Maritime Administration.

Mr. Seaver filed a dissenting report in 1958 for presentation at the Maritime Law Association meeting, advocating adoption of the Convention. In considering this very point and in advocating to the shipowners that they were, in fact, decreasing their liability by the adoption of the \$207 figure, he said:

"In appraising the merits of the Convention, the interests of passengers, crew, cargo interests and other potential claimants must be borne in mind, as well as the interests of the shipowners. However, the Convention provides distinct advantages for the shipowner, in many instances. *The owner's total liability would actually be less under the Convention than under our statute in any case where the value of his vessel exceeds \$207 per 'Convention' ton, and does not sustain substantial damages as a result of the casualty.*

"The value of any postwar built vessel exceeds this figure. For example, an undamaged Mariner would provide a fund of about \$6,000,000, under our statutes, in times of normal values, while her fund under the Convention would be a maximum of \$1,721,000. It is true that a Liberty would be responsible for a fund of about \$1,381,000 under the Convention, and

something between half a million and a million under our statute, depending on the state of the vessel market at the time of the incident. However, the 18 year old America would be responsible for about twice as large a figure under our statute as she would be under the Convention. *It is significant, in this connection, that all of our new dry cargo vessels cost from \$10,000,000 upward to build.*" (Emphasis supplied)⁷

An excellent example of Mr. Seaver's argument is found in the recent Andrea Doria-Stockholm incident where the value of the Stockholm by far exceeded any fund which would have been constituted from the \$207 figure.

A study of the limitation proceedings will reveal that in most instances they are brought by the smaller craft, particularly in those cases where there is nearly no casualty to the vessel itself, but where an accident occurs and the owner pleads the limitation statutes. In such cases, a fund constituted under the \$207 per net ton arrangement would be far less than the value of the vessel.

There is a real need to improve the limitation statutes from the standpoint of the personal injury and death claimants. If the statutes are to continue in effect, at the very least, the fund should be increased under the American system to respectable proportions where the claimant will have the option either to require a deposit based on the value of the vessel itself or a fund much larger than the present \$60 minimum based on tonnage, whichever is greater.

It is shocking to behold the spectacle of a number of men, badly crippled or killed because of negligence of the navigator, where they or their widows and children are limited to a small percentage of the damages they suffered. And, where small craft are concerned, they may not get anything because of the exclusion of such craft from the \$60 ton minimum, while the shipowner collects in full for any damage to the vessel and walks away whole from the casualty. This illustration points up the inequity of the limitation statutes as well as their economic obsolescence in these times.

7. Report of the Committee to consider proposals relating to the Limitation of Liability of shipowner, Maritime Law Association, Docu. No. 418, July, 1958, p. 4271.

The Convention Further Expands the Limitation Statutes to New Groups They Were Never Intended to Reach

Article 6 of the proposed convention would give the right to limit not only to owners and charterers, as provided in existing American law, but also to all other forms of representatives, charterers, managers, operators, vessel officers and other crew members and even to shore personnel. This provision would extend the benefits of the limitation of liability statutes to an entirely new group of entities and individuals never contemplated or intended by the United States statutes, and would restrict the existing rights of personal injury and death claimants, aside from the fact that the constitutionality of these provisions would be seriously questioned.

The limitation statutes originally were designed to encourage the investment of *private* capital in the merchant marine. The Government does not fit into that category and should not seek or obtain immunity from liability at the expense of personal injury or death claimants. The provisions of the Brussels Convention would extend the benefits of limitation proceedings to an entirely new group of entities and individuals who have no investment in the vessels but who operate vessels as agents or who perform some services in connection with the vessel's business. We are unable to justify any extension of limitation benefits to the Government on the basis of the original express purpose of the statute, even though such benefits already exist in American legislation. To now extend these benefits to agents of the Government who make no investment merely gives to these agents and others involved an undeserved and unjustified windfall.

Recommendations

1. The limitation of liability statutes should be wiped off the books because there is absolutely no economic need for them in this era of the corporate device and available insurance coverage.

2. If the limitation statutes are not to be abolished :

(a) They should be sharply restricted only to those seagoing commercial vessels which actually go to sea and they should not apply to inland water vessels. They should also be inapplicable to the U. S. Government.

(b) The fund should be enlarged from \$60 per gross ton to \$207 per gross ton or to the value of the vessel whichever is higher

as under the existing American rule. In addition, the owner should be required to deposit the hull and liability insurance moneys into the limitation fund. The owner should be required to post adequate security to cover all contingencies at the time of the filing of the petition or otherwise pleading the limitation statutes.

The Collision Convention and H. R. 7911

This bill was introduced for the sole purpose of changing the present "fifty-fifty" damage rule in collision cases to the comparative negligence rule, which would apportion the damages according to the degree of negligence. There would be no objection to the satisfaction of this purpose. Indeed, it would be a desirable change. However, the bill has other extremely objectionable features which go far beyond its purpose.

Section 2 of the bill would wipe out all statutory presumptions of fault. There are a number of legal presumptions which have grown up in the law to protect the victims of reckless or indifferent operators. Thus, where one vessel violates a statute or regulation leading to a collision, a presumption arises that the violation was the proximate cause of the accident and it then becomes incumbent on the violator to show that the violation could not have been the proximate cause, in order to exculpate himself. This is the Pennsylvania Rule. There is also the familiar doctrine of *res ipsa loquitur*, long established in our law. These presumptions grew up in our law to offset the advantage which the offender has in such cases because the instrumentality is in his exclusive control. Without such presumptions the victims are at the mercy of the offender. The proposed bill wipes out all these presumptions and, in effect, would thus reward the lawbreakers.

Another material objection relates to the question of joint and several liability. There should be no modification of the rule of joint and several liability of joint tortfeasors toward third parties.

Also included in the bill are provisions as, "if the collision occurs without fault, if it caused by force majeure, or if the cause of the collision cannot be determined, the damages shall be borne by those who have suffered them" (Sec. 2). Such provisions are designed for the protection of lawbreakers who are able to cover up their tortious conduct. Under our American system of law, presumptions have grown up to "smoke out" such tortious conduct and to place the responsibility for the accident where it belongs. The added provisions

above referred to and the others contained in the proposed bill would either conflict with our well established wholesome doctrines, or at very least create doubts where there are none.

Another serious inroad into the existing admiralty law is a two-year statute of limitations. Under our law, the time limitation is governed by the equitable doctrine of laches. This has worked out exceedingly well under our system and has prevented miscarriages of justice in cases where claimants for good reason, either inability to find or arrest the offending vessel or because of physical or mental incapacity, have failed to bring the action within analogous statutory periods. Not only does this proposed two-year statutory provision violate the admiralty doctrine of laches, but it also conflicts with the three-year statute in the Jones Act.

All these objections relate to provisions which have no bearing on the basic purpose of the bill which is to substitute the comparative negligence rule for the present "fifty-fifty" division of damages. The objectionable provisions are far more important than is the basic purpose of the bill. The bill should therefore be rejected unless the objectionable features are removed.

Conclusion

There is a need to either abolish the Limitation of Liability statutes or improve them as herein suggested. The relief is needed by the claimants, particularly the personal injury and death claimants. The shipowners, in an attempt to forestall an anticipated change, which would wipe out or reduce the special privilege which they have enjoyed over the years, now take the initiative and seek to expand these special privileges at the further expense of the victims of their tortious conduct. Congress will not be so easily fooled. This Association should adopt a realistic approach and disapprove the proposed Convention and bill, and, sponsor instead, a new bill which would bring long needed relief to the claimants.

As to the Collision Bill, it too should be rejected unless the objectionable features are removed.

Respectfully submitted,

ABRAHAM E. FREEDMAN.

October 6, 1961.

87TH CONGRESS
1ST SESSION
H. R. 7912

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 1961

MR. GARMATZ introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To limit the liability of shipowners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Shipowners' Limitation of Liability Act, 1961".

SEC. 1. DEFINITIONS.—In this Act—

A. "Personal claims" means claims resulting from loss of life and personal injuries.

B. "Property claims" means all claims other than personal claims.

C. "Tonnage" means (1) net tonnage plus the amount deducted from gross tonnage for engineroom space in computing net tonnage, or (2) three hundred tons, whichever is greater.

D. "Ship" includes all seagoing vessels and all vessels used on lakes or rivers or in inland navigation, including pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, canal boats, scows, car floats, barges, lighters, and all non-descript self-propelled and non-self-propelled vessels.

SEC. 2. CLAIMS, AND THE AMOUNT THEREOF, WITH RESPECT TO WHICH LIABILITY MAY BE LIMITED.—

A. Except as hereafter in this section otherwise provided, the owner of a ship may limit his liability, and the liability of his ship, to the amount provided in section 3 of this Act, with respect to claims arising from any of the following occurrences, unless the occurrence

giving rise to the claim resulted from the actual fault or privity of the owner:

1. Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship.

2. Loss of life of, or personal injury to, any other person whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect, or default of any person on board the ship for whose act, neglect, or default the owner is responsible or any person not on board the ship for whose act, neglect, or default the owner is responsible. In regard to the act, neglect, or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect, or default is one which occurs in the navigation or the management of the ship or in the loading, carriage, or discharge of its cargo or in the embarkation, carriage, or disembarkation of its passengers.

3. Any obligation or liability imposed by law, relating to the removal of wrecks and arising from, or in connection with, the raising, removal, or destruction of any ship which is sunk, stranded, or abandoned (including anything which may be on board such ship), and any obligation or liability arising out of damage caused to harbor works, basins, and navigable waterways.

B. An owner shall be entitled to limit his liability in the cases set out in subsection A of this section even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody, or control of the ship.

C. If the owner of a ship is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and as to that claimant the provisions of this Act shall only apply to the balance in claimant's favor, if any.

D. The act of invoking limitation of liability shall not constitute an admission of liability.

E. Subsection A of this section does not apply to (1) claims for salvage or for contribution in general average or (2) claims by the master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives, or dependents, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in section 3 of this Act.

SEC. 3. THE EXTENT TO WHICH LIABILITY MAY BE LIMITED.—

A. A shipowner may limit his liability, and the liability of his ship, with respect to claims specified in section 2 of this Act to the following amounts:

1. If the occurrence has given rise to property claims only, an aggregate amount equivalent to 1,000 francs (1,000 gold francs equals approximately \$67, United States, 1960) for each ton of the ship's tonnage.

2. If the occurrence has given rise to personal claims only, an aggregate amount equivalent to 3,100 francs (3,100 gold francs equals approximately \$207, United States, 1960) per ton of the ship's tonnage.

3. If the occurrence has given rise to both personal claims and property claims, an aggregate amount equivalent to 3,100 francs (3,100 gold francs equals approximately \$207, United States, 1960) for each ton of the ship's tonnage, of which a first portion equivalent to 2,100 francs (2,100 gold francs equals approximately \$140, United States, 1960) for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion equivalent to 1,000 francs (1,000 gold francs equals approximately \$67, United States, 1960) per ton of the ship's tonnage shall be appropriated to the payment of property claims, but if the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank ratably with the property claims for payment against the second portion of the fund.

4. The franc mentioned in this section shall be deemed to refer to a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amounts mentioned in this section shall be converted into the currency of the United States of America on the basis of the value of that currency by reference to the unit defined above at the date on which the limitation fund is constituted.

B. The limit of liability prescribed by this section applies to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

C. When the aggregate of claims which arise on any distinct occasion exceeds the limits of liability provided by this section, the total sum representing such limits of liability may be constituted as one distinct limitation fund.

D. Subject to the provisions of section 5C. hereof, the limitation fund thus constituted shall be available only for the payment of claims arising on the distinct occasion in respect of which limitation of liability can be invoked under this Act.

E. After the fund has been constituted, no claimant or potential claimant against the fund shall be entitled to exercise any right against other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant.

SEC. 4. JURISDICTION AND VENUE: RELIEF AND PROCEDURE: CONCOURSE OF CLAIMS; INJUNCTION.—

A. The district courts of the United States in admiralty shall have exclusive original jurisdiction of all proceedings for limitation of liability under this Act. A shipowner, or other person included in section 7 of this Act, may assert as a defense in any action or proceeding in any court, or before any board, arbitrator, or any other tribunal whatsoever, his right to limit his liability and the liability of the ship to the extent herein provided, with respect to the claim or claims in such action or proceeding.

B. A proceeding for limitation of liability under this Act shall be commenced, at petitioner's option, within six months after (1) the occurrence as to which limitation is sought, or (2) the ship-

owner, or other persons seeking relief under this Act, has actually received a written notice of a claim and demand subject to such limitation, stating the amount and nature of the demand, by filing a petition for relief under this Act. The petition shall state if and when such a written notice was first received by the petitioner. The petitioner shall present with his petition a proposed order, or an application for such order, providing for the deposit into court of a sum equal to the full limit of his liability as provided in section 3 of this Act or for the filing of approved security therefor. A proceeding shall be deemed commenced within said period even if the sum or security offered is determined to be inadequate or insufficient or if the deposit or filing thereof is delayed beyond such period.

C. Such sum or security shall constitute the limitation fund.

D. Upon the filing of a petition showing that the aggregate amount of the claims or potential claims, arising from an occurrence in respect of which limitation of liability is invoked, may exceed the limit of liability provided in section 3 of this Act and the deposit into court or the filing of security as provided in subsection B of this section, all other actions and proceedings upon such claims and the commencement or prosecution of any action or proceeding thereon in any court or tribunal whatsoever subject to the jurisdiction of the United States of America shall cease. All such claims shall be prosecuted and determined exclusively in the limitation proceeding and be brought into concurrence for determination in said proceeding, and the court shall issue appropriate injunctions to enforce such concurrence.

E. The court in which the limitation fund has been constituted shall upon the issuance of such injunction order the release of any ship or other property attached or arrested, or otherwise seized, by reason of any claim for which liability is sought to be limited, or order the cancellation of any security given to avoid or release such arrest or attachment, or other seizure. Such order shall be effective and enforceable in any other court or tribunal, subject to the jurisdiction of the United States of America or any State, territory, or possession thereof.

Where it appears to the satisfaction of the court after a preliminary and summary hearing, upon notice served not later than twenty days after the expiration of the time fixed for the filing of

claims or within such further period as the court may allow for such service, that the petitioner is not entitled to any relief under this Act, or that it is manifest and patent that, at the time the petition was filed, the claims or potential claims against the petitioner or the ship would not exceed his limit of liability, or, at any time, where the petitioner has failed to comply with an order for the deposit of a sum or the filing of security, the court may summarily dismiss the petition, vacate or modify any injunction, or grant other appropriate relief. A proceeding may not, without the consent of all parties, be dismissed or the injunction vacated or modified solely by reason of (1) the withdrawal, dismissal, reduction, or settlement of less than all of the claims previously made, (2) the denial of the petitioner's right to limit after a trial of the issues thereon.

G. The claimant shall first proceed and go forward with evidence to establish the liability of the petitioner. If the liability of petitioner is established, by any claimant, the petitioner shall have the burden of proving absence of actual fault or privity.

SEC. 5. SUBROGATION; APPORTIONMENT AND DISTRIBUTION OF FUND, REFUND.—

A. In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amounts of their established claims, saving, however, to all parties, any priority to which they may be legally entitled.

B. If, before the fund is constituted or if constituted, before it is distributed, the shipowner has paid in whole or in part any of the claims specified in section 2 of this Act, he shall pro tanto be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the law of the limitation forum.

C. If, before the fund is distributed, the shipowner establishes that he may be compelled at a later date to pay any claims specified in section 2 of this Act arising out of the same occurrence with respect to which the limitation fund has been constituted, the court may order that a sufficient amount of the fund shall be provisionally set aside to enable the shipowner at such later date to enforce his claim against the fund as provided in the preceding subsection.

D. After payment of all established claims any balance in the fund shall be refunded to the petitioner.

SEC. 6. RELEASE OF A SHIP OR SECURITY.—

A. If a shipowner is entitled to limit his liability under the principles of the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, or under this Act, and his ship with respect to which he is entitled to limit his liability, or another ship, or other property has been arrested, or bail or other security has been given to avoid arrest, in the United States, its territories or possessions, the court may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under the principles of such convention or under this Act and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

B. Where, in circumstances specified in subsection A of this section, bail or other security has already been given (1) at the port where the accident giving rise to the claim occurred, or (2) at the first port of call after the accident if the accident did not occur in a port, or (3) at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo, the court shall order the release of the ship or other property, or of the bail or security given, subject to the conditions specified in subsection A of this section.

C. The provisions of this section shall apply likewise if the bail or other security already given is in a sum less than the full limit of liability under this Act, provided that satisfactory bail or other security is given for the balance.

SEC. 7. LIMITATION OF LIABILITY BY OTHERS THAN SHIP-OWNERS.—

A. In this Act the liability of the shipowners includes the liability of the ship herself.

B. Subject to subsection C of this section, the provisions of this Act shall apply to the charterer, manager, and operator of the ship, and to the pilot, and to the master, members of the crew, and

other servants of the owner, charterer, manager, or operator acting in the course of their employment, and to their respective insurers as well as to the insurers of the ship or of the owner, in the same way as they apply to an owner himself: *Provided*, That the total limit of liability of the owner and all such other persons shall not exceed the amount determined in accordance with section 3 of this Act.

C. When actions are brought against the pilot, master, or members of the crew, such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the pilot, master, or member of the crew is at the same time the owner, co-owner, charterer, manager, or operator of the ship, the provisions of this subsection shall only apply where the act, neglect, or default in question is an act, neglect, or default committed by the person in question in his capacity as pilot, master, or as member of the crew of the ship.

SEC. 8. REPEALS.—Sections 4283, 4284, 4285, and 4287 of the Revised Statutes of the United States, and the Act of June 16, 1884 (23 Stat. 57; 46 U.S.C. 183, 184, 185, 187, and 189), are repealed.

SEC. 9. REENACTMENTS.—Sections 4283A and 4283B of the Revised Statutes of the United States are reenacted without change as section 4283 of the Revised Statutes of the United States and are redesignated as subsections (a) and (b), respectively, of that section.

SEC. 10. EFFECTIVE DATE.—This Act shall become effective on the last day of the sixth month following the month in which it is enacted.

87TH CONGRESS

1ST SESSION

H. R. 7911

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 1961

MR. GARMATZ introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To unify apportionment of liability in cases of collision between vessels and related casualties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where a collision occurs between vessels the compensation due for damages caused shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

SEC. 2. If the collision occurs without fault, if it is caused by force majeure, or if the causes of the collision cannot be determined, the damages shall be borne by those who have suffered them. There shall be no statutory presumptions of fault in regard to liability for collision. This section shall be applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.

SEC. 3. If the collision is caused by the fault of only one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.

SEC. 4. (a) If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree their faults respectively contributed. If it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

(b) In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties. When a vessel pays a larger part than that which in accordance with the provisions of subsection (a) hereof she ought ultimately to bear she shall have the right of recourse for the excess against the other vessel.

(c) The damages to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in accordance with the provisions of subsection (a) hereof without joint and several liability toward third parties and without right of recourse against the other vessels.

SEC. 5. The liability imposed by the preceding sections shall attach, in cases where the collision is caused by the fault of a pilot, even when the carrying of the pilot is compulsory.

SEC. 6. The right of action for the recovery of damages resulting from a collision shall not be conditional upon the entering of a protest or the fulfillment of any other special formality.

SEC. 7. The provisions of this Act shall not affect in any way the scope and effect of any statutory or contractual provisions which limit or otherwise affect any liability of the owner of a vessel toward persons or property. The last sentence of section 1 of the Act of September 4, 1890 (26 Stat. 425; 33 U. S. C. 367), is hereby repealed.

SEC. 8. Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty.

The court in which the action is brought may extend such interval if it shall be satisfied that during such period there had not been any reasonable opportunity of arresting the vessel involved within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business.

The time within which the action to enforce the right of recourse allowed by subsection (B) of section 4 must be instituted shall be one year. This limitation shall run only from the date of payment.

SEC. 9. This Act shall apply to the liability to make good the damages caused or contributed to by any fault of a vessel even if no collision has actually taken place.

SEC. 10. This Act shall apply to the liability to make good the damages in all cases to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damages are done or consummated on land. In such cases the liability to make good the damages in proportion to the degree of the faults respectively committed shall apply in the same manner between any vessels or vessels and the owners or operators of any land structure, facility, or other property as the rule is applied between vessels.

SEC. 11. This Act shall apply to actions brought against the owners or operators of a vessel or of such a land structure, facility, or other property in personam as well as to actions in rem.

SEC. 12. This Act may be cited as the "Collision Liability Apportionment Act, 1961". It shall apply only to causes of action arising after the date of its approval.

NOTES

Companion bills were introduced in the Senate by Mr. Magnuson on July 29, 1961 (S. 2313 and S. 2314).

The International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships signed at Brussels in October, 1957 is printed in full at 1957 A. M. C. 1972 and also in M. L. A. Document No. 410 dated November 26, 1957 and subsequently reviewed in M. L. A. Document No. 418 dated July, 1958.

The International Convention for the Unification of Certain Rules to Govern the Liability of Vessels when Collisions Occur Between Them signed at Brussels in September 1910 is printed in full in Griffin on Collision at 852 and in Marsden on Collisions at Sea at 810 and in Knauth's Benedict on Admiralty, 6th Ed., Vol. 6, pp. 3-7.

Mr. MATTESON. The majority report gives no specific reason at all except it speaks vaguely in terms of the desirability of uniformity.

This report was not circulated in advance of the meeting in November in adequate time to give the membership time to receive it. In fact, most of the members did not receive it before the meeting.

However, there turned out at the meeting an attendance of more than a hundred more than had ever been at a maritime law meeting before, and it was quite obviously a power play to support the majority.

We were permitted to present minority report on the limitation convention but a vote was immediately taken and it was, as I recall it, 175 for the majority and 110 or 111 for the minority.

Having demonstrated their control, at that point debate was cut off on the collision convention. We were not even allowed to present orally our report to the members who had not had a chance to read it.

And that is the way that the Maritime Law Association took its action reversing all prior actions.

Now, whether you can say that that represents the feeling of the majority of the Maritime Law Association I think is quite doubtful.

Actually the Maritime Law Association is an association of about 1,500 members. No more than 175 usually attend the business meetings. This time there were something like 275.

Senator BARTLETT. Were proxies voted at that meeting?

Mr. MATTESON. What was what?

Senator BARTLETT. Was there a proxy solicitation by either side? A proxy vote?

Mr. MATTESON. No. There are no proxies solicited for these meetings.

Actually there is a big dinner in the evening and cocktail parties in between. Very few people take the interest to attend the business meeting.

Now, there is one thing peculiar about these two bills. They are both tied up with conventions. And they both purport to do two things—to produce uniformity internationally of our law with the law of other countries but also to prepare the way for the ratification of these treaties.

It has been considered before that when a treaty which modifies our private law is to be considered that domestic legislation should accompany it and be simultaneous with it if not actually preceding it.

That was the way it was done in the Carriage of Goods by Sea Act situation. So that—

Senator BARTLETT. May I interrupt you once more?

Mr. MATTESON. Yes, sir.

Senator BARTLETT. Let me ask you this question. Was legislative effort made in 1938 in connection with the treaty that was reported to the Senate but was not acted upon?

Mr. MATTESON. No, sir, there was not. It was sent as a matter of bare ratification.

Whether during the hearings a bill or bills were introduced I do not recall, and they might have been, but the hearings were before the Foreign Relations Committee on the request of the President for consent to ratification. There were no other hearings.

Now, once the Maritime Law Association had acted, these other associations fell like a row of dominoes.

But I want to assure you that the opposition to these conventions, while it may not have the opportunity to be as vocal at this point as the steamship owners are, is very strong and widespread and based on a matter of principle and right and justice.

I would like to speak first of the limitation convention because that is the primary one, and, as I see it, this and the collision convention are not related.

The limitation convention applies to all types of casualties. The collision convention was originally supposed to be—the convention is—a rule of collision cases between ships. The bill has been extended far beyond that.

One of the factors that is involved here is that these bills cannot be substantially amended and certainly not amended in any way that makes them inconsistent with the conventions on which they are based. As drawn, they do conform closely to the conventions and I see no problem there.

But if they are materially altered, they will no longer be a support for the ratification of the conventions. Neither will they be a bringing of our domestic law into uniformity with the law of other countries.

Any substantial amendment destroys both features.

When we come to the collision convention, you will notice that this bill, first of all, repeals all our current laws on limitation of liability, just wipes the slate clean. And an entirely new and different system, born and bred and framed abroad and brought home, is brought and supposed to be substituted.

It seems to me that at this point the threshold question is not which system of limitation of liability is better but why do we have one at all?

As a matter of fact, heretofore the shipowners have been most afraid of bringing to Congress any matter relating to the amendment of the limitation laws because they have been so afraid that if the rationale of these laws was ever reexamined the injustice and unsupportability of the principle would be so evident that the law should be wiped out.

What has happened has been that in recent years the limitation law has become so unpopular in the courts that the courts have been denying the right to limit on grounds of privity in knowledge, so frequently that they think they have almost lost the battle anyhow, so they are more or less forced to do something.

But here it is. They are proposing a brandnew system. Why do we have a system at all?

Well, the original plan was this, and the original bill and its original amendments so state: That these were bills to encourage the building and operation of ships.

And how was this to be done? This was to be done by giving the owner and operator of the ship an immunity from liabilities or a limitation of his liabilities with respect to the people that got hurt by them.

Well, recently in the case of *Cushing*, in the Supreme Court of the United States, this matter came before Mr. Justice Black, and with his keen mind he put his finger right on the fallacy. He said:

This is a matter of subsidizing the shipowner at the expense of the people he hurts, and that is not right.

If later Congresses, he said, wanted to subsidize a shipowner, they have done it out of the Public Treasury to which everybody contributes.

But then he went on to say that the circumstances which called forth this limitation of liability at the beginning are all out of date and changed. In those dates the ships were small and owned by individuals. Now we have the corporate form. In those days they did not have the form of P. and I. liability insurance that is now available to shipowners in very large quantities, and they all carry it because they have to have protection in cases where limitation of liability is denied, which are getting to be more and more frequent. So now the insurance is available.

So there have been many criticisms. The thing has been so unpopular in the courts that they find any excuse to defeat it.

Gilmore and Black have been referred to. They call it obsolete or, if not, obsolescent.

Senator BARTLETT. Mr. Matteson, is it true that this limitation came about in the early days of our Government?

Mr. MATTESON. Well, the history of it is something like this:

In the continental systems they developed something equivalent to our in rem theory, that the ship was liable, that if it did damage the ship had to be surrendered. And they established that as the limit of the owner's liability.

It grew up on that side from that conception. On the English side it grew up step by step. First it had to do only with theft and it was provided that any case where the crew embezzled the cargo—and that used to happen a lot in those days I guess—that the shipowner should not be liable beyond the value of his ship, and the value was the value at the beginning of the voyage and not after anything that might have happened.

As years passed they included fire in that, and by the beginning of the 1800's they had a law that related to or that included collisions.

Actually, their limitation laws are scattered through a lot of statutes rather than compact in one as ours are or at least they were.

Then that went on for a lot of years—theft, fire, and collision, and the limit being the sound value of the ship.

Then in 1860, about, they passed a new law which included going to the pounds-per-ton basis.

Senator BARTLETT. Now, when you say "they"—

Mr. MATTESON. The British Parliament. The British Parliament went to this system. And as of that time communications were not good. Representatives were not established of ship companies and underwriting organizations all over the world as they are now. This problem of determining values was a difficult one.

So they took this rule of thumb of pounds per ton.

As of that date, as the average of British ships and ships of that day did not vary so much as they do now—they were small and they were more or less of uniform type—that worked all right, except that the British Parliament and the shipowners sat on it for a hundred years until their figures became so ridiculous that something had to be done about it.

In our country there were in the early 1800's a couple of State laws. One was in Maine, I believe. Whether there was one in Massachusetts I am not sure. But the States did have some. Of course, a State

regulation was not very effective, and it probably was in the fear of Federal legislation anyway.

Finally, following a disaster that happened on New York Sound in the 1840's the shipowners became alarmed and appealed to Congress to act, and they enacted the limitation of liability law (9 Stat. 635, ch. 3, Mar. 3, 1851) and it has not been changed too much since.

Senator BARTLETT. Is there any major maritime nation in the world today so far as you know, Mr. Matteson, that does not have limitation on liability?

Mr. MATTESON. I think that it would be correct to say that practically all of them have a limitation of liability in some form, although I had a case with Mr. Haight recently of a collision in Japan between two American ships in Yokohama Harbor, and the question was whether one of them could limit liability under the laws of Japan. It turned out to be a very doubtful matter.

But they do have a limitation of liability there that would be applicable at least to Japanese ships.

Senator BARTLETT. Do you know what Russia does in this area?

Mr. MATTESON. No, I do not. Well, I think they ratified—well, they did ratify the collision convention of 1910. What that means I do not know, in view of justice as it is administered there.

Senator BARTLETT. In any case, am I correct in assuming that your suggestion to the committee is that no matter how long limitation may have been in effect in this country, that times, circumstances and conditions have changed and the whole practice may be obsolescent now and should be obsolete?

Mr. MATTESON. I am not, if the chairman pleases, going as far as to advocate all this. But I am saying that this is what logically the situation calls for—consideration as to whether we should go on with this sort of thing or should we not?

The only argument that can be made for going on with it that I can see is the fact that most maritime nations do have some kind of a limitation law.

Now, if that is going to be the reason for the perpetuating of it, we certainly have a wonderful status quo. And if it is ever going to be disturbed, somebody has got to take the lead. In other words, are we mice or are we men? Have we got the courage to do what should be done?

Senator BARTLETT. I thought you made quite a striking illustration when you noted that today big companies, corporations, are likely to own many ships in contrast to earlier periods of history when ships were more probably individually owned.

Then I got to thinking about the West Indies Company, which played such a predominant role in the British merchant marine, and, of course, I guess that would be equivalent to a big corporation of today.

I wondered how they handled losses. Was insurance available there?

Mr. MATTESON. I cannot speak as to that. This use of a corporate form has many possibilities. There was a period when it was quite the thing for American corporations which in fact owned fleets to incorporate each vessel individually so that there would be a parent company and a subsidiary company owning each of the vessels of the fleet.

I do not know that that is so common now, but that I think, for a variety of reasons, was bad for a while. I guess it is still done to some extent. How general it is now I really could not say.

Senator BARTLETT. Mr. Matteson, freely acknowledging that I have consumed some of your time, may I with your permission note that you have been on the stand for 45 minutes?

I was wondering if you could probably perhaps conclude in 10 minutes.

Mr. MATTESON. I have not told you what these things are about yet either.

I will go as rapidly as I can.

Senator BARTLETT. I will try not to interrupt you.

Mr. MATTESON. I do not want to press this point that I just was mentioning, but I do think this is a point at which we ought to look at limitation.

Now, in this situation where limitation is unpalatable and unpopular to the courts, where it is violently criticized by textbook writers and by the Supreme Court, the shipowners come forward with this proposal.

And here I want to mention first the thing that was mentioned by Mr. Freedman, which is that heretofore the privilege of limitation of liability has been confined to the shipowner and what we call a bareboat charterer, one who takes over the operation of a ship but is really an owner pro hac vice. It has been strictly confined to those.

Now, this convention comes forward with a grandiose enlargement of the persons who will be entitled to the benefit of limitation of liability, and these include charterers of any type or description.

A charter may be a charter for an amount of space in a ship, and it may be even an oral contract.

But, anyway, they refused to limit it to demise charterers as our statute has been, but they open it to anybody who can be brought into the classification of charterers. And what that means only years of litigation will tell.

They include any manager or operator. They include the master and all members of the crew and all other servants of the owner, charterer, manager, or operator acting in the course of their employment.

And, not only that, the liability can be limited with respect to the neglect of people on board the ship or people not on board the ship for whom any of these are responsible.

Now, those are very broad limitations, and I submit they are without justification.

I think it is astonishing that in this situation the shipowners would come forward and support something that is not just a liberalization of what we have but a bigger, better, and broader system of limitation of liability.

The next thing is something that has been slid over. We have had our system of limitation of liability in this country, and when an owner files his petition in the southern district of New York that court issues an injunction good throughout the country and compels all claimants to come into that court and file their complaints and prosecute them there.

This has the effect of denying a lot of people jury trials that would otherwise have them, but, in general, the system is not working out too badly.

Now, this convention proposes an international system where the shipowner does not have a choice between New York or New Jersey or San Francisco but he has the choice between any nation in the world to go to to constitute his limitation fund.

There is no limitation in this convention at all on the place where the shipowner can constitute his fund.

Prior to the Madrid Convention there was a limitation. There were four or five jurisdictions specified or classed within which he could file. That was stricken out at the Brussels Conference, so now it is wide open.

One of the nightmares that has come to me in connection with this thing is something like this, and this applies irrespective of any other consideration:

You asked Mr. Haight yesterday what would have happened in the *Andrea Doria-Stockholm* case if this bill had been in effect and if the convention had been ratified as of that time. He gave you a partial answer in which he talked entirely about figures.

As Mr. Freedman says, you can state figures to put your emphasis on any particular point you want to.

Incidentally, on that figure, Mr. Haight was using a figure I believe of 15,000 tons for the *Stockholm*, and the registered tonnage is 12,000, so that his figures would have to be modified by that.

Under the convention the *Stockholm* would have produced gross overall figures at \$207 per ton of about \$2½ million.

He used, for instance, as the limitation value of the *Stockholm* under our present law, \$3.9 million, which is the value which he was willing to admit and did admit to the court in the preliminary proceedings.

The ship was never valued by the court. And the claimants and the counsel of the *Andrea Doria* contended her limitation fund based on value was \$7 to \$7.5 million.

Certainly it was due some adjustment upward, so if you want to refer to those figures I think you ought to take at least \$5 million as her value.

But take the other side of the picture. Suppose it had been the *Andrea Doria* which had survived with a million dollars damage following this collision. When two ships are coming together at right angles, there is the barest chance of which gets the point of intersection first and, consequently, which hits the other one. If the *Andrea Doria* had survived her sound value was between \$25 and \$30 million, and her limitation of value would have been \$24 million up.

So you can see you can make this sound most any way you want by taking your examples the way you would like to have them.

I will say now as far as the figures on the convention in their relation to the claimants is concerned I do not consider the important feature of this convention at all. You can argue it and you can produce figures and talk about it, and you can commit yourself most any way on that, but on average I would say, and I am convinced, that on average the claimants would be worse off. There will be cases in which they will be better off, of course, but the total loss cases are really not so bad in the large run of cases.

And, personally, representing claimants I would rather take my chance on that odd case than have the general restriction in the limitation figures.

However, the point that immediately occurred to me in answer to your question was this: What did happen in the *Andrea Doria-Stock-*

holm case was that the owners of the *Stockholm* and the owners of the *Andrea Doria* were subject to suit in New York, and practically all the claimants were Americans, and they brought suit against these two companies in New York.

Consequently, the two companies were, each of them, forced by practical events to file their limitation proceedings in New York. The two proceedings were consolidated.

The whole case was disposed of in a year and a half, which for a major case is, I think, a world's record.

But it was all possible because these suits and proceedings could be forced into consolidation in New York.

Now, what would have happened if the convention had been approved? Naturally the *Stockholm* would have gone back to Sweden. It would have filed an impeccable limitation fund in Sweden, and that would have cut off any right of redress of any claimant against the *Stockholm*, or the Swedish American Line, anywhere else in the world.

The *Andrea Doria* people would have done the same thing except they would have gone to Italy. And they would have put off the right to sue anywhere else in the world.

Bear in mind that this is a basic conception of this collision convention. This is why it was framed by our foreign friends, and this is what they want to get—this single international jurisdiction for any shipowner.

But in a collision case where there are two ships, it creates an imposition.

Look at the position of the American claimants now. They have to go to both countries, incur all the expense, hire counsel if they can, prosecute their claims, subject to the risk and hazard that the Swedish courts will say the *Andrea Doria* was solely to blame and the Italian courts will say the *Stockholm* was solely to blame.

As a matter of hamstringing and making it impossible for claimants to prosecute their rights, this right to file in a foreign jurisdiction makes the position of claimants impossible.

Now, I will not go into an analysis of why I say this is so. It is in my statement. It is in the minority report which is in the volume I handed you.

I defy anybody to show me why this is not true in the convention.

I was amazed, for a long time, at least, that my friends did not even seem to realize this. But it is incontrovertible and I stand on the text as to that.

I rely on the statement as to any other points relating to that.

Now, I must say a few words about the Collision Convention of 1910.

Senator BARTLETT. Mr. Matteson, before you proceed, I am required to say that you will have a time limitation of 5 minutes. You have been on 55 minutes now.

Mr. MATTESON. OK. I have had a big field to tackle, sir.

Senator BARTLETT. I know.

Mr. MATTESON. And there has been so much in generalities without coming down to particulars, and I have to rely on my statement further.

I think I can say this pretty simply. The rule of joint and several liability is a universal rule of the law, common law, admiralty law,

everywhere. It was early recognized by the Supreme Court of the United States.

Now, the special case of cargo is emphasized here which is making a whipping boy out of a single interest. There is no reason why if the principle is fair for one it is not fair for another.

But this bill and this convention affect the property interests of passengers and crew. They also affect the property interests of other vessel owners. They affect all innocent property owners. And the bill goes beyond the convention. This is quite important, if the chairman pleases.

The bill goes beyond the convention, however the preamble or the working as to collision or casualty goes, and the bill in the final paragraph extends the principles of this convention to all cases to which the admiralty and maritime jurisdiction of the United States has been extended, and that means if the owner has piers, shore installations, oil terminals, anything, if an airplane falls on his dock the owner has the benefit of the principle of joint and several liability of joint feorsors. In a steamship incident he would not, which is certainly not consistent.

What happened was cargo always had this right. In 1893 the Harter Act was passed which cut off the right of cargo to sue the carrier. Now, it is a corollary of the rule of joint and several liability of tortfeasors that even though one of two possibly negligent people, two possible defendants, has immunity, you nevertheless have your rights against the other.

Following the Harter Act cargo still had the right to recover against the noncarrier as joint tortfeasor a hundred percent of his damages just as he always had and that right was not affected by the Harter Act, and I do not think the right of the cargo to make that kind of recovery has been challenged since or is challenged today.

Now, what happened was this: At common law one of two joint tortfeasors who is sued and has to pay 100 percent of the damages of the injured party has no redress against his joint tortfeasor. Common law allows no recovery between persons both at fault. There is no right of contribution.

This idea of contribution between joint tortfeasors is a modern conception and was first thought of in admiralty I think.

But earlier than this, this right of contribution between joint tortfeasors had been allowed in admiralty.

Now, then, the situation came up following the Harter Act. The noncarrying vessel was required to pay 100 percent of the cargo damages, and, exercising the special right that most tortfeasors do not have, exercised the right to claim a contribution from the carrying vessel. And the question before the Supreme Court in the *Chattahoochie* and all the subsequent cases was: Did this claim of contribution by the noncarrier against the carrier with respect to what the noncarrier had to pay the cargo violate any principle of the Harter Act or the Carriage of Goods by Sea Act?

And the Supreme Court said that it did not, that the Harter Act and the Carriage of Goods by Sea Act did not affect the relations between negligent vessel owners.

Now, how my friends can say that the situation that results from the exercise of this right of contribution by the noncarrier against the carrier is a violation of the Harter Act or the Carriage of Goods

by Sea Act is beyond me, because that is exactly what the Supreme Court said it was not.

And the whole thing comes about through the exercise of the right of contribution and not by anything that the cargo does.

So the shipowners, being annoyed by their rights of contribution among themselves, aim their gun at the poor cargo owner: "Let's cut down his rights."

Not only that, but they aim at not only the cargo owner but all these other classes of people that I have mentioned, and there is no more justification for violating this principle as to cargo than there is as to any of the other classes of case.

Senator BARTLETT. I hate to interrupt you, Mr. Matteson, but you have testified for an hour now, and I am going to suggest that in your written statement you said that some drafting had been done on a bill——

Mr. MATTESON. Yes.

Senator BARTLETT (continuing). And you offered to complete that drafting and to present it to the committee and requested permission to do so. That permission is granted. We will be happy to receive it, and I would hope that it could be sent to us within a short time.

Mr. MATTESON. It can be.

Senator BARTLETT. If you desire to file any supplementary statement, that permission will be granted.

Mr. MATTESON. Yes, thank you.

Senator BARTLETT. In connection with the draft I hope especially that you would send in a statement elaborating on that which you have just said concerning your belief that the bill goes beyond the convention.

Mr. MATTESON. Yes, I will be glad to do that.

The one thing more I wanted to say was I think everything that is proposed by this legislation can be done much better by other legislation which will not involve us in this foreign system of limitation which will force our people to travel all over the world to enforce their claims.

Senator BARTLETT. I very sincerely regret that time has run out. You have been an excellent witness, Mr. Matteson.

(The complete text of Mr. Matteson's statement, supplementary remarks thereto, and the draft of the proposed bill referred to follow:)

(Limitation of liability)

87TH CONGRESS
2d Session

S. —

IN THE SENATE OF THE UNITED STATES

MARCH —, 1962

Mr. ----- introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL To amend the laws relating to the limitation of the liability of shipowners, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 4283 of the Revised Statutes of the United States (46 U.S.C. 183) as amended, is amended in the following respects:

(1) Subsection (b) thereof is amended to read as follows:

"(b) In the case of any vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, the owner shall be liable for losses in respect of loss of life or bodily injury to an amount equal to \$140 per ton of such vessel's tonnage, such sum to be available only for the payment of losses in respect of loss of life or bodily injury. If such amount is insufficient to pay such losses in full, the unpaid balance of such claims shall rank ratably with other claims for payment out of the amount of the owner's limitation of liability established under subsection (a) of this section."

(2) Subsection (c) thereof is amended to read as follows:

"(c) For the purposes of this section the tonnage of a steam or motor vessel shall be her gross tonnage without deduction on account of engineroom, and the tonnage of a sailing or other vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, but in no case shall the tonnage of any vessel be considered to be less than 300 tons."

(3) Subsections (d) and (e) thereof are amended by striking therefrom the word "seagoing" wherever it appears.

(4) Subsection (f) thereof is repealed.

SEC. 2. Chapter 6 of title 48 of the Revised Statutes of the United States, as amended, is further amended by inserting after section 4286 (46 U.S.C. 186) the following new sections:

"Revised Statutes 4286A(1). The limitation of liability established under section 2 of this Act (Revised Statutes 4283, 46 U.S.C. 183, as hereby amended) shall apply to and include the liability of a charterer as defined in Revised Statutes 4286 (46 U.S.C. 186), and to the pilot, and to the master, officers and members of the crew, and to their respective insurers, and to the insurers of the vessel or of the owner, in the same way as they apply to an owner himself, and the total limit of liability of the owner and of all such persons shall not exceed the amounts determined in accordance with section 2 of this Act in any case where the owner and such charterer, if any, shall establish by appropriate proceedings that they are entitled to limitation of liability as provided in Revised Statutes 4283 (46 U.S.C. 183) as hereby amended.

"(2) When actions are brought against the pilot, master, officers or members of the crew or their respective insurers or the insurers of the vessel or of the owner or of such charterer, for damages which are subject to limitation of liability under this Act, and the owner and such charterer, if any, shall have petitioned a district court of the United States of competent jurisdiction for limitation of liability in respect of such damages as provided in Revised Statutes 4285 (46 U.S.C. 185), and shall have complied with all provisions of that section, all claims and proceedings against the pilot, the master, officers or crew of the vessel and their respective insurers or against the insurers of the vessel or of the owner or of such charterer shall cease.

"(3) When actions are brought against the pilot, master, or members of the crew, such persons may limit their liability even if the occurrence which gives rise to the claims occurred with the privity or knowledge of one or more of such persons. If, however, the pilot, master or member of the crew is at the same time the owner, coowner, charterer, manager, or operator of the vessel, the provisions of this subsection shall apply only where the act, neglect, or default in question is an act, neglect, or default committed by the person in question in his capacity as pilot, master, or as a member of the crew of the vessel.

Revised Statutes 4826B. If, before the distribution of the amount of the owner's liability as provided for in Revised Statutes 4283 (46 U.S.C. 183), the owner has paid in whole or in part any of the claims in respect of which he is entitled to limitation of liability, he shall pro tanto be placed in the same position in relation to such limitation of liability as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the law of the limitation forum, and if the owner establishes that he may be compelled at a later date to pay any such claim, the court may order that a sufficient amount from the limitation of liability to which he is entitled be provisionally set aside to enable the owner at such later date to enforce his claim as thus provided."

SEC. 3. Section 4287 of the Revised Statutes of the United States (46 U.S.C. 187) is hereby amended to read as follows:

"Revised Statutes 4287 (46 U.S.C. 187). Nothing in sections 4282, 4283, 4283A, 4283B, 4284, 4285, 4286, 4286A, and 4296B shall be construed to take

away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

SEC. 4. Section 4289 of the Revised Statutes of the United States (46 U.S.C. 188) is hereby amended to read as follows:

"Revised Statutes 4289 (46 U.S.C. 188). Except as otherwise specifically provided therein, the provisions of sections 4282, 4283, 4283A, 4283B, 4284, 4285, 4286A, 4286B, and 4287, and of Section 18 of the Act entitled 'An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes', approved June 26, 1884, shall apply to all vessels, including vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

STATEMENT OF LEONARD J. MATTESON RE S. 2313 AND S. 2314

My name is Leonard J. Matteson. I am a senior partner in the law firm of Bigham, Englar, Jones & Houston, 99 John Street, New York, N.Y. I have been engaged in the practice of admiralty and maritime law with this firm for more than 40 years. I am a recent past president of the Maritime Law Association of the United States, and was its president at the time of the Brussels Diplomatic Conference on Maritime Law in 1957, at which the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships which is the basis of S. 2314 was adopted, and referred to the participating nations for ratification. I am entirely familiar with the steps leading to the development of that convention, including the framing of the U.S. position paper constituting the official instructions to the members of the U.S. delegation attending that conference. That paper was prepared by our State Department after extensive consultation with the committee of our Maritime Law Association.

I have been familiar throughout my professional career with the 1910 Brussels Collision Convention (on apportionment of liability). For 11 years prior to its adoption the principle of that convention was opposed by the Maritime Law Association of the United States. The convention was repeatedly condemned by that association thereafter with the result that after 52 years it has not yet been ratified by the United States.

I speak here only as an individual, and not as a representative, or by instruction, of any interest. I speak only my own convictions which are based entirely on my views of what is just and right, in accordance with sound legal principle, and in the interests of citizens of the United States generally.

During my years of experience in collision cases, in which I have specialized, I have most frequently represented the interests of shippers of cargo, insured and uninsured—and by no means is it a fact that all cargo is insured. I have also represented passengers and crew members in their claims for injury, loss of life, and loss of or damage to their property. Most recently I was chief counsel for claimants in the *Andrea Doria-Stockholm* collision case.

I do not accept any implication that I am biased, or that my judgment has been warped, by these representations, but I do admit to a keen interest in the rights of these classes of persons and a determination to do all in my power to see that their rights are not jeopardized or curtailed, as they will be if S. 2313 and S. 2314 are enacted into law, and the conventions on which they are based are ratified.

These enactments and ratifications are the project of the shipowners organization, American Merchant Marine Institute, supported by Government departments whose attitude is dictated by the Government's interest in the ownership and operation of ships. The Maritime Law Association at its last meeting in November, for no convincing reason, decided by strongly contested and divided vote to reverse its prior repeatedly taken positions in opposition to both conventions, and to support the AMMI project. The association's document No. 450 containing the majority and minority reports of its committee on these conventions is submitted with this statement and it is requested that this document be received and made a part of the record of this hearing. Inspection will show how inadequate were the reasons of the majority for reversal of the

association's prior positions and how strong were the objections to the conventions and to the proposed legislation raised by minority members. The members signing the majority report and most of the members voting for it were members voting in the interests of their steamship company clients. Actually, at the meeting the membership voted to deny discussion or debate to the minority opposing the collision convention. Fortunately, they do not have that power here.

The organized steamship owners supported by Government departments which cannot be cleared of special interest pleading, can and do present a powerful lobbying interest in support of these bills and conventions. The interests whose rights will be seriously prejudiced by adoption of the shipowners' program are diverse, and are not organized, or susceptible of being organized, in a manner to present their opposition in any such concentration of strength as the shipowners. I speak for justice to the average unorganized American citizenry, small or large, with emphasis on the small. I speak with confidence that if I can expose the injustices to which they will be subjected by the proposed bills and conventions, this committee will be quick to defend them and to resist any further attempt at the steamrolling of this threat to their rights and interests.

S. 2313 and S. 2314 have this peculiarity. They are inextricably bound up with the conventions to which they are related. Their enactment is proposed as preliminary to or concurrent with ratification of the conventions by the Senate. This is essential in order to bring about uniformity between our domestic law and the law which our courts would be bound to apply to citizens of ratifying nations if the conventions are ratified. This procedure is also necessary to satisfy objections to the alteration of the private law of this country solely through treaty ratification.

As a result it is necessary that the bills incorporate fully, and accord with, the provisions of the conventions. Otherwise, neither is the objection to ratification removed nor is international uniformity, the alleged justification of the proposed legislation and ratification, achieved. Consequently, the bills which in fact do follow the conventions closely are not subject to any amendment which would create an inconsistency with the corresponding convention.

In spite of this close relationship between the bills and ratification of the conventions, it is an odd fact that neither convention is pending before the Senate at this time for advice and consent to ratification. When and if they are so submitted, they may be subject to consideration by another committee of the Senate.

S. 2314 on limitation of liability in particular assumes at least contemporaneous ratification of its corresponding treaty. In section 3A thereof it establishes limits of liability to be applied in the courts of the United States stated in French gold francs of specified weight and fineness (so-called Poincare francs). This measure of limitation would be applicable to all proceedings in the courts of the United States whether the petitioning shipowner is domestic or foreign, and even if he is the owner of a Mississippi River craft involved in a collision on that river. This is necessary to conform to the convention provision which is aimed at avoiding fluctuations in the value of national currencies among the ratifiers of the convention. But it would be a ridiculous situation for a U.S. domestic statute to so provide, unless or until there is in fact ratification of the convention.

It may be, therefore, that this committee will take the view that further consideration of these bills is premature until the conventions are actually brought before the Senate for consideration.

S. 2313 and S. 2314 and the corresponding conventions are actually unrelated and separate matters but are presented by the steamship interests as a package. The big push is for the Limitation Convention and S. 2314 and it is apparently hoped that the discredited Collision Convention of 1910 and S. 2313 which incorporates its principles may be carried along with its iniquitous content unnoticed.

S. 2314 is sugar coated. In spite of the wholly objectionable features of the convention incorporated therein, it contains some provisions not required in order to conform to the convention, which are desirable and have appeal; for instance, the specially guaranteed fund for personal injury and death claimants, already found in our law, is extended to apply to nonseagoing vessels of the United States as well as enlarged in amount. This much is good and it should be done. Under our present law, if an inland tug strikes a bridge, sinks, and becomes a total loss, with the loss of lives of five men, her owner upon showing

that he is without privity and knowledge of the cause of the sinking can limit his liability to the value of his interest in the wreck and the claimants can recover nothing from him (*The Cushing*, 347 U.S. 409). There should be a guaranteed minimum value, but it is not necessary to adopt the convention with all its faults to accomplish this.

S. 2314 contains other enticing or innocuous frills but all such features of S. 2314, which are set forth in MLA Document 450, pp. 4760, 4761, can, however, be included in a bill to amend our present limitation law. A number of such amendments would be desirable. Some tentative drafting on a bill to include them has been accomplished. I shall be glad to complete a draft of such a bill and present it to this committee at an appropriate time and request permission to do so.

I submit that such a bill would accomplish everything that could be considered desirable in amendment of our existing limitation law and would avoid the intolerable features of the 1957 convention and S. 2314 which would enable steamship owners by constituting their limitation funds in foreign courts to deprive our courts of their jurisdiction to entertain the claims of American or other claimants, and deny to American citizens the right to redress in our own courts.

S. 2314 AND THE 1957 CONVENTION ON LIMITATION OF LIABILITY

Preliminary

The 1957 convention would establish an international system of limitation of liability for shipowners enforceable by the courts of any country chosen by the shipowner, to the exclusion of the courts of any other signatory nation. Ratification of that convention and enactment of S. 2314 would establish a system of limitation of liability quite different in all of its features from our national system which has been in force for more than 110 years. Accordingly, section 8 of the bill repeals all of the sections of the Revised Statutes of the United States constituting our present law on this subject, thus throwing into the discard the legal and statutory experience of this country in this field for more than a century. The convention system would be completely new in language and in content.

Since the old system is to be scrapped and an entirely new system is proposed, the threshold question is raised as to why we should have any system of limitation of the liability of shipowners at all, and whether this special privilege which shipowners alone have enjoyed should be continued, or whether its continuance can be justified.

This special privilege of limitation of liability was first granted to owners by our law of 1851. It is a privilege enjoyed by no others in the field of transportation, neither railroads, nor truckers, nor bus operators, nor air carriers. Neither is it enjoyed by any others in the field of commerce or industry. It was stated to have been enacted "to encourage shipbuilding and the employment of ships in commerce," *Butler v. Boston* (130 U.S. 527), and it has been defended on the ground that it is necessary because of the large investment of the shipowner in his ship and the great risks of liability incurred. Actually, in these days, the investments of other operators in the fields of transportation and industry are as great or greater, and their risks of liability at least as great.

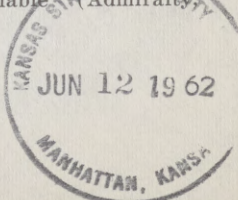
Limitation of liability for shipowners has been severely criticized. Mr. Justice Black in his opinion in the *Cushing* case, supra, properly characterized the limitation system as providing "subsidies paid by injured persons" and said that later Congresses when they wished to aid shipping, provided subsidies paid out of the Public Treasury rather than such subsidies at the expense of injured persons. Obviously justice requires that if financial encouragement is required for shipowners they should be subsidized out of the Public Treasury, contributed to by all, and not supplied through the process of mulcting persons who have suffered damage in their time of distress.

Mr. Justice Black also said:

"Many of the conditions in the shipping industry which induced the 1851 Congress to pass the act no longer prevail."

The leading text writers, Messrs. Gilmore and Black, state that:

"The act was passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as protection and indemnity insurance) were available." (Admiralty, p. 667).



These writers also interpret the recognized hostility of the courts toward the claims of shipowners for limitation of liability as "increasing signs of economic obsolescence of the limitation system."

On May 2, 1957, Senator Morse introduced a bill to amend the law relating to limitation of liability by requiring the "surrender of all hull and liability insurance." His bill would have effectively destroyed the system. He was promptly joined by five other Senators as cosponsors. Action on the Morse bill was, we understand, suspended awaiting the results of the 1957 convention which are now before us.

The one thing that shipowners fear most is that the rationale of their privilege should be reexamined. At the outset, under the circumstances, we would expect that your committee, before proceeding to the consideration of the provisions of S. 2314, would wish to satisfy itself that there is justification for the continuance of any system of limitation of liability for shipowners.

The convention and S. 2314 provide not only for continuation of the special privilege of limitation of liability but for a great enlargement of the class of persons brought within its shelter.

One cannot but admire the courage of the shipowning group, when their special privilege of limitation of liability is already under attack, is unpopular with the courts, is being termed "obsolescent" if not obsolete, and is being penetratingly analyzed by high authority as a subsidy at the expense of injured persons, in nevertheless advocating a greatly enlarged system. Perhaps a strong attack is considered the best defense.

Our law as originally enacted gives the right of limitation only to the "owner of any vessel." Rev. Stat. 4283. The only extension is that found in Rev. Stat. 4286 which provides that a character who shall "man, victual, and *navigate*" a vessel, in other words a bareboat or demise charterer, "shall be deemed the owner" within the meaning of the limitation statute and have the same right. This restriction of the privilege to actual owner or owners *pro hac vice* has been jealously guarded and Rev. Stat. 4286 has been strictly construed.

The 1957 convention, article 6(2) and S. 2314, section 7B, would enlarge the class of persons entitled to claim this privilege to include:

1. Any "charterer" of any type and description. "Charterer" is a broad term and "charter" may include even a freighting contract or an informal arrangement. An amendment proposed by the American delegation at Brussels to insert "demise" before the word "charterer" was rejected.

2. Any "manager and operator." This is indeed a wide classification, the exact scope of which can only be determined after years of interpretation by the courts.

3. "Master and members of the crew."

4. All "other servants of the owner, charterer, manager, or operator acting in course of their employment." This specification opens the door as wide as possible and will include all manner of persons performing all manner of functions.

These broad extensions are entirely inconsistent with the principles of limitation of liability heretofore recognized in this country.

Furthermore, the owner's right to limit liability is extended to loss, injury or damage whether on land or on water and to "the infringement of any rights caused by the act, neglect, or default of any person on board the ship * * * or any person not on board the ship for whose act, neglect or default the owner is responsible." (Convention article 1(1)(b); S. 2829 section 2(2) and this broad language is extended for the benefit of the broad classes of persons enumerated above to whom the right of limitation would be extended.

How broad the effect of these extensions may be can only be a subject of speculation and the final results can be known only after years of litigation.

The committee will certainly wish to be convinced that such broad extensions of this special privilege are necessary or justifiable. The proponents of S. 2314 and the 1957 convention have not begun to make any such showing.

The hidden blockbuster in the convention and the insuperable objection to the convention and to S. 2314 is, however, found in the fact that:

The convention and S. 2314 would enable shipowners to choose a foreign forum in which to constitute the limitation fund required by the convention and thereby deprive American citizens of access to the courts of the United States for recovery of their claims for personal injury, loss of life, or loss of, or damage to, property.

There can be no question as to the correctness of this statement. The courts of any country which is a ratifier of the convention are open to any shipowner for assertion of his right to limitation of liability thereunder. There is no restriction which can be pointed out in the bill or in the convention which restricts the shipowner's choice of forum. In fact, at the Brussels Conference in 1957, at which the convention was framed, there was struck out from the preliminary draft a provision which would have limited the shipowners' choice of forum, indicating clearly that the shipowners' choice was intended to be unrestricted.

Section 6 of S. 2314 (article 5 of the convention) does not restrict the shipowners' choice of forum but, on the contrary, recognizes that such choice is unimpaired. This section, as its heading indicates, deals only with the right of the shipowner to obtain release of security which he has been required to furnish elsewhere before his limitation fund has been constituted. Subsection 6B thereof describes three preferred jurisdictions and provides that, where a fund is constituted in any of these, security previously obtained in any other jurisdiction must be released. However, subsection 6A applies in any case where the fund is constituted in any other jurisdiction and provides that, in that event, release of security elsewhere obtained is discretionary, a clear recognition that the fund may be constituted elsewhere than in the preferred jurisdictions.

Irrespective of the provisions of section 6, and not limited thereby, section 3E provides:

"After the fund has been constituted, no claimant or potential claimant against the fund shall be entitled to exercise any right against other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant."

This provision effectively prohibits to any claimant of a ratifying country any further redress by way of attachment or execution. After the fund has been validly constituted anywhere, any such claimant will be compelled to go to a foreign jurisdiction selected by the shipowner for any redress in respect of his claim.

It is interesting to note that S. 2314 emphasizes the effectiveness of this provision by enlarging the words "no claimant against the fund" (convention art. 2 (4)) to "no claimant or potential claimant against the fund" (sec. 3E).

At the Brussels Conference a motion was made by the American delegation for the insertion in the convention of a provision which would enable the claimant to sue on his claim in a court of his own nationality for the purpose of obtaining a judgment which would be required to be recognized as proof of his claim and the amount thereof in the court administering limitation of liability under the convention but this motion was defeated.

It is therefore clear that the convention would effectively deny to claimants any rights whatever in any court other than those of the jurisdiction chosen by the shipowner.

S. 2314 clearly recognizes the right of the shipowner to limit his liability under the international convention (that is, in foreign courts), or under this act (that is, in accordance with the procedures which would be established by S. 2314 for U.S. courts when the shipowner chooses to constitute his fund here) (sec. 6).

When the shipowner chooses to limit his liability in a foreign court in accordance with the principles of the convention, article 4 of the convention is applicable. This article specifically provides that "the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted". This provision clearly places it within the competence of the court chosen by the shipowner for constitution of his fund to pass on all matters relating to its adequacy and availability. Rules for the distribution of the fund, including questions of priority of claims, and all rules of procedure will be governed by the national law of that country and in many cases will be extremely onerous on foreign claimants. Claimants from another country will be put to the expense of hiring foreign lawyers, if available, to represent them and to provide evidence in support of their claims in accordance with the law of the foreign courts.

Article 5(5) of the convention provides that "questions of procedure" and the "time limit" for bringing actions shall also be decided in accordance with the national law of the state in which the shipowner constitutes his fund and institutes his action for limitation of liability.

It is obvious that certain jurisdictions which may be chosen by shipowners may be inconvenient indeed. Compliance with local "time limits" and rules of procedure may be impossible. The system of legal costs may be onerous, as in England. Under some circumstances, the shipowners' choice of forum may amount to an effective denial of justice to claimants.

Article 1(6) of the convention provides:

"The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner shall be determined by the *lex fori*."

The *lex fori* is, of course, the law of the forum chosen by the shipowner.

S. 2314 (sec. 4G.) provides a rule of procedure in accordance with Anglo-Saxon conceptions of justice that the petitioning shipowner "shall have the burden of proving absence of actual fault or privity." Since the right of limitation of liability is conditioned on "absence of actual fault or privity" and all facts and circumstances pertinent to this question are in the knowledge and possession of the shipowner, this provision is fair and right. If, on the other hand, the burden is placed on the claimant, the result is that substantially no contest is possible. Nevertheless, in most European countries the law is that this burden is placed on the claimant.

On this important point, every effort was made at the Brussels Conference, 1957, to persuade the European countries to accept the Anglo-Saxon position on burden of proof, but they were adamant. The result is that in this provision, as in others, the convention constitutes an agreement to disagree rather than an agreement on uniformity. In any event, American claimants required to go to European courts to enforce their claims would be subjected to this burden of proof so unfair according to the American view.

The fact is that the American delegation sent by our Government to the Brussels Convention, 1957, was acting under instructions "to oppose the adoption of an international convention relating to the limitation of shipowners' liability in form or substance approximating" the preliminary draft, and were specifically instructed to oppose that draft on the ground "that the vessel owner should not be permitted to choose the forum wherein to establish the limitation fund, particularly in view of the trend toward flags of convenience."

There were four other points of opposition on which the U.S. delegation was instructed. The American delegation was overruled at the Brussels Conference on every one of the points on which they were instructed to oppose the draft convention, and the final convention did, in form and substance, approximate the preliminary draft.

In view of the fact that the carefully prepared views and instructions of the American delegation at Brussels were deliberately flaunted and disregarded and that the convention in fact violates every principle of right and justice expressed by our delegation there, making it impossible for our delegation to sign the convention, it is difficult to understand the support for the convention which has now developed in some quarters.

The results of the Conference are not, however, surprising when it is understood the European countries, including Great Britain, are highly distrustful of the results and expense of litigation in the courts of the United States and were determined to devise a system which would permit their nationals to escape the jurisdiction of our courts so far as possible. Are we prepared to aid and abet them in this effort? Or are we to blindly enter the trap which has been laid for us?

The option to shipowners to choose their own forums for limitation of liability can have particularly disastrous consequences for claimants in collision cases such as that between the Italian S.S. *Andrea Doria* and the Swedish S.S. *Stockholm*. Most of the claimants in this case were American citizens or residents. Both shipowners were suable in New York and suits here were promptly instituted by most of the claimants. Since they could not be prevented from proceeding with their suits by any foreign limitation proceeding, there was no alternative for the shipowners but to institute their proceedings for limitation of liability in New York, which they did. Their proceedings were consolidated and the entire litigation was completed in the record time of 18 months.

If the 1957 convention had then been in effect, and S. 2314 had been the law, an entirely different and impossible situation would have resulted.

The Swedish owner would have constituted a valid fund in Sweden, thus preventing any effective action by any claimant against him elsewhere than in Sweden.

The Italian owner would have constituted a valid fund in Italy, thus preventing suits against him by any claimant elsewhere than in Italy.

American claimants to protect their claims would have had to sue in two widely separated foreign jurisdictions, employing counsel in both and complying with all rules of procedure and time limits in both. They would even then have faced the possibility that the Swedish courts would exonerate the *Stockholm* and that the Italian courts would exonerate the *Andrea Doria*, or that the decisions of the two courts would be otherwise conflicting. They would have been compelled either to forgo their claims or accept grossly inadequate settlements.

This will be the situation in future collision cases if the 1957 convention is ratified and S. 2314 becomes law.

I have thus far not discussed the limitation amounts fixed in the convention and adopted in S. 2314. They are arbitrarily fixed at a total of 3,100 French gold francs (about U.S. \$207) per registered ton of the vessel's tonnage. They have no relation to the value of the ship and are the same for high valued new ships and low valued old ships.

Our law is based on the conception that the shipowner who is not personally negligent should be permitted to limit his liability to the value of his investment in the ship, even though damaged, or a total loss.

The English law originally fixed amounts per ton representing the then average sound value of British ships but the figures were permitted to become 100 years out of date. Any fixed figures will become progressively less adequate with the passage of time.

The convention figures are arbitrarily chosen and have no relation to anything nor any philosophical justification.

While the convention figures do provide a fund even in total loss cases, as our law does not, the same figure is applicable in all cases, and on the whole no bargain is offered to claimants. Total loss cases are comparatively few in number and it can be observed that in respect of the S.S. *Stockholm*, her limitation figure under the convention would be less than half what it was under our limitation law in spite of the fact that her value was reduced by repairs costing \$1 million.

In these days of high valued ships it will be the shipowner in most cases who gets the bargain by the proposed change in our law.

Our law already provides a minimum of \$60 per ton for personal injury and death claims. This amount is also out of date and should be increased, but this is no reason for accepting the great disadvantages of the convention. Assuming that the advantage of a fixed fund in total loss cases offsets the disadvantage to claimants of being deprived of higher funds based on value under our present law in most other cases—and it cannot be said to do more—the great disadvantages to claimants inherent in the convention still make the convention wholly unacceptable.

In summary, there are a number of major questions for this committee to consider in respect of S. 2314 before the details of that bill are reached.

1. Is it justifiable to continue any system of limitation of liability for shipowners, as financial encouragement for the ownership and operation of ships, or a "subsidy" at the expense of persons injured or suffering loss or damage for which the shipowner would otherwise be liable in full? If not, all that is necessary is to strike from S. 2314 all but the preamble and sections 8, 9, and 10.

2. If continuance of limitation of liability is justifiable, do we wish to adopt a system which—

- (a) greatly enlarges the class of persons to be benefited by such a subsidy;
- (b) gives the shipowner the right to choose a foreign jurisdiction for exercising his right of limitation of liability, thereby—

- (1) depriving American claimants of the right to seek redress for their wrongs in their own courts, and

- (2) forcing American claimants to seek redress, if any, in foreign courts subject to the disadvantages of foreign law and procedure and greatly increased expense,

- (c) gives the owners of colliding vessels the right to choose different forums, thus creating situations of impossible confusion and disadvantage to claimants?

3. If limitation of liability for shipowners is to be continued, is it desirable to scrap the legislative and legal experience of 110 years in favor of a completely different system of foreign origin with obvious defects, uncertainties, and injustices, or

4. Is it not preferable to confine ourselves to simple and obvious amendments to our present law of clear merit and disadvantage to no one?

5. Is the myth of international uniformity, which the 1957 convention and S. 2314 will not produce, worth following in view of the sacrifice of the rights of American citizens generally which is clearly involved?

S. 2313 AND THE 1910 COLLISION CONVENTION

The grounds for opposition to S. 2313 and the Collision Convention, 1910, can be more simply stated.

The ratification of this convention and/or the enactment of S. 2313 would make a radical change in our fundamental law, applicable only in collision cases. This change would be to the advantage of negligent shipowners and to the disadvantage of all others. This change consists in the abolition of the rule of joint and several liability of joint tort-feasors to innocent third parties.

Oddly enough, this rule is preserved in respect of death or personal injury claims (S. 2313, sec. 4(b)), but abolished as to claims for damages to "vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board" (sec. 4(c)).

The preservation of the rule as to death or personal injury claims admits the validity and justice of the rule of joint and several liability. No good reason can be given why the rule is not as valid and just in respect of property claims.

These provisions are found in article 4 of the convention.

S. 2313, however, goes much further than the convention and provides (sec. 10) that the act shall also apply "in all cases to which the admiralty and maritime jurisdiction of the United States has been extended notwithstanding such damages are done or consummated on land." The admiralty jurisdiction of the United States was extended by Congress in 1948 to include all injuries "caused by a vessel * * * notwithstanding that such damage or injury be done or consummated on land" (46 U.S.C. 740). Previously damage to structures and property on shore was outside the admiralty jurisdiction. The convention abolishes the rule of joint and several liability only as to "vessels, or to their cargoes, or to the effects or other property of the crews, passengers or other persons on board." S. 2313 abolishes this rule also as to all owners of wharves, piers, oil terminals, and other shore installations and property thereon, placing such owners under the same disadvantage.

The objection to the convention is not that it would permit our courts in collision cases to apportion fault and liability as between negligent vessels owners in collision cases, but that it would restrict the liability of negligent vessel owners to innocent parties to liability for a proportion of the damage suffered equal to the proportion of fault attributed by the court to the particular vessel.

Our Supreme Court many years ago established the rule in collision cases that the division of damages and liability between negligent shipowners, whose ships had violated the rules of navigation, should be in equal parts. The *Catherine* (1854) (17 Howard (58 U.S.) 169, 177). That rule was established as a matter of policy to enforce respect for the rules of navigation. The Supreme Court has recently refused twice, after full briefing, to consider modification of the rule laid down in the *Catherine* and since adhered to, in spite of clear indication from the courts of appeal that they would have liked to deviate therefrom. *The Metrose-Sandcraft* (252 U.S. 971); *The A. C. Dodge* (352 U.S. 928).

The wisdom of a modification of the rule of the *Catherine* requiring equal division of liability and damages between negligent shipowners in collision cases is debatable. The basic question of principle involved in the convention and in S. 2313 is whether vessel owners should be relieved in collision cases from the operation of the elsewhere universal principle of the joint and several liability of joint tort-feasors toward innocent parties; i.e., parties not guilty of any contributing fault.

This goes far beyond the reduction of damages recoverable by a person whose own fault has contributed according to his degree of fault, as is possible in suits by seamen under the Jones Act.

The convention and S. 2313 would limit the recoveries of innocent persons according to the degree of fault of someone else for whose negligence those persons are not responsible.

The principle of the joint and several liability to innocent persons is of universal application. The only exception to this rule is found in the conven-

tion and in the British statute on which the convention is based. The British statute has been criticized by British textwriters and courts. In Roscoe on "Damages in Marine Collisions" (2d ed., pp. 20, 21), it is referred to as "not logically satisfactory" and "historically unsound." In Marsden on "Marine Collision" (9th ed., p. 136), it is referred to as working "positive injustice." For criticism by the British courts see *Drumlanrig* ((1910), Prob. 249, 260, 269), and *Stoomvaart, &c. v. P. & O. Nav. Co.* ((1882) 7 App. Cas. 795, 819). The fact that the British are content with an unsound, illogical, and unjust law, or that others may have followed them in the convention, is no reason why we should adopt this rule in this country or agree to an international convention based on that rule, to the prejudice of the great majority of our citizens.

The operation of the joint and several liability rule can be stated as follows:

If I am injured through the negligence of A and sue A, A cannot defend against my claim on the ground that the negligence of B also contributed. This would not be even a partial defense to A for the rule is that "each of two persons independently guilty of tortious conduct causing harm to another is liable for the entire harm" and it is not even material that the fault of one of them is more serious than the other. See "Restatement of the Law of Torts," vol. IV, sec. 879 and comment "a."

The abolition of this rule and the substitution of the rule of liability only proportionate to degree of fault as proposed has this effect. A can now interpose as a partial defense that negligence of B contributed, and my recovery will be reduced in proportion to the degree of fault attributed to B, A being liable only for his share. This result follows even though B is not a party to the action or within the jurisdiction of the court.

If the case is one of collision in admiralty, all incentive to A to adopt the usual procedure in admiralty of impleading B is destroyed for it is obviously easier to place partial blame on an absent party than on who is present in the case and represented by counsel.

Under these conditions, I must at my peril anticipate all parties who may be later accused by A of contributing fault and make them parties defendant in my action, securing jurisdiction of them if possible. Even if I am successful in this, I may find that they are irresponsible, able to limit liability, or otherwise judgment proof.

It was in recognition of the hardships that might thus be visited on innocent parties that the rule of joint and several liability was early developed as a principle of common law. This principle has likewise always been the rule in our admiralty courts (the *Juniata*, 93 U.S. 337; the *Atlas*, 93 U.S. 302).

No justification can be offered by shipowners for this proposed broad and unique exemption in their favor from the otherwise universal application of the rule of joint and several liability. It would affect adversely the property interests of crew members, passengers, cargo owners, and even other innocent vessel owners. By the extension sought in S. 2313 the owners of all shore installations and property ashore would be prejudiced.

It is an odd fact that the only justification put forward for this broad special privilege affecting so many interests is based upon a unique situation affecting cargo interests only, in which the operation of entirely different principles has produced what shipowners term an "anomaly," which comes about in this way.

It is a corollary of the rule of joint and several liability of tort-feasors, which requires each negligent party to assume full responsibility to the innocent party who has been injured, that a tort-feasor thus liable is not relieved from liability by the fact that another negligent party has on immunity from liability to the person harmed (restatement of Law of Torts, vol. IV, sec. 880). This rule has also been followed without question in our admiralty courts. See the *Belgium-Nathaniel Bacon* (195 F. (2d) 270; 343 U.S. 326). In this and preceding cases, it was held by the Supreme Court that the fact that the carrier was exonerated from direct liability to cargo through the provisions of the Carriage of Goods by Sea Act or of the Harter Act, had no effect on the right of cargo to sue a noncarrying vessel and recover its damages in full, irrespective of the fact that the carrying vessel might also have been negligent. This result clearly followed from the application of the principle of the liability in solido of each of two negligent persons.

At common law, one of two negligent persons being sued by the innocent sufferer of harm and being compelled to pay the entire damage had no further redress. The common law allowed no recovery by one negligent person against

another, and the tort-feasor required to pay had no right of contribution from the other.

In admiralty, this harsh rule of the common law has been ameliorated and the negligent shipowner is in a position more favorable than most tort-feasors, in that the admiralty courts allow him to recover contribution from the joint tort-feasor.

Subsequent to the passage of the Harter Act in 1893, which gave an exemption to the carrying shipowner from liability to cargo carried on his ship for damage resulting from errors in navigation, a noncarrier having been compelled to pay the entire damage of the cargo on the carrying vessel sought contribution from the carrier to the amount which it had been compelled to pay. In a line of decisions beginning with *The Chattahoochee* (173 U.S. 540) and continuing through the *Esso Belgium*, *supra*, the Supreme Court has allowed such contribution. The argument against contribution was that the noncarrier was attempting to recover from the carrier by virtue of subrogation to the cargo owner's rights, and that, consequently, the allowance of contribution would be a violation of the exemption of liability to cargo given by the Harter Act. This contention was rejected by the Supreme Court on the ground that the Harter Act had no application to the noncarrier's claim for contribution, and that the noncarrier's liability for the cargo damage was merely a part of the damages sustained by the noncarrier as a result of the collision.

In spite of the clear pronouncements of the Supreme Court, shipowners still assert that the allowance of the right of contribution asserted by the noncarrier is a violation of the principles of the Harter Act and its successor, the Carriage of Goods by Sea Act.

This situation existed long before the passage of the Carriage of Goods by Sea Act in 1936, but no provision was inserted in the Carriage of Goods by Sea Act which would make any change.

The shipowners say that the situation created is an anomaly in that, through assertion of the noncarrier's rights of contribution, the carrying vessel owner is held liable indirectly for damage to the cargo as to which it has no direct liability.

This situation arises solely from the exercise of the right of contribution by the noncarrier which the cargo owner is powerless to control. The cargo owner's rights against the noncarrier have existed under established principles for many years, have not been modified in previous statutes, and are unchallengeable under existing principles of law.

The trouble here is that the shipowners would aim their gun at the wrong party. Instead of attacking the basis of the problem which is the noncarrier's right of contribution, itself an unusual privilege for a wrongdoer, they would cut back the rights of innocent shippers of cargo. If the current situation is unsatisfactory to shipowners, the obvious remedy would be to provide, as the British have done in their Maritime Conventions Act, 1911, enacting the provisions of the Collision Convention, 1910, that there shall be no contribution between shipowners in respect of any liability for which the contributor would not be liable directly to the claimant. It would be a simple matter to draft a bill which would accomplish this result and include therein any other desirable features of S. 2313, and I shall place myself at the service of the committee to submit a draft of such a bill if this is desirable.

There are other objectionable features in the Collision Convention, 1910. The convention, in article 6, abolishes all "legal presumptions of fault in regard to liability for collision." This apparently abolishes any application of the rule of *res ipsa loquitur*, or any presumption of negligence when a moving vessel collides with an anchored vessel, or a dock. It would also abolish the longstanding legal presumption established by the Supreme Court in the case of *The Pennsylvania* (86 U.S. 136). This presumption is that when at the time of a collision a vessel is proceeding in violation of the rules of navigation, it is presumed that her fault in this respect was a contributory cause of the collision, and the burden is placed on the owner of the offending vessel to show that this fault could not have contributed. Similar presumptions of fault were abolished in England in their Maritime Conventions Act, 1911.

S. 2313 contains these abolitions of presumptions of fault in section 2, but the words "legal presumptions" are replaced by the words "statutory presumptions," which may be somewhat narrower, and to that extent place the bill out of step with the convention. We understand that the Department of Justice is submitting a revised bill as substitute for S. 2313 in which the provisions of

section 2 of S. 2313 abolishing presumptions are eliminated. This bill, while conceding the undesirability of the proposed abolition of presumptions, is still further out of step with the convention, and its adoption would make ratification of the convention impossible.

S. 2313, in section 7, carries a repeal of "the last sentence of section 1 of the Act of September 4, 1890 (26 Stat. 425; 33 U.S.C. 367)," which repeal is continued in section 10 of the Department of Justice bill, both provisions being in accord with the provisions of the convention found in article 8. This is the provision which calls for a presumption of fault on the part of the "hit and run driver" of the sea; that is, the ship which after a collision fails to stand by. Whether this relaxation of a salutary provision is desirable is a matter which this committee will wish to consider.

S. 2313, in section 2, contains a provision taken from the convention, article 2, which is dangerous and suspect. The provision is that "if the causes of the collision cannot be determined, the damages shall be borne by those who have suffered them." What meaning may be given by the courts to these words is quite uncertain, but they can be construed with highly detrimental effects on the rights of claimants.

S. 2313, in section 8, contains a 2-year limitation on the time for suit for damages arising out of a collision. This is substantially less than would ordinarily be allowed in the courts of the United States. In the admiralty courts, suits for the recovery of damages are barred only by laches, although State statutes are often followed as a guide.

Both the provisions of S. 2313 abolishing presumptions, and those barring actions after an interval of 2 years, could seriously affect seamen's actions under the Jones Act when the injury arises out of a collision. Presumptions of fault arising from statutory violations are an important feature of Jones Act cases, and the time limitation applicable is 3 years. S. 2313, if it becomes law, would, as a later and particular statute, probably supersede the statutory provisions heretofore applicable in Jones Act cases where the injury arises out of a collision.

These additional objections are comparatively minor, but they are real. They are inherent in the convention itself. They cannot be changed if the bill is to serve as a basis for ratification of the convention, or if the clamor for international uniformity is sincere. Our suspicion is that the emphasis by the shipowners on the desirability of international uniformity is only a smokescreen to further their selfish purposes. The willingness of the Department of Justice to withdraw its support of the important provisions of the convention on presumptions of fault is revealing. It will be interesting to see if the shipowners' group follow this lead.

Whether they do or not, we believe it is clear that the real purpose they seek is the unique and special privilege of being relieved of the otherwise universal rule of the joint and several liability of joint tortfeasors. This they seek with respect to the property claims of all innocent third parties in collision cases. The granting of such relief will lead to harassment, and the placing of impossible burdens on such parties.

Cargo interests are unfairly used as the whipping boy to accomplish these ends. Cargo's rights against noncarriers were not cut down by the Harter Act or the Carriage of Goods by Sea Act. Carriers, galled by the allowance of rights of contribution to noncarriers in respect of the latter's liability to cargo, propose an easy solution. They would simply further curtail the rights of cargo owners. However, the very breadth of their appeal displays the weakness of their argument. There is no more reason why the rights of cargo should be restricted than the rights of other innocent persons who would be affected.

I submit that the Collision Convention, 1910, is as indefensible now as it always has been, and that, if any action at all is to be taken, it should be in curtailment of the noncarrier's right of contribution, as has been suggested.

Respectfully submitted.

LEONARD J. MATTESON.

Dated: New York, N.Y., March 1, 1962.

SUPPLEMENTAL STATEMENT OF LEONARD J. MATTESON

Re S. 2313 and S. 2314 with substitute bills

As a result of the hearings before this committee on March 1 and 2, 1962, it is clear that S. 2313 and S. 2314 are presented as a "package," and that the

enactment of each is intended to be preliminary to, or concurrent with, ratification of the international convention on which it is based.

S. 2313 is based on the "Convention for the Unification of Certain Rules With Respect to Collision Between Vessels," Brussels, 1910, which will hereinafter be referred to as the 1910 convention.

S. 2314 is based on the "Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships," Brussels, 1957, which will hereinafter be referred to as the 1957 convention.

There is no good reason why these acts and conventions should be joined in a package. S. 2313 deals with a detail of the law relating to the liability of shipowners resulting from a collision (there are at present no statutory provisions relating to such liability, but only the rules of liability developed by the courts). S. 2314 deals with a general and greatly enlarged privilege to be granted to shipowners and others for limitation of aggregate liability of every nature arising out of the operation of a ship (since 1851 we have had a limitation of liability law whose benefits are confined strictly to the owner of a ship, or a bareboat charterer who operates the ship thereby becoming the owner pro hac vice).

Obviously neither is in substance dependent upon or related to the other and it is impossible to speak of them as one bill.

S. 2314 is considered by the proponents to be the more important (statement of Leavenworth Colby). S. 2313 is an attempt to revive the 1910 Convention on Collision Liability which has been found unacceptable in this country for 52 years. The addition of S. 2313 to the "package" appears to be an attempt to disguise or dilute the serious grounds for opposition to that convention which have heretofore prevented its acceptance.

The urgent plea for international uniformity made at this time can hardly be sincere. Our laws with respect to limitation of liability have been divergent from the laws of other countries since they were enacted in 1851. Our law on the joint and several liability of joint tortfeasors in collision cases is as it always has been. We have since 1910 refused to follow other countries in the abolition of that rule to the prejudice of innocent persons.

There have been cogent reasons for our refusal to modify our laws to conform to foreign conceptions and ideas. Our divergence on these points has existed for very long periods of years. No disadvantage to our nationals has been, or can be, pointed out in our adherence, or continued adherence, to our own convictions on these points.

It is asserted without foundation or support that our adherence to these conventions will improve the competitive position of American shipowners. This is clearly not the fact. Our laws with respect to collision liability and limitation of liability are applied in our courts impartially to foreign and domestic shipowners alike. The modifications sought in our law are in the interests of shipowners generally. More foreign shipowners than domestic will be benefited thereby, since more foreign than domestic ships enter and leave our ports thereby becoming subject to our laws. For example according to figures recently released by the AMMI, only 40 percent of arrivals and departures from the port of New York in 1961 were of U.S. vessels, 60 percent were foreign, and many of the 40 percent were U.S. vessels in our coasting trade not subject to foreign competition. The assertion of competitive advantage or disadvantage obviously does not apply to our coastwise ships, nor to any vessels operating in inland waters to which the application of the convention would be extended by S. 2314.

The alleged advantages to U.S. shipowners of adherence to these conventions are purely illusory. The presentation by witnesses in support of S. 2313 and S. 2314 is replete with inaccuracies, half-truths, dubious assertions, and important omissions. The burden of proof should be strongly on the proponents of this new and radical legislation to demonstrate its desirability or necessity and the assertions in support should be carefully checked. In this supplementary statement, I shall attempt to clarify some of the points on which I fear the committee may not have been adequately informed. I shall discuss first the "more important" bill, S. 2314.

The 1957 convention was framed at a Diplomatic Conference on Maritime Law held at Brussels in September 1957. The draft convention which was the basis of consideration had been framed at a meeting of the Comité Maritime International in Madrid, September 1955. The instructions to the U.S. delegation to the Diplomatic Conference set out in the U.S. position paper were to "oppose

the adoption" of a convention "in form or substance approximating the draft convention voted at the Plenary Conference of the Comité Maritime International in Madrid, 1955." The U.S. delegation was also instructed to oppose five specific features of the draft and to advocate a number of proposals as the basis for an international convention.

The 1957 convention as voted at Brussels did approximate the Madrid draft and incorporated every one of the five features the U.S. delegation was instructed to oppose. Every one of the proposals the U.S. delegation was instructed to put forward was summarily rejected. Consequently the U.S. delegation properly declined to sign the convention.

Nevertheless, the proponents of S. 2314 now ask legislation in support, and ratification of, the 1957 convention. They would have us abandon the carefully prepared U.S. position at Brussels and every conviction of our own as to a proper convention. In the name of international "uniformity" they would have us not only meekly submit to a convention every detail of which we opposed, but accept an international system of procedure which will enable foreign shipowners, if not our own, to deprive our courts of power to adjudicate and enforce claims of our own nationals, and compel our nationals to go to foreign courts where their claims will be enforceable only according to foreign law. Under the convention our own shipowners would also have this right and their self-righteous assertion at this time that they would not exercise this right is not to be trusted in cases which may arise in which their financial interests would be served by doing so.

The complete reversal of position by Government Departments and private shipowning interests as to this convention is difficult to understand and is not adequately explained. No change has occurred which would make this convention which was bad in 1957, good in 1962.

The reversal of position by the Maritime Law Association has all the evidences of a power play by shipowning interests. That association had condemned the convention in no uncertain terms with no substantial opposition at its annual meeting in 1955, 1956, and 1958. At the meeting in November 1960, a vote to reverse this position was taken on the recommendation of the majority of a committee consisting of shipowner representatives and associates. The committee report, with minority reports appended, M.L.A. Document 450, received such inadequate advance distribution that most of the members present had not had an opportunity to examine the reports in advance of the meeting. Three hundred and forty of the active membership of 1,441 attended the meeting, but this was nearly twice the average attendance. A majority vote of those present would have required 171. The vote taken as recorded was 157 in support of the majority report, 111 opposed, not voting 72. This can hardly be regarded as the overwhelming endorsement of the convention it is represented to be.

The weakness of the representations made in support of the 1957 convention and the complete failure to answer the strong arguments against the convention suggest that the proponents have not themselves fully understood or appreciated the serious nature of the objections.

The basic objections to the 1957 convention and to S. 2314 are set forth in my original statement submitted to the committee on March 2, 1962, supplemented by my oral statement on that day (Transcript, p. 154 to 187), and are summarized at page 21 of the multigraphed statement. Probably the most important objection is that set out at page 12, et seq. of the multigraphed statement as follows:

"The convention and S. 2314 would enable shipowners to choose a foreign forum in which to constitute the limitation fund required by the convention and thereby deprive American citizens of access to the courts of the United States for recovery of their claims for personal injury, loss of life or loss of, or damage to property."

At first this statement was controverted, and a principal proponent of the convention and the present legislative program, at the November 3, 1961 meeting of the M.L.A., attempted to deny this witness' statement that the shipowner's choice of forum was unlimited (See M.L.A. Doc. 452, minutes of fall meeting, Nov. 3, 1961, p. 484), but that proponent was relying on article 5 of the convention relating to the release of security obtained by claimants in other jurisdictions prior to the constitution by the shipowner of his limitation fund which has only limited effect. He was overlooking the fact that the convention contains no restriction on the shipowner's choice of forum, and that article 2(4) of the convention which forbids the exercise by any claimant or potential claim-

ant against the fund (S. 2314, sec. 3E) of any right against any other assets of the shipowner is effective after the fund has been properly constituted whatever jurisdiction is chosen by the shipowner. (See M.L.A. 452, p. 4851.) Obviously this proponent, and apparently others, failed to appreciate the effect of the convention.

But if the shipowner's choice of forum were restricted to those enumerated in article 5(2) of the convention as was suggested, it would still be the fact that the forum chosen might well be a foreign jurisdiction and that the effect of the shipowner's choice and constitution of the fund would be to deprive our courts of the power to give relief to claimants either by attachment or by execution on a judgment and would render any proceedings by claimants in the courts of this country fruitless. At the Brussels Conference 1957, a motion by an American delegate that suits in other courts be permitted for the purpose of establishing claims was rejected. Under article 5(5) of the convention all procedure relating to actions is left to be determined by the national law of the contracting state in which the proceeding for limitation of liability takes place. Undoubtedly most foreign countries would require that claims against the fund be established only by proceedings in their courts and subject to their laws. Moreover, our own courts would probably refuse to take jurisdiction of suits by claimants when the result could only be an unenforceable judgment.

It seems to be no longer questioned that my interpretation of the effect of the convention on jurisdiction of claims in our courts when the shipowner's limitation fund is constituted in a foreign country, is correct.

It is, of course, true that the shipowner's limitation fund to be properly constituted and to have the effect which I have stated, must be "actually available for the benefit of the claimant". Convention, article 2(4). The question then arises as to who determines that the limitation fund has been properly constituted in a foreign country. A decision by the courts of that country as to the adequacy of the security furnished and the availability of the fund to claimants might be unsatisfactory. This is only a subsidiary question, for in most cases probably there would be no basis for questioning the adequacy and availability of the fund and the effect on jurisdiction would then unquestionably be as I have stated.

But the case where the constitution of the foreign fund approved by a foreign court would be unsatisfactory and inadequate as to availability for American claimants or otherwise is still to be apprehended. Mr. Rault in his testimony (Proceedings, p. 111, et seq.) asserted the right of American courts to review the determination of foreign courts as to the adequacy and availability of the fund and suggested that American courts would not summarily release security obtained prior to the constitution of the fund as required by article 5 of the convention, but would hold proceedings in abeyance until the limitation proceeding was finished and American claimants had actually been paid. This is quite contrary to the provisions of the convention and there is no provision in S. 2314 which would authorize such procedure.

Actually the convention provides in article 4 that "The rules relating to the constitution and distribution of the limitation fund * * * shall be governed by the national law of the state in which the fund is constituted." This appears to be a direct delegation to the court of the shipowner's choice to determine adequacy and availability and it would probably be so interpreted. Considerations of international comity would probably make it improper, and our courts would certainly be most reluctant, to undertake to review the determination of a foreign court. Moreover, practical reasons would also make such a review difficult if not impossible. But if our courts should disagree and attempt to nullify the decision of a foreign court that the fund is adequate and available, a situation of hopeless confusion would be created.

The question of release of security would, of course, only arise in cases where claimants had succeeded in attachment of shipowner's assets prior to the constitution of the limitation fund. After the fund has been constituted, attachment is forbidden by article 2(4). Moreover, whether security obtained is released or not, is probably moot since execution on a judgment would in any event be prohibited by article 2(4).

Questions as to convertibility of foreign currency in which a limitation fund is constituted will rise to plague American claimants and Mr. Rault's speculations on what might be the result are far from a satisfactory basis for subjecting American claimants to these risks (Proceedings, pp. 113-114).

Mr. Haight's answers to the question as to what would have happened in the *Andrea Doria-Stockholm* case if the convention had then been in effect did not meet the principal difficulty envisioned in my multigraphed statement at page 18 which was that the Swedish owner of the *Stockholm* would have constituted an adequate and available fund in Sweden and the Italian owner of the *Andrea Doria* would have done the same in Italy. The result would have been to prevent suits and enforceable judgments in this country. The claimants, mostly American, would have had to sue abroad in two widely separated jurisdictions at great expense and with the risk of conflicting decisions in the two countries, an impossible situation.

What did happen in the *Stockholm-Andrea Doria* case was that both shipowners were compelled to limit their liability in our country because they were subject to suits and enforceable judgments here. No such compulsion could be exerted under the convention.

In this country it sometimes happens in collision cases that one shipowner files his limitation proceeding in one district court and the other in another district court. Under our laws this situation is easily dealt with for we have provisions in our law under which actions can be transferred from one district to another. Under these provisions, the two proceedings for limitation of liability, though filed in separate district courts, can be joined in one forum and conflicts in decision and procedure avoided.

Under the convention there is neither provision nor authority for a transfer of jurisdiction. If in a collision case the shipowners choose to constitute their funds in two different jurisdictions claimants will be whipsawed and there is no possible remedy. This feature of the convention is intolerable to American claimants.

The further basic objections to the convention are:

1. The broad extension of classes of persons to be included within the shelter of the shipowner's limitation. (See my multigraphed statement, p. 10 et seq.) If there is any moral justification for continuance of the privilege of shipowners to limit liability when that privilege is exposed to pointed and valid attack from high authority, there can be no justification in this day for broad extensions of the benefit of this privilege and no justification has been offered.

2. The complete repeal of our existing limitation laws dating back to 1851, and all amendments, invites reexamination of the moral justification of any such laws. There is no moral justification but only timidity at disturbing the status quo. Simple repeal of these laws would affect foreign shipowners subject to the jurisdiction of our laws as well as American shipowners. As has been pointed out the number of foreign shipowners who would be affected considerably exceeds the number of our own.

3. The complete repeal of our existing laws wipes out the fruits of 110 years of legislative and judicial thought, experience, and precedent, to embark on a new international system of many obvious faults and uncertainties, the full impact of which can only be known after many years of litigation.

4. The system of limitation based on a figure in foreign currency applied to the tonnage of the vessel in question has obvious defects. The figure in foreign currency is unappealing and applied to our inland vessels is almost ridiculous. It is arbitrary and has no philosophical basis, as our law based on value has. Before many years the figures will be out of date while the value basis is always self-adjusting. It is indiscriminate and bestows a disproportionate benefit on the owners of high value ships such as the *Stockholm* and the *Andrea Doria*.

The amounts per ton fixed in the convention cannot fairly be represented as bestowing increased benefits on claimants. In most cases the reverse will be true, and on average they will benefit shipowners. Only in the rare total loss cases will claimants' position be improved. The fact that under our laws "the risk of survival" is imposed on claimants only illustrates the injustice of limitation laws generally.

(We must correct an erroneous statement made by Mr. Singman who asserted that under our system when the vessel is a total loss the fund includes "some comparatively small pro rata of the freight pending" (Proceedings, p. 16). The words "pending freight" in our statute have been interpreted by our courts to mean all freight and passage money earned on the voyage. Since under modern freight and passage contracts, freight and passage money is payable in advance and earned on sailing, "vessel lost or not lost", the "pending freight" is quite substantial in practically all cases whether the vessel survives or not.)

5. A strong objection to the convention is found in its provisions as to burden of proof on "actual fault or privity." These words in themselves, differing from our own which are "privity and knowledge," probably favor the shipowner. In our courts it has always been held that the burden of proof is on the shipowner to show his freedom from "privity or knowledge" which is the condition on which his privilege of limitation is based. This has been considered only fair and just, also because all the pertinent facts on this point are in the possession of the shipowner and difficult of access by claimants. On the contrary, in continental systems of law it is an equally ingrained conception that the shipowner is entitled to limitation of liability unless the claimants can sustain the burden of proving the actual fault or privity of the shipowner.

On this important and often critical point the convention produces no uniformity but only an agreement to disagree. Unable to agree because the continental nations refused to accept the American and English views, the convention provides only that on this point the law of the forum shall control (art. 1(6)).

It is certain, therefore, that when the shipowner chooses a continental forum, and perhaps many others, American claimants forced to litigate their claims there will be subjected to this impossible burden of proof in respect to the owner's right to limit.

While the 1957 convention is subject to these and other serious objections, it is nevertheless the fact that if our limitation laws are to be continued, they should be amended in certain respects and could reasonably be amended in others. While some of these amendments would be achieved in S. 2314, it is certainly not necessary to adopt the whole of the 1957 convention with its many objectionable features in order to accomplish them. All that is desirable in S. 2314 can be fully accomplished by a bill making a few simple amendments in our existing law. Such a substitute bill has been drafted and is submitted herewith with the following comments.

(See p. 219 for wording of bill.)

The simple but needed amendments to our existing limitation laws, if they are to continue to exist, are on the following points:

1. The special provision in our law of a guaranteed \$60 per ton for loss of life and personal injury claims (the Sirovich amendment of 1935) has with the passage of time and the effects of inflation become woefully inadequate. On the basis of inflation alone it should be at least doubled. With the precedent of the convention it should be increased to \$140 per ton, the U.S. currency equivalent of the provision in the convention of 2,100 gold francs as a special fund for such claims.

2. This increase in the Sirovich provision from \$60 to \$140 per ton will not alone suffice to place death and personal injury claims under our law on a parity with such claims under the convention. Under the Sirovich provision, the guaranteed amount when operative represents the maximum amount available for personal claims. Under the convention if the \$140 provided is exhausted the personal claimants have recourse for the unpaid balances of their claims to the fund provided for other claims. To equal the convention our law must be further amended to make this additional provision for death and personal injury claims.

Our substitute bill would make these changes by a partial rewording of Revised Statutes 4283, subsection (b); title 46, United States Code, section 183. Subsection (a) need not be amended.

3. The provisions of subsection (b) as thus amended should not be confined to seagoing vessels as at present, but should be extended to all inland vessels, with a provision that their tonnage should in no case be considered to be less than 300 tons.

The most severe impact of our existing limitation laws is in respect to inland vessels which are in many cases of low value but which are subject to disaster which may result in much loss of life and personal injury. For example, see *The Cushing*, 347 U.S. 409, in which a tug sank with the loss of five lives. In that case it was alleged that the tug was a total loss and the owner's liability was limitable to zero dollars.

The Sirovich amendment contained a special provision excluding inland craft and certain others from the requirement of a guaranteed minimum for personal claims. The time has certainly come for this exclusion to be removed. S. 2314, exercising a local option in the convention, article 8, with respect to other than

seagoing vessels, extends to all vessels the financial, as well as all other, provisions of the convention, but the provisions for international limitation of liability become slightly ridiculous when made applicable to our inland vessels.

Similarly, the provisions of Revised Statutes 4283, subsections (d) and (e), 46 U.S.C. 183 (d) and (e), which are also Sirovich amendments should no longer be restricted to seagoing vessels. Incidentally subsection (e) seriously restricting the owner's right to limitation of liability in respect of loss of life and personal injury claims is omitted in S. 2314 and the convention, and would be repealed if S. 2314 should become law.

Our substitute bill would therefore strike out the word "seagoing" before "vessel" in subparagraphs (b), (c), (d), and (e) of Revised Statutes 4283. It would add a provision as to tonnage of a sailing or other vessel to subsection (e), and a provision for minimum tonnage applicable to all vessels. Subsection (f) containing the definition of a seagoing vessel and the exclusion of vessels in inland navigation and some others would be repealed.

These amendments we submit constitute the only necessary or advisable amendments to Revised Statutes 4283.

(4) While we are strongly opposed to any broad enlargement of the classes of persons included within the owner's entrenched privilege of limitation of liability, if that privilege is to be continued, we would not consider the inclusion of the pilot, master, officers, and crew within the owner's privilege seriously objectionable. Rights against these individuals are not usually of great value and are seldom pursued. Claims against such individuals have, however, on occasion been asserted because their liability cannot be limited and because the vessel owner, although himself entitled to limitation, might be compelled to indemnify such individuals by reason of provisions of labor contracts or otherwise, thus losing the benefit of his own right to limit. Moreover, these individuals are the navigators of the vessel and have little if anything to do with her seaworthiness.

5. S. 2314 includes within the classes of persons entitled to the benefits of the owner's privilege of limitation of liability, one class which is not included in the convention. This is the insurers of all persons entitled to the benefits of the owner's limitation of liability (S. 2314, sec. 7B, cf. Convention, art. 6(2)).

This inclusion stems from the decision of the Supreme Court in the *Cushing* case, referred to supra, 347 U.S. 409, in which it was indicated that even if the insured owner was entitled to limitation of liability, his insurers might be held liable under the Louisiana direct action statute beyond the amount necessary to indemnify the owner up to the full amount of their policies. Since the statistical approach to the fixing of premiums for the owner's liability insurance takes into account the probability of the owner's right to limit liability, when irrespective of that right the insurer's liability becomes thus unlimited, the result must be reflected in the premiums charged for his insurance. The result is that if this situation continues to exist operators of vessels in Louisiana, and any other State having a similar law, will be compelled to pay premiums based on unlimited liability. By indirection they will therefore lose all benefit of the limitation laws.

We consider that there is substantial merit therefore in spelling out in the limitation statute the right of insurers to have the benefit of any right of their insured to limit liability.

We have, therefore, proposed in our substitute bill the addition of a new section to our existing law to be designated as Revised Statutes 4286A.

Subdivision (1) of this section is similar to section 6B of S. 2314 and includes the pilot, master, officers, and crew of the vessel and their insurers and the insurers of the owner, and of a charterer deemed an owner as defined in Revised Statutes 4286. It does not include the other broad classes of persons which would be included under the convention, article 6(2) and under S. 2314, section 7B, whose inclusion we would deem wholly unjustifiable.

Subdivision (2) of our proposed new section is procedural. It would extend to the new persons included in subdivision (1) the benefit of the suits "shall cease" provision of Revised Statutes 4285 applicable to suits against the owner when the owner shall have complied with the procedural provisions of that section. Other matters aside, it is a serious shortcoming of S. 2314, section 7, that it contains no indication of how the persons other than the owner may obtain the benefits of the owner's limitation of liability. Our subdivision 2 is intended to clarify this.

Our subdivision 3 is precisely in the language of S. 2314, section 6 C, dealing with the privity and knowledge chargeable to the pilot, master, and crew when suits are brought against them.

5. S. 2314, sections 5 B and C contain provisions taken from the convention, article 3 (3) and (4), providing for subrogation of the owner pro tanto to the rights of a claimant whose claim he has paid against his limitation fund. These provisions are unobjectionable. They represent the law of England and probably of this country as well. The two sections are readily combinable.

Our substitute bill therefor proposes the addition of a new section to our existing law to be designated as Revised Statutes 4286 B which is a combination of S. 2314, sections 5 B and C.

6. The addition of new section Revised Statutes 4286 A and Revised Statutes 4286 B, and the elimination of the term "seagoing" in all subsections of Revised Statutes 4283, requires appropriate amendments of Revised Statutes 4289. Our proposed substitute bill includes the necessary amendments to this section.

We submit that our proposed substitute bill includes all that is good and desirable and not subject to serious objection in S. 2314 and in the 1957 convention, and that its adoption would be vastly preferable to the adoption of S. 2314.

Senator BARTLETT. Mr. Greene and Mr. Burke.

Before another word is said, let the chairman advise again that the hearing is going to adjourn promptly at 12:30.

Mr. GREENE. May I suggest, Mr. Chairman, that Mr. Burke present a short summary of his paper?

Senator BARTLETT. All right.

STATEMENT OF TERENCE G. BURKE, INSURANCE MANAGER, MOORE-McCORMACK LINES, INC.

Mr. BURKE. My name is Terence G. Burke. I am insurance manager of Moore-McCormack Lines, Inc.

Not being a lawyer, I think I am allowed to summarize and will do it.

What we are worried about is the economic necessity. We are not looking for any panic legislation or anything of that type. We do think because of what we are looking for that the limitation of liability bill as proposed here would be to our advantage.

I do not know of any American shipowners against the proposals that we now have. We are all in favor of the single forum. We certainly think that it would do a lot to eliminate waste, time, money, our witnesses, and so forth.

As to S. 2313, the collision bill, all of the shipowners are certainly for that. One of the big things we are worried about, looking at it from an insurance standpoint, is we would eliminate double insurance on cargo carried on our ships. After all, we are in the business of carrying cargo. We are not going to antagonize our cargo clients. If we do have a collision they get 100 percent reimbursement from their cargo underwriters for which, incidentally, they have paid this premium, and I cannot find in any instance there has been an extra premium for shipping by U.S. ships.

As far as costs are concerned, we find in our company, and I am sure the others are the same, that insurance is the third largest item—wages first, then fuel.

Against that item we will have a 5-year loss record. Our record is based upon what has happened for the last 5 years. So if we have anything outstanding, believe me we are paying through the nose for it. The underwriters will keep it up there.

One of the provisions we have in this bill is that we would have a period of litigating claims of 2 years. If we could get that, we estimate our insurance costs ought to go down somewhere between 50 and 60 percent.

Gentlemen, I thank you for the opportunity of coming here.

Senator BARTLETT. Thank you, Mr. Burke.

(The complete text of Mr. Burke's statement follows:)

STATEMENT OF TERENCE G. BURKE, INSURANCE MANAGER, MOORE-McCORMACK LINES, INC., ON S. 2313 AND S. 2314

My name is Terence G. Burke. I am insurance manager of Moore-McCormack Lines, Inc., an American steamship line operating 44 ships in 4 international trade routes. I am here to testify in support of two bills which I, my company, and the members of the American Merchant Marine Institute for whom I speak today, consider essential to the health and welfare of the American steamship industry and beneficial to all those connected with or affected by our merchant marine.

Other witnesses before this committee have outlined and explained the legal aspects and advantages of the proposed legislation, and I shall not venture to elaborate on these points. Rather, it is my hope that I can explain the practical, dollars-and-cents significance of this legislation for the American shipping industry, and point out the significant economic benefits which the bills contain for all sectors: shipowners, cargo owners, crew members, and passengers alike.

A brief word on the context in which these bills must be considered: I am sure there is no need to tell this committee of the importance to this nation of a strong merchant marine, nor to expound on the ills which have beset American-flag fleets in recent years. The symptoms are reported daily in our newspapers and are the object of recurring studies, and concern, by industry and Government alike. The past decade has seen a decline in the number of American-flag ships, a drop in employment in the industry, and a drop in the proportion of U.S. foreign commerce carried in U.S. vessels.

Only one factor has risen significantly in the industry, and it continues to rise sharply: costs. It is the cost differential over foreign competitors that hobbles, or destroys, the competitive position of American ships. It is mounting costs which render increasingly difficult the task of attracting private investment capital for building new ships and replacing the obsolete. This is the source of our industry's problems, and it is on this field that the battle for a strong American merchant marine must be won.

The battle to keep costs down is quite simple, and literally, a fight for survival. It is being fought wherever possible and with whatever means are available—from cargo containerization to paperwork simplification. It is my strong conviction, and that of the industry I represent, that the legislation now under consideration by this committee would, if passed, be a significant step in eliminating a heavy and discriminatory burden of unnecessary costs now borne by the American merchant marine. At the same time, these two bills would secure liberal benefits for other sectors of the industry.

Turning first to S. 2314, relating to shipowner's limitation of liability and implementing the Brussels Convention of 1957, let me emphasize that to the shipping industry the concept of limitation of liability is not a special privilege or exemption—it is an economic necessity. The industry by its very nature must expose immense investments to extraordinary risks and perils. Add to these unique burdens the threat of unlimited liability and it would become virtually impossible to attract investment in an industry already offering such uncertain economic rewards.

At the same time the steamship companies are fully cognizant of their responsibilities to the cargoes and persons they carry and to third parties. The proposed limitation legislation is an effective answer to the needs of both sectors of the industry.

It liberalizes the amount available to claimants, guaranteeing them a substantial fund against which they may recover in every case. It is a more equitable system in that claimants would never be prejudiced, as they now are, in the event of total loss or heavy damage to the vessel limiting liability—situations in which claimants need the greatest protection. Not only of far greater advantage to the claimants in total loss cases, the fund established

under the proposed legislation (\$207 per ton) is both equitable and reasonable from an economic standpoint in cases where the limiting vessel suffers lesser damages. Even more significant is the fact that of all ship sales for 1961 reported by two leading American ship brokerage houses in annual market surveys (covering all types and ages of vessels), the limitation fund under the proposed bill would exceed, often severalfold, the prices for which the great majority of these ships were sold. Of the handful of sales in which the price exceeded such a fund, it did so generally by a small margin. And it should be kept in mind that these sales were of undamaged vessels—after a collision or accident of sufficient proportion to render limitation meaningful, the value of all of these ships would be substantially lower than the proposed fund.

The principal economic benefits accruing to shipowners from the proposed bill are, first, that it eliminates circumvention of the limitation proceeding, and, second, that it permits the shipowner to adjudicate in a single forum all claims arising from a particular occurrence. The first of these benefits results from the extension of limitation to parties such as a ship's master or pilot, parties whom the shipowner is legally or morally bound to stand behind in the event of suits against them by claimants. To permit avoidance by such indirection of a shipowner's right to limit is to emasculate the limitation principle and expose the shipowner to the economically prohibitive risk of unlimited liability. Nor, under the proposed bill, could a claimant gain advantage over the shipowner and over other claimants by bringing suit in some jurisdiction other than that in which the limitation proceeding is being conducted.

Moreover, the right to adjudicate all claims in a single forum results not only in a more equitable and expeditious determination of all issues and claims—a benefit for all concerned—but it eliminates the tremendous waste, both of money and man-hours, of litigating the same issues, with the same witnesses and the same evidence, in a number of jurisdictions other than the limitation forum. Also eliminated by the proposed bill is the expense and delay attendant on successive attachments of the same vessel at such places.

The importance of the second bill before this committee, S. 2313 relating to apportionment of liability in collision cases, can be summarized as follows: it eliminates costly duplication of insurance on cargo carried by American ships. The burden of this present duplication falls entirely on the shipowner, not on the cargo, and places American ships at a distinct and further disadvantage to foreign vessels, which suffer under no such disability.

As explained by the preceding witnesses, the present law permits cargo in collision cases to recover 100 percent of its damages, half of which is recovered indirectly from the carrying vessel. Under the proposed law cargo could recover only from the colliding vessel and only in proportion to that vessel's fault. Thus, in a collision case in which both vessels were equally to blame the proposed law would relieve each vessel of the 50 percent liability to its own cargo which accrues under present judicial decisions.

Cargo owners suffer no disadvantage under the proposed change—they would still receive 100 percent indemnity from their cargo insurance. Nor would there be any increase in the amount of premiums paid by cargo owners as a result of this change in the American law. Cargo insurance rates are set on a world market and irrespective of the nationality of the carrying vessel. Indeed, underwriters have no way of knowing or controlling the nationality of the vessel which will carry the insured cargo. Since the rest of the world already follows the rule here proposed, and relieves a ship from having to contribute to its own cargo's damages, the insurance rates on all cargo presuppose the application of such a rule. Any extra recovery received by underwriters in subrogation suits under the American law is simply a windfall for the cargo insurance companies. They have received premiums for insuring against losses under the general rule which denies such indirect recovery, and then have been allowed such recovery notwithstanding. At the same time, under its protection and indemnity (P. & I.) insurance coverage, the American shipowner pays for liability insurance covering the identical loss.

This double insurance, which is totally unnecessary in the case of the American shipowner and with which foreign vessels are not burdened, would be eliminated by the proposed legislation.

A word should be said about the nature and extent of the insurance carried by shipowners. It is the third largest single operating cost item in the American merchant marine's huge budget—less than wages and fuel, but larger than maintenance and repair costs or subsistence expenditures. Unlike cargo in-

surance (which is a minute percentage of cargo's costs and in which individual losses are spread via the rate structure over all cargo owners), the hull insurance and protection and indemnity (P. & I.) insurance carried by shipowners is in fact no more than form of self-insurance. Each shipowner's insurance premium rates are based exclusively on the loss experience of his own ships for the preceding 5 years. The underwriters' objective is to earn in premiums enough to pay the insured's losses and earn a profit for themselves. If a particular shipowner's loss ratio (i.e. payments to the shipowner under the policy versus premiums paid to the underwriter) increases in a given 5-year period, his premiums, and only his, will be increased in the succeeding period or periods. In the long run the shipowner fully bears his own losses, the advantage of insurance coverage being that it eases the impact of such losses by spreading them over a period of time.

I have described the insurance structure of the industry only to emphasize that when claims are paid by a steamship company, the loss is not merely passed on to underwriters—it is ultimately shouldered by the individual company itself, and no one else. It is these losses which comprise the industry's insurance costs—a portion of which are unnecessary and duplicative payments of cargo claims that would be eliminated by the proposed bill. By permitting indirect recovery by cargo against the carrying vessel, the cost of that portion of the cargo loss is concentrated on American vessels. The proposed legislation would merely eliminate the windfall provided cargo underwriters. That no increase in cargo insurance rates would result from passage of the bill is demonstrated not only by the mechanics of setting rates on a worldwide basis as described earlier, but by the fact that no increase in cargo insurance premiums followed adoption of the both-to-blame clause in American bills of lading in the mid-1930's. That clause, until rejected by the courts, had the same effect as the proposed bill in prohibiting indirect recovery by cargo against the carrying vessel.

There are two other significant respects in which the proposed collision liability apportionment bill offers direct benefits to the American merchant marine without prejudicing any other sector.

First, it increases the effectiveness of concurrence by removing the incentive of indirect recovery which invites cargo to bring suit in this country regardless of where the limitation proceeding may be located.

Secondly, it requires suits on claims to be brought within 2 years. This period of time is equitable to all claimants, and at the same time it reduces the insurance costs of shipowners. As the law now stands, shipowners must carry estimated losses which may arise from particular accidents as part of the potential loss experience under their policies covering hull and P. & I. insurance. These are carried for 5 years and during this entire period shipowners must pay premiums calculated in part on these estimated claims which are unlitigated and which may never be litigated. Three-fifths of this cost (i.e., 3 out of the 5 years) is a completely unnecessary burden on shipowners and would be eliminated under the 2-year time for suit provision of the proposed bill.

I respectfully submit that this proposed legislation presents a unique opportunity to benefit all sectors of the American shipping industry in a most equitable manner; while increasing and stabilizing the funds available to compensate claimants, the bills abolish a heavy load of completely unnecessary and wasteful, costs and risks which burden and discriminate against the American merchant marine.

Thank you.

Senator BARTLETT. To paraphrase that which you said at the beginning, I believe you remarked that these bills would be good for the shipowners.

Mr. BURKE. Yes, sir.

Senator BARTLETT. Let me ask you this: Would they be good for the American public?

Mr. BURKE. I would say yes. I see no reason why they should not. After all, we are all carrying the same passengers. We all carry passengers on our ships, and the passengers would not be hurt by reason of the enactment of these two bills if enacted.

They would be much better off, we believe, because of the fact that there would be definite limitation funds for them, whereas now it could be an "iffy" proposition if the ship did not arrive back in port.

Mr. BOURBON. You say you like the idea of one forum. As a matter of fact, is it not possible under this to have two forums? Under this bill?

Mr. BURKE. Well, I think so far as I am concerned as a layman it would be my idea there would be one forum. Now, maybe Mr. Greene can straighten me out on that, but I do not think that we as a shipowner would want two forums. We would want one.

Mr. BOURBON. You would not be able to control it, would you?

Mr. BURKE. Well, thank goodness, we have never had a total loss with a passenger ship and we have never had that problem.

Mr. BOURBON. But if you ran into, say, a Liberian ship, that shipowner could set his forum up anywhere, could he not, under this bill?

Mr. BURKE. Well, he can do it right now. He can set it over there. All things being equal, the American shipowner would prefer to have his forum over here. We would not go shopping around or dodging our responsibilities.

Senator BARTLETT. Thank you, Mr. Burke.

Mr. Greene.

**STATEMENT OF RAYMOND T. GREENE, MEMBER OF THE FIRM OF
FOWLER, WHITE, GILLEN, HUMKEY & TRENAM, INDUSTRIAL
NATIONAL BANK BUILDING, MIAMI, FLA.**

Mr. GREENE. My name is Raymond T. Greene. I am an attorney at law. I have been practicing admiralty law as a member of the firm of Kirlin, Campbell & Keating of New York for the past 20 years. Recently I retired from practice in New York and joined the firm of Fowler, White, Gillen, Humkey & Trenam of Miami.

I am and have been for the past 4 years chairman of the committee of the Maritime Law Association dealing with the subject of limitation of liability and collisions.

I have been very honored in being chairman of such a distinguished committee, which includes among its 13 members 3 past presidents of the Maritime Law Association and 2 past General Counsels of the Maritime Administration of the United States. Also included are two of the leading underwriters of this country, one of whom appeared before this committee in the previous hearings, Mr. Anderson. Both of these underwriters are quite active in all phases of the insurance industry—by that I mean insuring both vessels and cargo.

For myself, I am quite pleased in seeing some of the opposition papers referring to me as a "shipowner's lawyer." I hope they hang on to me.

But I also would like to bring out the fact as a shipowner's lawyer and representing some of the leading oil companies of the United States, they are substantial shipowners but they are collaterally also some of the largest cargo shippers in the world.

This same category also refers to the U.S. Government, two of whose men were serving on this same committee.

When I joined this committee 4 years ago, the entire 13 members of it had, without exception, all been on record as being opposed to the 1957 Brussels Convention for Limitation of Liability. After the passage of a short time and at the request of certain members of Gov-

ernment agencies, we brought these bills out, or these conventions I should say, for a review.

It was strongly advocated at the committee meetings that we look at them completely objectively.

I am pleased to say that the majority of that committee has certainly done that. We have acted in the role of counsel, not advocate.

Regrettably, two or three members of the committee, two of whom have appeared before you here in opposition to these bills, took a very dogmatic and a very definite position against them and were entirely uncooperative in the efforts to see if—and I emphasize the word “if,” which was the word we all had in mind 4 years ago—if something practical could be worked out.

What you have before you in the form of bills is what we now think is a very practical solution to what we first thought was an insurmountable job.

In bare convention form there was and there still is some objection to both of these conventions. We think that the enabling legislation which is in the form of these two bills greatly improves it and makes it workable for us here in the United States and at the same time permits us as a maritime nation to be adherents to these two conventions.

On this point of our being adherents to these two conventions, I personally cannot emphasize too strongly the necessity—not the desirability but the necessity—of the United States taking her rightful place in the maritime world.

I have had the privilege over the past number of years of traveling a great deal around the world, of trying cases in several foreign countries. I have been engaged in litigation in practically every country of South America. And it was always regrettable to hear the comments passed there that “we get told everything to do by the United States but they do not seem to do it themselves. They came down here and criticize our laws”—and their laws are quite shaggy and difficult to comprehend for our minds—“yet here are conventions where we can get some unanimity of thinking throughout the world and Uncle Sam sits on the sidelines.”

I have been repeatedly told by several of the South American maritime interests that they are ready to move right in on this 1957 convention but they would like to see what the United States is doing.

The two countries that they look to are Great Britain and the United States. And it would aid all of them in the sense of letting them know what to do if Great Britain and the United States were shoulder to shoulder.

That not only aids them but it certainly adds to our prestige.

We have already joined the international family through the Safety of Life at Sea Convention. We have several more conventions coming up which are very vital to us that have to do with nuclear, that have to do with arrest of ships. How are we going to be able to maintain prestige at the conference table on things of such vital necessity to use if we have these other conventions hanging loose and we do nothing about them?

To dwell on one point of committee procedure, and more to set the record straight, as I mentioned, those in opposition to these bills have been dogmatically in opposition to them since the very beginning.

The remark was made and the inference left that this collision bill was steamrolled through the last meeting of the Maritime Law Association, and nothing can be further from the truth. The full report which you have been given in the Document No. 450 of the Maritime Law Association was prepared and mailed and distributed a fair time ahead of the meeting.

Actually, as chairman, I was a little disappointed that it was not out earlier, but that was due to the fact that I was delayed in waiting for the minority reports.

At that meeting the limitation bill was argued at length. There was no one in the entire organization, be they committee or otherwise, that wanted to speak that did not get the opportunity.

The vote was taken, and those in favor, of course, were successful. And immediately after that again those in opposition took this stalling, this avoiding action, in making a motion to have the rest of the subject matters tabled, which was defeated, and the matter was brought on.

I only mention this to keep the record straight.

Now, regrettably, because of the shortness of time, I cannot really do exactly what I wanted to, particularly in view of the great distortion that has been made in the presentation by the opposition. I will attempt to hit a few of the highlights and would request permission of this committee that the Maritime Law Association, through their majority committee, submit written documents covering these details in far more understandable and explanatory fashion.

Senator BARTLETT. Permission granted.

Mr. GREENE. Do these conventions harm anyone? That can be answered in two ways. I do not know of anything that has ever happened in the world that does not harm somebody. I can quite readily visualize a case where these conventions would be of a detrimental nature insofar as comparing them to present existing conditions.

But I do not think that is the way we have to look at it. We are not legislating or asking for legislation for specific instances or for specific groups. We are looking at it for the overall.

In the majority of cases, for the majority of people, these bills, in my opinion, are of the utmost necessity, are a great improvement over existing conditions.

There has been a great deal made of the fact that an American claimant has to go abroad to file his claim in some foreign jurisdiction. That certainly could happen. I do not know any way to reach an international agreement where all the rules are according to what we want.

This is an international agreement. I never heard many complaints when some of my friends were representing Italian citizens, Italian cargo owners, in New York in order to make their claims against the *Andrea Doria*. It would have been a lot easier, cheaper, more economical for them to have done it back in Italy. They had to come over here.

Now, there has been a lot said about this choice of forum. And, regrettably, in the fashion of people that are not wanting to develop something but are trying to tear something down, it has been loaded with half-truths.

We have two particular sections here which we think are a vital necessity in the sense that they certainly do everything that is possible to defend and safeguard the American claimant.

Section 3(e) of the bill proposes that in the event a shipowner petitions for limitation of liability, none of his assets, his other ships, his bank accounts, or what have you, can be attached and held as security or be attached in any other fashion in any other jurisdiction.

Now, as a practical matter, what did we have in mind when that went on? And what is the practical working way of it?

A limitation case is abroad. An American claimant. After the petition has been filed, after the legal process has started, it attaches a bank account here someplace in the United States. The shipowner comes back in. He says, "I want this vacated."

You have to come over to such foreign country and file your claims over there.

According to the statute, our courts, not the court of the foreign country but our district judge, United States, will look at the situation, and he wants to be satisfied on one point, which the statute provides for: Is there an actual available fund for that American claimant in that foreign country?

He is not going to send any American claimant abroad to get a paper judgment.

It is not dependent upon what the foreign court says. That is decided in the United States.

Now, we have the second situation which is as developed and covered in the sixth section of the bill where we have a slight reversal of the factual situation in the sense that the assets, the ship, bank account, whatever it may be, is attached, and subsequently the shipowner institutes limitation proceedings in a foreign country. Under such circumstances he comes back as in the first instance. He wants these funds in the United States released. There again it is reviewed by a U.S. district judge, not a foreign judge. It is by our own judge, for our own American claimant, who then says, "Well, I can only release these funds when first the foreign litigation is concluded and not only has he asked for the right to limit but that the foreign court has determined and given him the right to limit liability."

Needless to say, if the right to limit liability is denied, then everybody is a free agent.

So we have protected the American claimant. He moved fast and he got in and he got good security. There is nothing in the statute that says he has to give up that security until the shipowner can come back and prove to an American court that he has been given the right to limit liability, and that an adequate actual available fund is available in this foreign jurisdiction.

If our American judge is not satisfied on that, he still is sitting on this security for the American claimant. If the foreign shipowner or the American if he wants to go abroad is denied his right to limit liability, our American claimant has still been protected. He has got his security right here, and he goes after it.

Now, much has been said about the unfairness, if we want to put it that way, of having to send American seamen abroad so that they have to claim in some foreign court. The inference has been left that our American shipowner is going to run around the world and find

some out-of-the-way place to limit his liability. Frankly, I think this is fanciful.

There are quite a few members of the admiralty bar before this body, and I would like to know how many of them have had any litigation in Liberia or Panama or Honduras.

The shipowners do not want to go to some obscure place any more than does the claimant.

But I can see a possibility, and this is regrettable that I have to think of things now—this is something that these committees should have been doing over this past number of years before we came before this committee—but if it is the American seaman he is worried about and the American shipowner hiding out in some foreign jurisdiction, I can visualize a clause being inserted in such a bill as this where we can protect that situation and still be in complete conformity with the convention.

It is quite possible to insert a clause in here that says: If the vessel owner petitions for liability limit in the three places mentioned in the bill—namely, if it occurred in the port, if he does not petition there, or his next port of call, or the port of embarkation—then an American shipowner has to come back to the United States to limit.

That can be done. That is no violation of the international aspects of this. And it is controlling the American shipowner if the American seaman thinks that the American shipowner is going to hide out behind the Iron Curtain on him.

I only pass that on as a suggestion, not as a recommendation, because the matter is purely personal from having heard it just mentioned here.

A great deal has been said about the inclusion of small craft. Well, that is a very complex subject. It consumed a great time during the convention.

Actually, our concept of small craft which we often refer to as inland craft is quite different in some of the foreign countries where they have a far heavier coastal trade which is almost negligible in this country.

But we cannot see the including of small craft in the proposed limitation bill as a hardship to any interests.

Will the small craft object because we say he has to put up a minimum fund equal to a 300-ton ship or roughly \$62,000? Well, quite frankly, if that is a hardship, that is a good man to keep off the water. I do not want to see him out there, regardless of what interest I represent. I hope that when I run into something there is at least a \$62,000 kitty there to take care of the trouble he is in.

It certainly is an advantage to the claimants. A great deal of the small craft is in single ownership, individual ownership. Without forcing them to have adequate insurance to cover this in many instances, in total loss all you have got is the bubbles on the water after he goes under.

I think this is a very fine safeguard for all concerned, and as to the so-called hardship to the small-boat owner, if he cannot provide for that, we are better off without him roaming around as we would be without the man on the street driving a car that is not properly insured.

The point has been raised about the inadvisability, as it has been put, of moving from the so-called value theory over to the tonnage theory. Well, actually, gentlemen, we have recognized the inadequacy of the value theory some 20-odd years ago when we put in the Sirovich amendment. We had a value theory, and then when we saw the weakness in it we stopgapped it.

But the Sirovich amendment was only a stopgap. This is a far sounder approach.

As has been mentioned by previous speakers, it takes a great deal of this unnecessary and time-consuming matter out and saves a great deal of money for the claimant, because I personally have seen some of these valuation cases as part of a limitation case drag on for months, and they are a very expensive type of litigation.

Now, I would like to submit some figures that I have prepared in connection with different types of vessels on this difference in tonnage figure.

Frankly, I do not have much sympathy for the way they have used this formula. I tried to find out. I think the first formula used was the formula they used when ships were going through the Suez Canal in order to charge them for pilotage. It would have been an awful lot easier for everybody concerned if we used gross tonnage or registered tonnage or something that we could all go to book for without having to go to an engineer to calculate it every time.

Why you find this difference in the two tonnage figures is under general principles when you go from gross tonnage to net tonnage or in the reverse order there are three ingredients in between—engineer room spaces, the living spaces, and the miscellaneous spaces.

By miscellaneous spaces that includes the pilothouse, chartroom, radio shack. On a tanker that would include the pump room, some of the dead forepeak space.

Unfortunately, in our law we started at the top figure, gross tonnage, and we took out the living spaces. The new one starts with the bottom figure, adds in engine room. The gap is this third category which was never recognized in either one of them.

But actually, for example, in a T-2 tanker it is 340 tons difference.

In the *United States* it is 209 tons difference—the biggest ship we have in this country.

On some of the new tankers we are building I had some figures calculated on Standard Oil's new 47,500-ton class. It is a little over 400 tons difference.

On a big 106,000-ton tanker it is 800 tons difference.

So that as a practical matter it is one of those arbitrary things that somebody had to pick some kind of a formula. It is very small in the overall picture.

An inference was made in the presentation this morning about why should not these people put up all their insurance money. Well, a bill was introduced along that line some years ago, and I think it is inherent absurdity. It sounded its own death knell.

I can see no greater way for abuses in the marine industry than to ask people to put up their insurance money.

What about the companies that are not insured? Some of our biggest fleets under the American flag do not have a penny of insurance on them. He does not give up anything.

What about the man that is underinsured? What about the fellow that is overinsured?

I think the facts of attempting, the mechanics of attempting to have insurance money surrendered to establish a fund with are just insurmountable and will lead to many, many forms of abuse.

Objection has been made to the fact that the proponents of this bill are adding additional beneficiaries in the form of master, charterer, and that.

Looking at it on a long-range proposition, in view of the fact our basic laws are over a hundred years old in this country, we are not really adding beneficiaries. We are just trying to come back to where we started.

A hundred years ago the running of a ship was a fairly simple operation. There was not much chartering other than maybe a bareboat charter now and again.

Now we have all forms of chartering, voyage chartering, consecutive voyage charters, time charters, general AA agreements. Business has become more complex. People have more kinds of names and titles and designations and categories.

All we are trying to do is cover the same group that was covered in one or two words a hundred years ago. Now it is going to take us 15 or 20 words to cover the same type of people.

To refer for a moment—and I will only take a moment or two—to this collision bill, I can officially go on record as chairman of the Maritime Law Association committee that we are in principle in favor of the redraft of the collision bill as introduced during the course of Mr. Colby's testimony.

I am not attempting to hedge when I say "in principle" because I fully realize that we are not wedded to these words. It is going to take some more editing and no doubt as the matter moves through committees there will be other people wanting changes.

But in principle in its basic concept, in the policies that it sets forth, we are fully in accord with this revised bill.

Just one or two points on this collision bill. I will state them very categorically and fast.

The 2-year statute of limitations as prescribed in this bill which is adopted from the convention and which must be in the bill if we want to be an adherent to the convention does not in any way affect a Jones Act case—period.

The suggestion that we throw out times and go back to laches must be advanced by people who have not been experienced with laches. Heaven knows what you have when you go into foreign countries, but we have enough trouble right in our own backyard.

The same type of accident, in Delaware I have 6 years, but if I go to my friend Mr. Rault's State, Louisiana, I have 1 year.

The chaos that comes from laches is absolutely ridiculous.

The statement that the vessel is out of the United States and she would not be back for heaven knows when is no hardship. We do it every day in the week. We go in and we file the lawsuit. That stops the time. I have had lawsuits lying up in the courthouse for 3 and 4

years. Then as soon as the vessel comes back in you prefer your process.

It is a simple matter to protect yourself on that.

Also this word "casualty." I can certainly say that we had nothing motivating us that we are trying to slip something through. We are still talking about collisions and that is all we are talking about, and not Mr. Freedman's poor seaman that slipped on the oil. We are not trying to do that.

The reason for changing the word from "collision" to "casualty" was simply because we were afraid that the word "collision" is too restrictive in our concept of what should be covered here.

Years ago "collision" might have satisfied because then the admiralty jurisdiction of our district courts only pertained and had jurisdiction over an actual collision between two ships. If you ran into a dock that was something different. But now the extension of the admiralty theory goes a little bit beyond. I can do an awful lot of damage to a dock and never touch her as I go along a narrow stream with my wash. Yet there may be contributory fault on the part of that dock if it is not built properly or something of that order.

That is why we have deliberately changed the word from "collision" to "casualty," not with the idea of trying to put something over on anybody, but the idea of conforming with our own basic concept of the extension of the admiralty theory.

I apologize for my presentation. I think it has been kind of jumpy. I know I have had a devil of a job trying to follow it myself. But the time has been short, and I have been trying to cover just a few of the highlights.

On behalf of the entire Maritime Law Association, Mr. Chairman, I certainly thank this committee for the excellent reception and hearing we have had.

Senator BARTLETT. Thank you, Mr. Greene and Mr. Burke.

(The remarks in question were not received.)

Senator BARTLETT. Just before the recess, Mr. Shapiro made a statement as to that which he regarded as allegations or accusations or charges against the AMMI. After the recess had been concluded others were on their feet undoubtedly to speak on this same subject.

The chairman thought we ought to proceed with the testimony in normal course and will now say that if anyone wants to make answer of any kind on that subject the record is open for a written statement only. And also any other supplementary statements.

Mr. MATTESON. Mr. Chairman, in hastening to a conclusion I omitted to do one thing, which I intended to do.

Yesterday I think it was Mr. Singman introduced into the record an opinion letter of counsel for the Department of State supporting the collision convention.

I have an opinion letter to the Secretary of Commerce from Mr. John M. Woolsey, later U.S. district judge in the southern district of New York, which I would like to introduce in the record.

Senator BARTLETT. All right. That goes in too. And a copy of the comparative analysis of S. 2313 and the substitute proposals submitted by backers of these bills.

(The documents referred to follow:)

FEBRUARY 26, 1962.

COMPARATIVE ANALYSIS OF S. 2313 AND SUBSTITUTE PROPOSALS

To unify the law relating to apportionment of liability in cases of collision and other casualties [between vessels, and related casualties] and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where a collision occurs between vessels[,] the compensation due for damages arising from death or injury of persons or from loss or damage to vessels or their cargoes or freights or to other property [caused] shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

SEC. 2. If a casualty [the collision] occurs without fault, if it is caused by force majeure, or if the causes of the casualty [collision] cannot be determined, the damages shall be borne by those who have suffered them[,] and no liability shall attach to any vessel, or its owners or operators, unless its fault has contributed to the casualty. [There shall be no statutory presumptions of fault in regard to liability for collision.] This provision [section] shall be applicable notwithstanding the fact that the vessels, or any one of them, may be at anchor (or otherwise made fast) at the time of the casualty.

SEC. 3. If a casualty [the collision] is caused by the fault of only one of the vessels, liability to make good the damages shall attach only to the vessel, and its owners or operators, which has committed the fault. [to the one which has committed the fault.]

SEC. 4. (a) If a casualty is caused by the fault of two or more vessels, [two or more vessels are in fault] the liability of each vessel and its owners or operators shall be in proportion to the degree in which the [their] faults of each vessel have respectively contributed. If it is not possible to establish the degree in which [of] the respective faults[,] have contributed, or if it appears that the faults are equal, the liability shall be apportioned equally.

(b) In respect to damages caused by death or personal injury, the vessels at [in] fault and their owners or operators shall be jointly as well as severally liable to third parties. When any [a] vessel and its owners or operators pays a larger part than the proportion in which that vessel was at fault there shall be a right of contribution or recourse against the other vessel or vessels and their owners or operators to the extent such other vessels were respectively at fault. [that which in accordance with the provisions of subsection (a) hereof she ought ultimately to bear she shall have the right of recourse for the excess against the other vessel.]

(c) The damages to the vessels or to their cargoes, or freights or to other property or to the effects [or other property] of their [the] crews, passengers[,] or other persons on board shall be borne by the vessels at [in] fault and their owners or operators in accordance with the provisions of subsection (a) hereof without joint and several liability toward third parties and without any right of contribution or [of] recourse against the other vessels[,] or party.

SEC. 5. The liability imposed by the preceding sections shall attach[,] in cases where a casualty [the collision] is caused by the fault of the [a] pilot even when the carrying of the pilot is compulsory.

SEC. 6. The right of action for the recovery of damages resulting from the casualty [a collision] shall not be conditioned [conditional] upon the entering of a protest or the fulfillment of any other special formality.

SEC. 7. (a) [8.] Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty.

(b) The interval [time] within which the action to enforce the right of contribution or recourse may be brought [allowed by subsection (B) of section 4 must be instituted] shall be one year. This limitation shall run only from the date of payment.

(c) The court in which the action is brought may extend either of the foregoing [such] intervals if it shall be satisfied that during such period there had not been any reasonable opportunity of arresting the vessel involved within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business.

[SEC. 9. This Act shall apply to the liability to make good the damages caused or contributed to by any fault of a vessel even if no collision has actually taken place.]

SEC. 8. [10. This act.] *The foregoing provisions shall apply to the liability to make good the damages however caused or contributed to by any fault of a vessel or her owners or operators in all cases to which the admiralty and maritime jurisdiction of the United States extends, whether such damages are done or consummated on navigable waters or on land. [has been extended notwithstanding such damages are done or consummated on land.] In all [such] cases the liability to make good the damages in proportion to the degree that [of] the faults respectively contributed [committed] shall apply [in the same manner] between [any vessel or] vessels and their owners or operators and any other party or parties at fault or between such other parties, including the owners, operators or possessors of any land structure, facility[,] or other property, or any other person or persons involved, in the same manner as the provisions are applied between vessels and their owners or operators. [as the rule is applied between vessels.]*

SEC. 9. [11.] *The foregoing provisions shall apply to actions brought in personam against the owners or operators of a vessel or against other parties responsible, including the owners, operators or possessors of a land structure, facility or other property as well as to actions brought in rem against a vessel, cargo or other property. [This Act shall apply to actions brought against the owners or operators of a vessel or of such a land structure, facility, or other property in personam as well as to actions in rem.]*

SEC. 10. [7.] *The foregoing provisions [of this Act] shall not affect in any way the liability of any vessel or person under a contract of carriage or any other contract nor be construed as imposing any liability upon any vessel or person from which such vessel or person is exempted by any contract or any provision of law, nor as affecting the right of any vessel or person to limit liability in the manner provided by law. [Scope and effect of any statutory or contractual provisions which limit or otherwise affect any liability of the owner of a vessel toward persons or property.] The last sentence of section 1 of the Act of September 4, 1890, 26 Stat. 425 (33 U.S.C. 367), is hereby repealed.*

SEC. 11. [12.] *This Act may be cited as the "Collision Liability Apportionment Act, 1962 [1961]". It shall become effective on the last day of the sixth month following the month in which it is enacted. [Apply only to causes of action arising after the date of its approval.]*

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of the Petition of Companhia de Navegacao Lloyd Brasileiro, for Exemption From or Limitation of Its Liability as Owner of the S.S. "MANDU"

Report prepared by the Honorable John M. Woolsey (before elevation to the Federal bench) giving reasons for recommending that the Brussels Convention remain unratified by the United States

FEBRUARY 14, 1928.

Your File No. 45,475N.

Hon. WALTER F. BROWN,
Assistant Secretary of Commerce,
Washington, D.C.

MY DEAR MR. BROWN: I am exceedingly sorry that I have not been able sooner to answer your letter of December 10th inquiring as to the advisability of submitting the International Convention Relating to Collisions which was signed at Brussels on September 23, 1910, to the Senate for ratification.

This delay has been due to professional engagements which I could not postpone or control.

During this period of delay I have been able to give the matter very careful consideration and am prepared now to give you my considered views on this subject.

I do not think it would be advisable to submit the Convention to the Senate.

I believe—

First, That to attempt to modify our Municipal Law by treaty is wrong in method and probably unconstitutional in the case of Maritime Law.

Second, That the Convention is wrong in some of the important changes it seeks to effect in our laws.

My reasons for this belief follow.

I. *A Treaty is not a proper method by which to modify our maritime law.*

The ratification by the Senate, of a Convention such as the one under discussion, unless immediately followed by a statute embodying the terms of the Convention and making them the uniform law of the Admiralty Courts of the United

States, would be certain to lead to confusion, for it is axiomatic that Conventions of this kind are binding only in respect of vessels belonging to the Nationals of the Nations which have adopted it.

There were 23 Nations present at the conference which led up to the Convention. But of those present at the Conference the Treaty has not been ratified by Chile, Cuba, Spain, Italy, and the United States. Two more nations have ratified the Treaty since it was adopted by the Conference.

The present status of the Treaty regarding ratification is shown in a list hereto annexed as Schedule I of this letter.

Now if we should ratify the Convention, it would not be applicable to vessels of the above named countries which have not signed it, nor to any other countries which have not signed it, and if their vessels should become involved in litigation in our Courts, I do not believe that the rule of the Treaty could properly be enforced against them.

If the Treaty should be ratified, it would be similar in its effect to having Congress pass an Act applicable only to vessels of certain countries which would undoubtedly be held unconstitutional by our Supreme Court owing to the fact that it would destroy the uniformity and symmetry of our maritime law.

Our Supreme Court in many cases and notably in recent years has laid it down as axiomatic that maritime law must as a matter of constitutional law be uniform throughout the country and the same rules of maritime law must be applicable in all our courts.

The list of cases which have held this is hereto annexed as Schedule 2 of this letter.

Consequently, I think it is probable that the Supreme Court would hold that a Convention of this kind was not a constitutional method of changing our admiralty law because it did not make our maritime law uniform in respect of all litigants before our Courts and, consequently, that no change in the law was effected by the adoption of such a Convention.

This is so because the Convention would operate to make different rules apply in determining collision liability between vessels of different nationalities.

For instance, the Convention, while it would affect the rule applicable for collisions between vessels of the signatory powers, would not change our rule of law determining collision liability in respect of vessels belonging to citizens and subjects of nonsignatory powers nor to vessels of the United States. Apparently, for example, the old American rule would still apply in the following cases:

1. To a collision between an American vessel and a vessel owned by a National of a country which had not ratified the Treaty.

2. To a collision between vessels of two nations neither of which had ratified the Treaty.

3. To a collision between a private vessel and a public vessel of the United States.

4. To a collision between private American vessels.

5. To a collision between vessels owned respectively by nationals of a signatory power and of a power which had not adopted the Convention.

It is to be noted also, in this connection, that article XI of the proposed Convention provides—

"The present Convention has no application to war vessels or other vessels exclusively devoted to public service."

"An Act Authorizing Suits against the United States in Admiralty for Damage Caused by, or Salvage Service Rendered to, Public Vessels Belonging to the United States" was passed on March 3, 1925, which, after years of effort on the part of the admiralty bar, put public vessels of the United States in the same status for the purpose of liability as ordinary merchant vessels.

This Convention, if adopted and held to be the Law possibly would, insofar as it was operative, result in the repeal of the Act of March 3, 1925, or at any rate it would require different rules to be applied where a warship was involved in a collision. Either contingency would be serious. The repeal of the Public Vessels Act would be a step backwards because before that Act it had not been possible to bring suit against the United States for damage caused by these public vessels, although, to be sure, salvage actions were entertained by the Court of Claims in respect of such vessels.

If the treaty were held to repeal by implication the Public Vessels Act, such a change in the law would make it necessary, as it was formerly, to get a special

Act of Congress passed whenever it is desired to hold the United States liable for collision between one of its public vessels and a privately owned vessel.

Applications for these special laws have been innumerable since the war, and they are a source of great deal of annoyance and inconvenience to Congress which it was sought to obviate by the passage of the Public Vessels Act.

What is needed and, indeed, contemplated by a Convention such as that under discussion is to have the appropriate lawmaking power in each of the signatory nations make and put into force identic laws embodying the principles approved and agreed on in the Convention.

This was the course followed, for example, regarding the International Rules for Preventing Collisions at Sea by the *Act of August 19, 1890* adopting the International Rules for Preventing Collision at Sea.

It is true that the Salvage Convention was advised by the Senate on January 18, 1912, and ratified by the President on March 14, 1912, but soon thereafter on August 1, 1912, Congress passed and the President signed an Act embodying the principle of the Convention, entitled "*An Act To Harmonize the National Law of Salvage with the Provisions of the International Convention,*" Etc., Act of August 1, 1912, Ch. 268, 37 Stat. L. 242.

As a result the principles of the Salvage Convention have been put into our law as the uniform law of the Admiralty Courts of the United States in respect of salvage.

A change of our Municipal Law by Treaty is, therefore, a dangerous and doubtful method of procedure under our form of Government in any case, and in the present case would, if the Treaty was not held unconstitutional, cause almost endless confusion in the administration of our maritime law as regards collisions, and to a considerable dislocation of principles which have come to be adopted in such cases by our courts.

Therefore, I object to the submission of the Convention to the Senate on the ground of method as well as on the ground of principle hereinafter dealt with.

II. *The principal changes which are expected to be effected by the Convention.*

The proposed Convention lays down two rules of great importance in the law of collision which differ from the rules as now enforced in our Courts.

These changes are as follows:

1. When a collision is due to mutual fault, article IV of the Convention, makes the vessels involved liable in proportion to the degree of fault if it is possible to determine such degree. If, however, it is impossible to determine the degree of fault or if the faults of the two vessels appear equal, the responsibility for the collision is to be divided into equal parts.

2. The second paragraph of article IV provides that damages, whether to ships cargo, effects, or other property of those on board, are to be borne by the ships in proportion to their degree of fault and third persons owning property lost or damaged owing to such fault shall only recover such proportion of their damage as is represented by the degree of fault of the vessel sued, and, apparently, as a necessary corollary, that there shall not be any right of contribution as between the two vessels in fault for damages so recovered against one of them.

In the case of death or personal injuries, however, this rule is not followed, for under the third and fourth paragraphs of article IV a recovery is allowed against either vessel for the full damage of the person so killed or injured with a right of contribution as between the two vessels in proportion to the fault of which each may have been guilty.

Under the maritime law and procedure now existing in the United States, if vessels are mutually guilty of fault, the whole damage caused by the collision to everyone involved is equally divided between the two vessels, a balance struck and a recovery had of half of such balance by the vessel in whose favor the balance exists.

If the principle involved in this Convention were made part of our law, it would, therefore, involve the following far-reaching changes:

1. In case vessels were mutually at fault and the faults were not of equal degree the collision damages would be apportioned and not equally divided.

I approve of this apportionment of damages between vessels mutually but not equally at fault.

2. In the case of mutual fault it would limit the recovery as against each of the ships in fault to the amount of the collision damages represented by the degree of that fault, except in cases of claims for death or personal injury, and would do away with any right of contribution as between the two guilty vessels except in the case of recovery for death or personal injury.

I disagree entirely with the principle, set forth in the last paragraph, for I think that it is a wrong doctrine that a party which has not been guilty of any fault should not be able to recover all his damage against a tortfeasor who has been guilty of an act of negligence which puts him under legal liability—whatever the proportion of that negligence may be as between him and the other tortfeasor involved in the case.

It seems to me that to adopt this principle of the Convention confuses the question of liability with the question of the amount of damages.

Furthermore, I strongly disagree with the principle that as between the two tortfeasors there should not be any contribution in respect of property damage, for I believe that it is a wise rule of law which provides that, when two persons have been guilty of fault and recovery is had against one of them, he should be able to reimburse himself for such damages as he may have to pay to a third party for the joint wrong, and then recover of the other tortfeasor in proportion to the fault of that other tortfeasor. Indeed, in my opinion this right of contribution is, perhaps, the outstanding characteristic of our maritime law and procedure. Certainly it is one of the fairest and wisest principles which we have developed.

III. *The Convention is wrong in principle because under cases of mutual fault it only allows cargo to recover from each vessel such proportion of the damages as the vessel's fault bears to the whole damage and does not allow a contribution as between the two vessels in proportion to their degree of fault.*

1. The principle of the proposed Convention that the liability of vessels should be proportionate to their fault is to my mind a perfectly correct and just theory. But the proposed Convention, as is above indicated, goes further and limits the amount which cargo can recover from each of two vessels in fault to the proportionate share represented by her fault, and does not allow contribution as between the two guilty vessels.

2. This has been the British rule since about 1815 and now is statutory there, due to the adoption by an Act of Parliament of the Collision Convention now under discussion.

The British rule was finally crystallized before the adoption of the Convention by England in the case of *The Drumlanrig*, (1910) Prob. 249, affirmed (1911) App. Cas. 16, in which the English Court of Appeal held that when two vessels are to blame for a collision cargo can only recover one-half of its damage from each.

In *The Drumlanrig*, two of the Lords Justices in the Court of Appeal criticized this rule of the British Admiralty on the ground that it was not based on any principle whatever—per Lord Justice Vaughan Williams, 1910 Prob. 262, and per Lord Justice Buckley, 1910 Prob. 269—but felt that as the rule had been in force for so many years in the British Admiralty Courts and that as such admiralty rules had been incorporated by reference in Section 25, subdivision 9, of the Judicature Act of 1873, they were not at liberty to change the rule.

The House of Lords considered the case as purely one of statutory construction and affirmed the Court of Appeal. Lord Shaw, however, felt that the rule was not founded on principle. *The Drumlanrig*, 1911 App. Cas. at page 26.

The rule was also referred to with criticism by Lord Blackburn, one of the greatest English Judges, in an earlier case in the House of Lords. *Stoomvaart Etc. v. P. & O. Steam Navigation Co.* (1882), 7 App. Cas. 795.

In the case of a collision between two British vessels on the high seas, the Circuit Court of Appeals for the Third Circuit recognized the English rule as laid down in the cases above mentioned and applied it as an integral part of the British collision law and held that it was not a mere matter of procedure and, hence, that the American rule should not apply.

The Eagle Point, 142 Fed. 453 (January 11, 1906); Certiorari denied, 201 U.S. 644 (March 12, 1906).

3. Under our rule, prior to the Act of February 13, 1893, commonly known and hereinafter referred to as the Harter Act, cargo, if damaged in a collision due to the fault of both colliding vessels, could recover its whole damage either from the vessel on which it was being carried, hereinafter called the Carrying Vessel, or from the other vessel, hereinafter called the Noncarrying Vessel.

The part of the Harter Act relevant to the matter under discussion is Section 3, which provides:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and sup-

plied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent, or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The Harter Act would not be affected if the Convention should be ratified by the Senate and then held by the Supreme Court as modifying our collision law as between the signatories. Because, although by Article 3 of the proposed Convention it is provided that "if the collision is caused by fault on the part of one of the vessels, indemnity for this damage falls on the one which has committed it." Article 10 expressly preserves such statutes as the Harter Act which may obtain in the law of any of the signatory powers, for it provides:

"Subject to further conventions, the present provisions do not affect the nature and extent of shipowner's liability as they are regulated in each country, nor the obligations resulting from the contract of carriage or any other contract."

Under the Harter Act, therefore, if, as is usually the case, the owner of the Carrying Vessel has used due diligence to make the vessel seaworthy and has properly manned and equipped her, cargo on her cannot recover against her or her owners for damage due to collision.

If, therefore, the Carrying Vessel is solely to blame for a collision the matter, so far as cargo is concerned, ends there.

The Harter Act, when it applies, bars recovery against the Carrying Vessel, and the Noncarrying Vessel, not having been guilty, cannot, of course, be held liable.

But if both vessels are in fault, the cargo on the Carrying Vessel can recover its full damages from the Noncarrying Vessel which in turn can offset the recovery thus had against it as part of its collision damages against the Carrying Vessel.

This, it seems to me, is as it should be, because if one party damages another by negligence, there is not any reason why the wrongdoer should not be liable in full, and then seek contribution, where and as it may, from the other tortfeasor. The English doctrine of allowing a recovery against each vessel of only such proportion of the damages as is presented by its fault, which had been laid down by Dr. Lushington in the case of *The Milan*, Lushington on Admiralty, 405, and authoritatively settled in the case of *The Drumlanrig*. (1910) Prob. 249; (1911) App. Cas. 16, has always been repudiated by our Courts.

Rover v. Sturges, 24 How. 110 (1860).

The Gregory, 9 Wall. 513 at 516 (1869).

The Atlas, 93 U.S. 302, (1876).

The City of Hartford, 97 U.S. 323 (1877).

The Virginia Ehrman, 97 U.S. 309 (1877).

The North Star, 106 U.S. 17 (1882).

The Sterling, 106 U.S. 647 (1882).

The Manitoba, 122 U.S. 97 (1887).

The Chattahoochee, 173 U.S. 540 (1890).

Erie R.R. Co. v. Erie & Western Transp. Co., 204 U.S. 220 (1907).

The Eugene F. Moran, 212 U.S. 466 (1909).

The George W. Roby, 111 Fed. 601 (1901).

Great Lakes Towing Co. v. Mababa S.S. Co., 273 Fed. 577 (1916).

The Sif, 266 Fed. 166, (1920) and

The Job T. Wilson, 84 Fed. 204 (1897).

4. The result of our rule of law, was that after the passage of the Harter Act the Supreme Court allowed a recovery of full damages by cargo against the Noncarrying Vessel which then offset the amount of the damages suffered by it, including such cargo recovery, against the Carrying Vessel which had also been held to blame.

Though the Harter Act would not be affected by the Convention, the theory of recovery of cargo damage in its entirety against the Noncarrying Vessel, with a right on the part of that vessel to secure contribution would be destroyed.

Thus cargo in a collision case would never recover its full damages unless the Noncarrying Vessel was solely at fault, and her value was large enough to per-

mit of full payment to cargo, which in such a case would have to share the fund *pari passu* with the owners of the carrying ship.

In cases of mutual fault cargo could never recover for more than the share of the damages which the proportionate fault of the Noncarrying vessel represented, and the Carrying Vessel in all, except most unusual cases where the owner owing to his fault could not invoke the Harter Act, would be protected from liability by that act.

5. The doctrine of contribution as between tortfeasors has always seemed to me to be one of the most important principles involved in our maritime law and procedure.

It seems to me that it is difficult to deny the justice of the theory of contribution. It has been repeatedly approved in the United States Supreme Court.

The North Star, 106 U.S. 17 (1882).

The Chattahoochee, 173 U.S. 540, 522-555 (1898).

In Re New York & Porto Rico S.S. Co., 155 U.S. 532 (1895).

Erie R.R. Co. v. Erie & Western Transp. Co., 204 U.S. 220 (1907).

The Ira M. Hedges, 218 U.S. 264 (1910).

The principle of contribution between tortfeasors underlies the Admiralty Rule 59 of the old rules of The United States Supreme Court and Admiralty Rule 56 of the present rules, copies of which are hereto annexed as Schedules 3 and 4 of this letter.

These rules permit a respondent in an admiralty case to implead any other party claimed by him to be wholly or in part responsible for the damage complained of by the libellant.

These rules were all passed in pursuance of authority granted by Congress to the Court and all have the force of law.

Act of August 23, 1842, Chap. 188, Sec. 6.

5 Stat. 518.

R. S. 562, 917-918.

Providence & N.Y. S.S. Co. v. Hill Mfg. Co. 109 U.S. 578, (1883).

The growth of this doctrine of contribution or right to claim over against a third party, in our law is somewhat interesting.

Rule 59 of the old rules of the Supreme Court provided for the right to bring on a third party claimed by the respondent to be liable for the damage complained of in the libel only in respect of collision cases.

The District Courts broadened this principle, and by analogy allowed the practice of bringing in third parties who were claimed to be liable in other than collision cases.

This procedure was challenged by a writ of prohibition and was approved by the Supreme Court *In re New York & Porto Rico S.S. Co.*, 155 U.S. 523 (1895).

Consequently when the Supreme Court passed its last Admiralty Rules in 1921, it broadened the principle of Rule 59, and in Rule 56 gave expressly to respondents the right to implead third parties in other than collision cases and recognized the practice that had developed in the Admiralty Courts of the United States under the old Rule 59 which applied in terms only to collision.

It seems to me that the narrow rule of the common law, which only in the rarest cases, allows recovery over between tortfeasors is not as wise or fair as the admiralty rule which we have developed in this country, which is very broad in enforcing contribution between tortfeasors. For, when a person without fault is damaged, why should he not be able to get as full an indemnification as the means of either tortfeasor permits, subject, of course, to statutory limitations such as the Harter Act, and let the tortfeasors, no matter how many there may be, spread the loss out among themselves?

Cf. *The Eugene F. Moran*, 212 U.S. 466 (1909).

6. In the case of *The Thekla*, 266 U.S. 328 (1924) the Court had before it a collision between a Norwegian vessel and a public vessel of the United States and a question arose whether when the United States filed a libel against a privately owned vessel for damage to one of its public vessels, the privately owned vessel could invoke the usual rule requiring the United States to appear and answer in a cross-libel, although under the decision of *The Western Maid*, 257 U.S. 419 (1922), the owners of the Norwegian vessel could not on its own initiative maintain a libel against the United States owing to the fact that the damage was due to a fault of a public vessel for which there was no jurisdiction to sue the United States at the time when the collision happened in that case.

A question certified from the Circuit Court of Appeals for the Second Circuit as to whether a decree under such circumstances could be entered against the United States, it was stated at page 340 by Mr. Justice Holmes:

"A collision involves two vessels. The trial of such cases in the ordinary course is upon libel and cross libel, consolidated under authority of statute. Rev. Stat. Sec. 921. *The North Star*, 106 U.S. 17. If both parties were in fault the entire damage would be divided equally between them, and it could not be argued that the United States could avoid the consequences of the rule although the damage to the other vessel might bar its recovering anything. This shows that the subject matter is the collision, rather than the vessel first libelled. *Bowker v. United States*, 186 U.S. 135, 139. The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill. *Columbian Government v. Rothschild*, 1 Sim. 94, 103. *Goldthwait v. Day*, 149 Mass. 185, 187."

The damages which flow from a collision, therefore, should be spread over those in fault in proportion to their fault and the punishment thus be made to fit the crime. No innocent party should suffer, unless some statutory rule which binds the Court shall prevent or diminish his recovery.

IV. My suggestion—

I should heartily favor an Act of Congress allowing fault to be apportioned as between colliding vessels and providing that cargo should still have its present right of full recovery from the Non-Carrying vessel and that the right of contribution as between the two vessels should remain as it is.

I think that would improve the law, because often times under our present decisions which hold that if a vessel is guilty of a statutory fault, i.e., fails to observe one of the collision rules, it must to exonerate itself prove that the collision could not have been caused or contributed to by this fault.

Yang-Tsze Ins. Ass'n. v. Furness, Withy & Co., 215 Fed. 859 (1914) Writ of certiorari discussed 242 U.S. 430 (1917).

Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291 (1917).

To prove this is usually impossible, and as a result though the fault of one vessel may be almost microscopic, and the fault of the other glaring, the damages have to be divided in half.

In a jurisdiction which strives as admiralty does at the just distribution of liability, that is, of course, absurd and is confessedly a rule of thumb.

V. Conclusion.

For the reasons given, I do not think the proposed Convention would improve the law or would make for justice, and, therefore, I am not in favor of having the proposed Convention sent to the Senate for its ratification.

I do not think we ought to change the law in a way which would not promote justice, and I think that the Convention would not do so.

Change for the sake of change, which threatens to become the curse of our age, is a practice which certainly should not be encouraged in law.

In my letter to you acknowledging your letter of December 13th, I said that I would endeavor to give you the considered opinion of my partners and myself in connection with your inquiry.

I, therefore, think it is only fair, before closing, for me to state that some of my partners do not agree in what I have said regarding the error in principle made by the Convention in apportioning cargo's recovery against each vessel to the degree of fault of that vessel and in doing away with contribution as between the vessels in cases where there has been mutual fault.

It seems to me, however, that it might fairly be said that in the very article in which the Convention lays down this rule, it recognizes the justice of my criticism by not extending the rule to cases of death and personal injury.

Perhaps I should add that I have almost always been on the steamship side of collision cases during my twenty-five years at the Bar. Consequently, the views that I have given above are not colored by any interest whatever in the cargo side of these questions, nor are they in any sense intended as propaganda on behalf of cargo interests.

They represent my considered opinion as to what I believe to be the only method by which justice can be served in cases of collision due to mutual fault of the vessels involved.

I am venturing to send you an extra copy of this letter in case you should wish to use it in any way.

Believe me,

Faithfully yours,

(Signed) JOHN M. WOOLSEY.

SCHEDULE I

PRESENT

1. Germany	-----	Ratified.
2. Argentine	-----	Ratified.
3. Austria Hungary	-----	Ratified.
4. Belgium	-----	Ratified.
5. Brazil	-----	Ratified.
6. Chile	-----	Not ratified.
7. Cuba	-----	Not ratified.
8. Denmark	-----	Ratified.
9. Spain	-----	Not ratified.
10. France	-----	Ratified.
11. Great Britain	-----	Ratified.
12. Greece	-----	Ratified.
13. Italy	-----	Not ratified.
14. Japan	-----	Ratified.
15. Mexico	-----	Ratified.
16. Nicaragua	-----	Ratified.
17. Norway	-----	Ratified.
18. Holland	-----	Ratified.
19. Portugal	-----	Ratified.
20. Roumania	-----	Ratified.
21. Russia	-----	Ratified.
22. Sweden	-----	Ratified.
23. United States	-----	Not ratified.

SUBSEQUENTLY RATIFYING

24. Uruguay

25. Poland and Danzig

SCHEDULE II

The Lottawanna, 21 Wall, 588 at 575 (1884).*Butler v. Baston Steamship Company*, 130 U.S. 527 at 556 (1889).*Southern Pacific Company v. Jensen*, 244 U.S. 205 at 216, 217 (1917).*Chelentis v. Luckenbach*, 247 U.S. 372 at 382 (1918).*Union Fisk Company v. Erickson*, 248 U.S. 308 at 313 (1919).*Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 at 160 (1920).*Exparte State of New York (No. 1)*, 256 U.S. 490 at 502 (1921).*Western Fuel Company v. Garcia*, 257 U.S. 233 at 242 (1921).*Grant Smith-Porter Company v. Rohde*, 257 U.S. 469 at 476 (1922).*Industrial Commission v. Nordenhall Company*, 259 U.S. 236 at 276 (1922).*Osaka Shosen Kaisha et al. v. Pacific Export Lumber Co.*, 260 U.S. 490 at 495 (1923).*Great Lakes Company v. Kierejewski*, 261 U.S. 479 at 480 (1923).*Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109 at 124 (1924).*Washington v. Dawson & Co.*, 264 U.S. 219, 227 at 228 (1924).*Panama R. R. Co. v. Johnson*, 264 U.S. 375, at 386 (1924).*Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 at 457 (1925).

SCHEDULE III

SUPREME COURT RULE 59 (OLD)

Vessels jointly liable made to contribute in suits for damages by collision

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly

served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain.

Stipulation given on filing petition

But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

SCHEDULE IV

SUPREME COURT RULE 56

Right to bring in partly jointly liable

In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution, or otherwise growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or persons ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.

Senator BARTLETT. The committee will stand in adjournment.

(Whereupon, at 12:36 p.m., the subcommittee was adjourned subject to the call of the chairman.)

(Subsequently, the reports of the Department of State on S. 2313 and S. 2314, dated February 28, 1962, were received; also the reports of the Department of Commerce, dated March 2, 1962, and the reports of the Federal Maritime Commission, dated March 13, 1962. Subsequently, also, a statement was submitted by Abraham E. Freedman, rebutting remarks which had been made at the hearing, requesting its inclusion in the record. The documents follow:)

STATE DEPARTMENT,
February 28, 1962.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: I refer to your letter of February 13, 1962, and my reply of February 23, 1962, and wish to forward the following comments, made by the State Department, on H.R. 7911 and H.R. 7912 which correspond to S. 2313 and S. 2314.

S. 2313 (H.R. 7911), a bill to unify apportionment of liability in cases of collision between vessels and related casualties.

"The bill proposes to enact into U.S. law substantially the provisions of the 'International Convention for the Unification of Certain Rules to Govern the Liability of Vessels When Collisions Occur Between Them,' signed at Brussels on September 23, 1910, on behalf of 24 governments including the United States. A total of 34 governments (not including territorial extensions) are now parties to the convention.

"The convention was submitted by the President to the Senate on April 29, 1937, with a view to receiving its advice and consent to U.S. ratification. The Senate Committee on Foreign Relations reported the convention favorably to the Senate on June 15, 1939. The report (Ex. 4, 76th Cong., 1st sess.), sets forth the text of the convention and discusses it fully, including discussion of the four reservations recommended by the U.S. delegation to the 1910 conference. These proposed reservations appear to have been given effect by the drafters of H.R. 7911 to the extent that the points raised retain vitality. The convention was among several treaties returned to the President by direction of a Senate resolution of April 17, 1947, never having been acted upon by the Senate. This action did not reflect a reversal of the Department's support of the convention, which is highly technical and which proved to be extremely controversial.

"The Department of State in principle favors the enactment of the proposed legislation for the following reasons:

"1. The bill would bring into conformity with the collision law of the rest of the maritime world the law of the United States with respect to the fixing of degree of fault, on the basis of which the damages are apportioned, in the case of collisions between vessels. Foreign courts are free to fix the degree of liability of the respective vessels on the basis of the number and gravity of the navigational faults committed by each in cases where both are to blame. Our law in such cases requires that the damages be shared equally, although one vessel may have been grossly at fault and the other may have been blameworthy in a very minor degree. This situation gives rise to many inconsistencies. To cite only two, on the Canadian side of the Great Lakes the proportionate fault rule applies but on the American side the law calls for equal division in both-to-blame cases. Also, American courts have refused to apply the convention, even in cases where the collision occurred on the high seas and both ships were under the registries of countries which were parties to the convention.

"2. The bill would permit our own law to be administered in a more consistent and predictable manner. For examples, courts in some cases have applied a major-minor fault rule whereunder, to avoid hard decisions, they have decided not to notice or give any weight to the fault of the less offending vessel. The rule is characterized in Gilmore and Black, "Law of Admiralty (1957)," page 403, as vague and unreliable. The bill, if enacted, would probably also assist in clarifying application of the rule of the *Pennsylvania* 86 U.S. (19 Wall.) 125-136 (1873) which is to the effect that when a ship in collision is in violation of a statutory rule intended to prevent collisions it is automatically presumed that her fault contributed to the collision unless it is shown that this fault could not have so contributed. Admiralty courts have not always been in complete agreement as to the manner of proof required to show, not that the fault *did* not, but that it *could* not have contributed to the collision.

"3. The bill, by bringing U.S. collision law into conformity with that of the rest of the maritime world and by eliminating many uncertainties would put an end to much of the "forum-shopping" by parties to collision litigation who, quite naturally, seek to arrange for the proceedings to be held in the jurisdiction most favorable to their particular interests.

"4. The bill would establish generally the statute of limitations of 2 years within which maritime collision suits must be brought. Present law provides for a 2-year limit, but it is applicable only to suits against Government-owned vessels. This proposed extension would replace the rule of laches now generally applicable under U.S. law and would constitute a suitable and desirable alteration.

"The proposed legislation would, it is true, have the effect of changing the existing situation, under U.S. law, with respect to the liability of the owners of the vessels to the owners of the cargo they are carrying at the time of the collision. The Department understands that, insofar as the cargo insurance is concerned, generally the insurance rate, being governed by competition, has been the same for a given commodity carried on a given route regardless of whether the carrier has been an American vessel (not governed by the principles

of the 1910 convention) or a foreign vessel whose government is a party to the convention. It assumes the competitive situation will continue to be the controlling factor if H.R. 7911 is enacted.

"The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee."

S. 2314 (H.R. 7912), a bill to limit the liability of shipowners, and for other purposes.

"The bill proposes to enact into U.S. law substantially the provisions of the International Convention on the Limitation of Shipowners' Liability, written at the Diplomatic Conference on Maritime Law, Brussels, September 30-October 10, 1957.

"The United States was represented at the Brussels Conference, and its delegation was successful in securing most U.S. objectives. The delegation recommended that the convention be studied by interested Government departments and by interested groups and associations in private industry, and that the convention be submitted to the Senate or that appropriate legislation should be submitted to the Congress if within a reasonable time no serious reason developed which would lead the Secretary of State to believe that such course would not be appropriate. Such studies were initiated, and although some of the Government departments favored U.S. adoption of the convention, there appeared to be, until recently, a lack of interest on the part of private associations and individuals who would be most affected if the convention were adopted. In view of the apparent lack of support, action by the Department was held in abeyance.

"The Department of State favors the enactment of the proposed legislation for the following reasons:

"1. The bill would permit the shipowner to limit his liability and that of his ship, with respect to claims arising from loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship, and in some cases to other persons, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner. Maritime countries generally have legislation of this type in force, but the extent to which liability may be limited under the statutes and the limitation proceedings authorized thereunder vary widely as between different countries. Uniformity throughout the maritime world would be highly desirable. A particularly desirable result would be to put an end to "forum-shopping" by claimants and by shipowners who, quite naturally, seek to arrange for the proceedings to be held in the jurisdiction most favorable to their particular interests.

"2. The system proposed by the convention and reflected in the bill H.R. 7912 is considered to be a reasonable liberalization of the limitation provisions of present U.S. law, and would be more equitable to the claimant in many cases. This is mainly true because the amount of the limitation fund is fixed at a certain, uniform figure, even though the vessel may be lost or badly damaged as a result of the casualty.

"The Department assumes that the Committee on Merchant Marine and Fisheries will also invite the comments of the Department of Commerce (Maritime Administration, Justice (Admiralty), and Navy (Judge Advocate General and Military Sea Transport Service) since these would appear to be directly concerned by the proposed legislation.

"The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee."

Sincerely yours,

FREDERICK G. DUTTON,
Assistant Secretary
(For the Secretary of State).

THE SECRETARY OF COMMERCE,
Washington, D.C., March 2, 1962.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of this Department with respect to S. 2313, a bill to unify apportionment of liability in cases of collision between vessels and related casualties.

The Department recommends favorable consideration of the bill.

The Convention for the Unification of Certain Rules With Respect to Collisions Between Vessels was signed at Brussels in 1910 by the representative of 24 governments, including the United States. All of the convention signatories and other governments, except the United States, Cuba, and Chile, have since ratified or adhered to this convention which is now the law of all the major maritime nations, except the United States. S. 2313, if enacted, would implement the convention upon formal adherence to it by the United States.

Enactment of S. 2313 would change the admiralty and maritime law of the United States in three principal respects. The core of the bill and the convention, and the most important respect in which they would change the present law of the United States, is the provision that in cases of collision between ships, where both ships are to blame, the damages resulting from the collision shall be divided between the ships in proportion to the gravity of their respective faults (the proportionate fault rule); however, if it is not possible to establish the degree of the respective faults, or if it appears the faults are equal, the liability shall be equally apportioned. Under the existing U.S. law, the total damages in a both-to-blame situation are divided equally between the vessels involved, regardless of how much the fault of one ship may have exceeded that of the other (the divided damages rule). The proportionate fault rule is considered fair and equitable, and is preferable to our present arbitrary rule of divided damages.

The concept of proportionate fault is not new in U.S. legislation; it is applicable to issues of contributory negligence in litigation under the Death on the High Seas Act (41 Stat. 537, 46 U.S.C. 766). Foreign courts that apply the rule of proportionate damages have not encountered particular difficulty in administering it.

The U.S. divided damages rule (often called the half-damages rule) has repeatedly been criticized by our courts who have at times used various techniques to ameliorate its harshness, such as following the major-minor fault rule under which the vessel which is guilty of gross negligence (major fault) is held liable for all the damages and the vessel which is guilty of trivial negligence (minor fault) is not held liable for any damages. Recently, the U.S. Court of Appeals, Third Circuit, in *Petitions of Oskar Tiedeman and Company and of the United States*, 289 Fed. (2d) 237, 241, (1961), involving a most serious collision between the USNS *Mission San Francisco* and SS *Elna II*, stated:

"It seems too bad that the *Elna* [whose fault was slight] should be tarred with the same stick as the *Mission* [whose faults were grave] in this case. If we had a rule which divided responsibility in proportion to the negligence of the parties, as is the case in many other countries, we could make an equitable adjustment. But our American rule of even division of the damages makes for some hard cases and this is one. With regret, the judgment as to the *Elna* will be affirmed."

Under the terms of the bill, liability for personal injuries and deaths resulting from collisions would also be governed by the proportionate fault rule. The bill provides that the vessels in fault shall be jointly as well as severally liable to third parties in such cases.

Secondly, the bill and the convention would alter to some degree the liability of the vessels in collision to the owners of cargo carried on the vessels. When both vessels are to blame, the present U.S. law allows the cargo (owners) of either vessel to sue the other vessel for the entire cargo damage, but it does not allow the cargo to recover from its own carrying vessel if that vessel has met the statutory requirements in regard to the exercise of due diligence with respect to seaworthiness, manning, equipment, and proper stowage (the Harter Act of 1893, 27 Stat. 445, 46 U.S.C. 192, and the Carriage of Goods by Sea Act of 1936, 49 Stat. 1210, 46 U.S.C. 1304).

Adherence to the convention will make no change in this doctrine, also observed by most of the maritime countries. However, in a both-to-blame collision, the noncarrying vessel is then allowed, under the admiralty law doctrine of contribution, to collect from the carrying vessel one-half of the damage which the former was required to pay to the cargo of that vessel, regardless of the degree of its fault (*The Chattahoochee*, 173 U.S. 540, 1899), thus indirectly contravening the Harter Act and the Carriage of Goods by Sea Act (COGSA) which declare that a vessel owner who uses due diligence to make his vessel seaworthy shall not be liable for loss of or damage to cargo due to an error in navigation. Under the convention and the bill, cargo which is lost or damaged in collision recovers from each vessel that percentage of its loss which corresponds with the percentage of fault of that vessel, with no cross-contribution between them. In other words, only if the carrying vessel has not complied with the Harter Act or COGSA will

the cargo be allowed to recover that percentage of its loss corresponding to the percentage of fault of the carrying vessel.

Thirdly, S. 2313 would establish a 2-year statute of limitations to govern litigation arising out of maritime collisions; a 1-year statute of limitations would apply to suits for contribution in respect of damages caused by death or personal injury. At present, there is no specific time limit for the commencement of such suits under American law, only the rule of laches, except as to suits against Government-owned and operated vessels where a 2-year statute of limitations does apply (41 Stat. 526, 46 U.S.C. 745).

Section 7 of the bill would abolish the presumption of fault under the so-called standby statute (26 Stat. 425, 33 U.S.C. 367) to conform with article 6 of the convention. This statute provides that, in case of collision between two vessels, if the master of either vessel fails, without reasonable cause, to stay by the other vessel to give aid and comply with certain other requirements, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default. However, the courts have not applied this statute in presumption of fault issues and its repeal would not substantively change our maritime law.

In 1937, President Roosevelt requested the advice and consent of the Senate to adherence to the convention. The Senate Committee on Foreign Relations (76th Cong., 1st sess.) recommended that the Senate advise and consent to the ratification of the convention (Ex. Rept. No. 4, 76th Cong., 1st sess., June 15, 1939). The 76th Congress did not take action on the request for advice and consent.

A factor of paramount importance, aside from the substantive merits of the provisions of the bill, is the need to bring about worldwide uniformity in admiralty and maritime law, a subject of international scope and concern. Endorsement by the United States of the principle of international uniformity of maritime law is evident from the fact that it is a party to many multilateral maritime conventions. The enactment of this bill would promote this end by bringing the collision liability law of the United States into harmony with the law of the rest of the maritime world. The resultant uniformity will dispel uncertainties as to rights and liabilities, and will markedly decrease the tendency of litigants to shop around for the most favorable forum in which to bring suit.

The Bureau of the Budget advises there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

EDWARD GUDEMAN,
Under Secretary of Commerce.

THE SECRETARY OF COMMERCE,
Washington, D.C., March 2, 1962.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of this Department with respect to S. 2314, a bill to limit the liability of ship-owners, and for other purposes.

The Department recommends favorable consideration of the bill.

Enactment of this bill would repeal certain of the statutes on shipowners' limitation of liability (49 Stat. 960, 1479, 1480; 19 Stat. 251; 9 Stat. 636; 23 Stat. 57; 46 U.S.C. 183, 184, 185, 187, 189) and replace them with more progressive legislation that would be comparable to the provisions of the International Convention Relating to the Limitation of the Liability of the Owners of Seagoing Ships adopted at the 10th Diplomatic Conference on Private Maritime Law at Brussels, October 10, 1957. The United States was not a signatory to the convention nor has it since deposited an instrument of accession, although its delegation actively participated in drafting the convention. The convention has not yet come into force since the necessary number (10) of instruments of ratification have not been filed. The provisions of the bill are substantially the same as those of the convention.

Under existing U.S. statutes, a shipowner is allowed to limit his aggregate liability arising out of a marine casualty to the value of the vessel after the occurrence plus the pending freight, subject to a minimum of \$60 per ton of the vessel's tonnage insofar as claims for loss of life and personal injury are concerned (46 U.S.C. 183, et seq.). Under these statutes, tonnage of a seagoing steam or motor vessel is her gross tonnage without deduction on account of

engineroom, and tonnage of a seagoing sailing vessel is her registered tonnage, excluding space occupied by the crew from the tonnage.

The proposed legislation would institute a system whereby the owner's aggregate liability, and that of his ship, would be limited to an amount equivalent to 3,100 Poincare gold francs (about \$207) per ton of the ship's tonnage. Of this fund, 2,100 francs (\$140) per ton is earmarked exclusively for the payment of personal injury and death claims and, if the first portion is not sufficient to pay the personal injury and death claims in full, the unpaid balance of such claims ranks ratably with the property claims for payment against the second portion, 1,000 francs per ton (\$67). Tonnage in the bill is defined as (1) net tonnage plus the amount deducted from gross tonnage for engineroom space in computing net tonnage, or (2) 300 tons, whichever is greater. Under the bill, as under existing U.S. law (46 U.S.C. 183), the owner would not be allowed to limit his liability, and the liability of his ship, if the casualty resulted from his actual fault or privity, such as a failure to make the ship seaworthy before the voyage began.

The legal principle that allows shipowners to limit liability is of an ancient origin. It was first codified in U.S. law in 1851. The law of every maritime nation permits owners to limit liability to some extent through one system or another. This concept springs from the pragmatic need to insulate shipowners from the ruinous liability that could result from marine casualties. Also, the ship, unlike other property, normally operates in distant areas where the owner cannot personally see to its safe navigation and management. Because of this unique absentee ownership, he is relieved, in part, from the consequences of torts, such as negligence in navigation, unless the casualty giving rise to the claims resulted from his own fault or privity.

Under our present statutory formula, the limitation fund is basically the equivalent of the value of the ship after the casualty, somewhat akin to the doctrine of abandonment of the ship to the claimants. Statutory amendments in 1936 added the \$60 per ton increment for the sole benefit of personal injury and death claimants. Where the ship is lost, if the court allows the owner to limit his liability, those who have suffered property damage recover nothing, except some comparatively small pro rata share of the freight pending on the current voyage. Personal injury and death claimants would recover pro rata portions of a sum based on \$60 per ton of the ship's tonnage.

In comparison, the bill would establish a fund which is fixed in amount, regardless of the value or the condition of the ship after the casualty, based on \$207 per ton of vessel tonnage if personal claims are involved, or \$67 per ton if only property damage is involved. The Department considers this to be an equitable monetary adjustment of the existing formula. The decrease in the value of the dollar since the enactment of the 1936 amendment provides a sound justification for this change. Under the bill the amount of the fund is certain, independent of issues involving the value of the ship. Under existing law, all claims arising during the same voyage of the ship must share in a single fund, while the bill would create a separate fund for each occurrence.

It is of great importance that there be international uniformity in admiralty and maritime law. The rights and liabilities of shipowners and claimants should not vary depending upon the country in whose courts litigation is brought.

Under the bill, ships which would be included are (1) all seagoing vessels, and (2) all vessels used on lakes or rivers or in inland navigation, including *pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessel, or their tenders, canal boats, scoops, car floats, barges, lighters, and all nondescript self-propelled and non-self-propelled vessels*. Under existing law, the types of vessels in *italic* are not covered by the provisions of 46 U.S.C. 183 (b), (c), (d), and (e) and 183b, and thus do not come within the \$60 per ton minimum requirement with respect to claims for loss of life or bodily injury, and related items.

The bill provides that the exclusive original jurisdiction of all proceedings for limitation of liability shall be with the district courts of the United States in admiralty. With respect to fault or privity of the petitioner for limitation of liability, the bill provides that, after a claimant has established the petitioner's liability, the petitioner shall have the burden of proving absence of actual fault or privity. These provisions would not change existing U.S. law.

The Bureau of the Budget advises there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

EDWARD GUDEMAN,
Under Secretary of Commerce.

FEDERAL MARITIME COMMISSION,
Washington, D.C., March 13, 1962.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Interstate Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt of your request of March 7, 1962, for the views of the Federal Maritime Commission with respect to Senate Joint Resolution 166, a joint resolution to authorize the Secretary of Commerce to contract pursuant to the Merchant Marine Act, 1936, as amended, for the construction of at least two oceangoing ore or coal carriers.

The resolution would authorize the Secretary of Commerce to contract pursuant to sections 501 and 504 of the Merchant Marine Act, 1936, for the construction of at least two oceangoing ore or coal carriers and to pay the construction-differential subsidy in connection therewith, and the cost of national defense features. The bill further states that any appropriations available to the Department of Commerce for ship construction shall be available for the construction of such vessels.

Inasmuch as the Commission has no responsibility in connection with the award of construction-differential subsidy with respect to the construction of vessels, we express no opinion as to the provisions of Senate Joint Resolution 166.

The Bureau of the Budget has advised there would be no objection to the submission of this letter from the standpoint of the administration's program.

Sincerely yours,

(Signed) THOS. E. STAKEM, *Chairman.*

FEDERAL MARITIME COMMISSION,
Washington, D.C., March 12, 1962.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Interstate Commerce,
U. S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt of your request of March 2, 1962 for the views of the Federal Maritime Commission with respect to Senate Joint Resolution 160, a joint resolution to authorize the Secretary of Commerce to contract pursuant to the Merchant Marine Act, 1936, as amended, for the construction of at least two oceangoing ore or coal carriers.

The resolution would authorize the Secretary of Commerce to contract pursuant to sections 501 and 504 of the Merchant Marine Act, 1936, for the construction of at least two oceangoing ore or coal carriers and to pay the construction-differential subsidy in connection therewith, and the cost of national defense features. The bill further would make any appropriations available to the Department of Commerce for ship construction available for the construction of such vessels.

Inasmuch as the Commission has no responsibility in connection with the the award of construction-differential subsidy with respect to the construction of vessels, we express no opinion as to the provisions of Senate Joint Resolution 160.

The Bureau of the Budget has advised there would be no objection to the submission of this letter from the standpoint of the administration's program.

Sincerely yours,

(Signed) THOS. E. STAKEM, *Chairman.*

RESPONSE BY ABRAHAM E. FREEDMAN, COUNSEL FOR AFL-CIO MARITIME COMMITTEE, TO REMARKS OF MR. SHAPIRO ON S. 2313 AND S. 2314

At the conclusion of my testimony, two significant events occurred which appear to be related, and which merit some comment. First, Mr. Colby, who had first introduced the substitute bill for S. 2313, apparently under the banner of the Department of Justice, came forward and advised the committee that the substitute bill was not the product of and was not endorsed by the Department of Justice; that it was, in fact, the product of the American Merchant Marine Institute; that he had merely helped in the drafting of some of the language.

Thereupon, Mr. Shapiro, the vice president of the American Merchant Marine Institute, arose and proceeded to make a personal attack upon me, charging me with having made incorrect statements, and otherwise attempting to cast discredit upon me. Throughout his diatribe, he carefully refrained from specifics, and in no instance did he undertake to point out in what respect specifically any of my statements were incorrect. He concluded with the statement that his association only represents American-flag shipowners.

I cannot help but feel, first of all, that this outburst of the American Merchant Marine Institute executive was induced by the embarrassment resulting from the exposure that the American Merchant Marine Institute had attempted to slip the substitute bill through the Congress under the false impression that it was the child of the Department of Justice. The personal attack was a diversionary measure designed to shift attention from the American Merchant Marine Institute's deceptive tactics.

Mr. Shapiro's statement that the American Merchant Marine Institute does not represent any foreign-flag owners or operators is likewise deceptive and misleading. The undeniable fact is that many of the members of the American Merchant Marine Institute operate their vessels in the so-called flags-of-convenience fleet in order to escape the U.S. tax laws and to engage foreign seamen under foreign standards while engaging in trade into and out of the United States. They don't pay any taxes and don't engage American labor, but they don't hesitate to take advantage of all the benefits of American facilities. They even get the benefit of our current war risk insurance program, where their vessels suffer damages not related to any war or warlike activities. The American taxpayer foots the bill for all this and they reap the harvest. There is a queer sense of loyalty, patriotism, and devotion to the United States. One can well understand Mr. Shapiro's anxiety to divert attention from the real force in his association which has now drained the American merchant marine to less than one-half of what it was at the close of World War II, while they built up the fleet of Liberia to the point where it is now larger than the U.S. fleet. Then, he and his cohorts come before Congress and cry that the American merchant marine needs help—at the expense of the crippled seamen and the widows and children of deceased seamen.

In view of Mr. Shapiro's statement, I earnestly urge this committee to undertake a penetrating investigation into this flag-of-convenience fleet, which is operated and maintained by the American Merchant Marine Institute members. It has brought the American fleet to the brink of disaster. It must be stopped if the American fleet is to survive.

Respectfully submitted.

ABRAHAM E. FREEDMAN.

MARCH 26, 1962.





