ADMIRALTY—SHIPOWNERS' LIMITED LIABILITY ACT—A SHIPOWNER CANNOT INVOKE THE ACT TO LIMIT HIS LIABILITY FOR WRECK REMOVAL EXPENSES SINCE A STATUTORY DUTY TO REMOVE A SUNKEN VESSEL PREVENTS HIM FROM BEING "WITHOUT PRIVITY OR KNOWLEDGE," A CONDITION PRECEDENT TO THE INVOCATION OF THE ACT.

The owner of a ship which had sunk in the Panama Canal petitioned the United States District Court for the Southern District of New York for a limitation of his liability[1] to the Panama Canal Company[2] for wreck removal expenses.[3] The District Court refused to grant the petition.[4] The Court of Appeals for the Second Circuit, *held*, affirmed. Subject to a condition stated,[5]

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[1] Shipowners' Limited Liability Act, 46 U.S.C. §§ 183-183c, 185, 188 (1970) and Rule F of the Admiralty Rules. The Admiralty Rule was not considered in the litigation.

The pertinent portion of the Shipowners' Limited Liability Act is as follows:

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (1970).

[2] The Panama Canal Company is a corporation wholly owned by the United States Government and charged with the operation of the Panama Canal.

[3] The Canal Company's claim for removal expenses arose under 35 C.F.R. § 117.5 (1972), which states:

> Control of wrecked, injured, or burning vessels. When a vessel in Canal Zone waters goes aground, or is wrecked, or is so injured that it is liable to become an obstruction in such waters, or is on fire, the Canal authorities shall have the right to supervise and direct, or to take complete charge of and conduct, all operations which may be necessary to float the vessel, to clear the wreckage, to remove the injured vessel to a safe location, or to extinguish the fire, as the case may be. The Canal authorities may, when necessary, take such action without awaiting the permission of the owner or agent of the vessel, and may require the master of the vessel and all persons under his supervision and control to place the vessel, and all equipment on board, at the disposal of the Canal authorities without cost to the Canal Company. Unless the Panama Canal Company is subsequently found and determined to be responsible for the accident or the condition necessitating action by the Canal authorities, the necessary expenses incurred by the Canal Company in carrying out the provisions of this section shall be a proper charge against such vessel, her owners and/or her operators.

[4] *In re* Chinese Maritime Trust, Ltd., 361 F. Supp. 1175 (S.D.N.Y. 1972).

[5] The Court of Appeals for the Second Circuit conditioned its holding on all parties agreeing to litigate their claims in the United States District Court for the Southern District of New York. The Chinese Maritime Trust and the cargo claimants intended to litigate in New York. The Canal Company had originally sought to bring its suit for removal cost in the Canal Zone.

In the District Court the petitioners contended that the limitation proceeding and the action for removal costs presented common questions of fact and that possible inconsistencies in outcome could result if separate trials were allowed. The ship's owners also pointed out the burden on them which would result if they were made to participate in proceedings in New York and the Canal Zone. Using Judge Frankfurter's opinion in Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954), as a basis, the petitioners urged that one of the purposes of the limitation statutes was to

a shipowner confronted by a statutory[6] and regulatory[7] duty to remove a wreck is not "without privity or knowledge" within the meaning of the Shipowners' Limited Liability Act of 1851 and therefore can be made a party to an *in personam* suit for the unlimited recovery of expenses necessary for wreck removal. *Chinese Maritime Trust, Ltd. v. Panama Canal Co.*, 478 F.2d 1357 (2d Cir. 1973), *cert. denied*, 414 U.S. 1143 (1974).

The Shipowners' Limited Liability Act [hereinafter the 1851 Act] was passed in 1851 with the purpose of encouraging the adolescent American shipping industry by placing maritime investors in the same position as their British competitors.[8] Courts generally construed the 1851 Act liberally to achieve its purpose of promoting the shipping industry and took care to bring owners within the 1851 Act's provisions whenever possible.[9] Under the provisions of the 1851 Act, an owner could limit his liability for losses caused by the ship's destruction to his interest in the ship and the cargo aboard (*in rem* liability) as long as the loss of the vessel was "without privity or knowledge."[10] This exception to the limitation principle, expressed by the requirement that the owner be without privity or knowledge, lent itself to judicial interpretation.[11] A flexible element was therefore incorporated into the 1851 Act. In recent times a growing hostility of the courts toward the limitation principle has hindered use

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have all claims settled in one place at one time. *In re* Chinese Maritime Trust, Ltd. 361 F. Supp. 1175, 1179 (S.D.N.Y. 1972).

After stating that the *concursus* doctrine had fallen out of favor, the District Court cited Judge Frank's holding in Petition of the Texas Co., 213 F.2d 479, 482 (2d Cir. 1954), that the limitation statute was not concerned with *forum non conveniens* issues and that shipowners were really not the intended beneficiaries of any *concourse* but rather it was to aid claimants to a limited fund. 361 F. Supp. at 1179.

Although acknowledging that there was no limited fund to be protected, the court of appeals expressed concern about the difficulty to the parties which would result from two simultaneous suits in such divergent districts. The court felt that such obvious waste and inconvenience should be avoided by requiring the parties to agree to litigate all claims in the district court in New York. The purpose for this condition is clear, but the terminology regarding *concursus* is not.

[6] The Rivers and Harbors Act of 1899, 33 U.S.C. 409 (1970). The pertinent portions of § 409 are as follows:

> And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, . . . it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same. . . .

Section 415 provides for *in rem* liability for wreck removal expenses incurred by the government.

[7] 35 C.F.R. § 117.5 (1972). *See* note 3 *supra*.

[8] G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY, 664 (1957).

[9] Coryell v. Phipps, 317 U.S. 406 (1943). The Court held that the negligence of competently selected men could not be imputed to the owner so as to preclude the limitation of liability. Flink v. Paladini, 279 U.S. 59 (1929). The 1851 Act was held to include corporate stockholders as owners so that the liability of each stockholder could be limited on a proportionate basis to his interest in the ship.

[10] 46 U.S.C. § 183(a) (1958). *See* note 1 *supra*, for text. The limitation of liability described in the Act is referred to in this article as *in rem* liability.

[11] *See, e.g.*, Coryell v. Phipps, 317 U.S. 406 (1943); Petition of Sinclair Navigation Co., 27 F.2d 606 (S.D.N.Y. 1928); Austerberry v. United States, 169 F.2d 583 (6th Cir. 1948).

of the 1851 Act.[12] Thus, denials of petitions for limitation under the 1851 Act have been numerous in the last few years.[13] In the wreck removal cases the application of the 1851 Act has been shortcircuited by the revival of the Rivers and Harbors Act of 1899[14] [hereinafter the 1899 Act]. The Supreme Court in *United States v. Republic Steel Corporation*[15] found that the intent of the 1899 Act was to allow the government to use injunctive relief against any obstructions in a navigable waterway.[16] The apparent creation of an injunctive remedy, where none had existed before, lead the Court in *Wyandotte Transportation Company v. United States* to see other remedies in the 1899 Act as being nonexclusive.[17] By a unanimous decision it was held that an owner had a duty to remove a vessel whether or not he was at fault in regard to the sinking.[18] The Court in *Wyandotte* expressly reserved the question of the applicability of the 1851 Act to the case but indicated that the in rem limitation of liability in that Act was similar to the provision in the 1899 Act which the Court circumvented in its ruling.[19] The duty found in the 1899 Act by the *Wyandotte* Court was first applied to the 1851 Act by the United States District Court for the Northern District of California in *In re Far East Pacific Lines, Inc.*[20] That Court found that the provisions of the 1851 Act could not be applied to wreck removal expenses because the owner had a duty under the 1899 Act to remove the ship. The failure to do so was within the privity and knowledge of the owner and so the essential requirement for invocation of the 1851 Act was lacking.[21]

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[12] G. GILMORE & C. BLACK, JR., *supra* note 8, at 666-67: "Since approximately 1930 the early enthusiasm, both legislative and judicial, for the limitation principle has cooled." In American Car & Foundry Co. v. Brassert, 289 U.S. 261 (1933), the Court listed the judicially created exceptions to the 1851 Act. "For his own fault, neglect, and contracts the owner remains liable." *Id.* at 264.

[13] *See, e.g., In re* Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972); *In re* Barracuda Tanker Corp., 409 F.2d 1013 (2d Cir. 1969); *In re* Pacific Far East Line Inc., 314 F. Supp. 1339 (N.D. Cal. 1970).

In the early cases, the courts seemed to resist granting a limitation order if personal injuries or death actions were involved. Justice Black probably expressed the unspoken reasons for these decisions in his dissent in Maryland Casualty Co. v. Cushing, 347 U.S. 409, 437 (1954):

> 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.

[14] Comment, *Removal of Obstructions from Navigable Waters: Shipowners' Liability and the Wreck Act*, 48 N.C.L. REV. 552, 561 (1970). For the text of the 1899 Act, see note 6 *supra*.

[15] 362 U.S. 482, 486 (1960).

[16] Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

Id. at 492.

[17] 389 U.S. 191, 204 (1967).

[18] *Id.* at 206-07.

[19] *Id.* at 205-06, n.17.

[20] 314 F. Supp. 1339 (N.D. Cal. 1970).

[21] "The statutory duty to diligently remove the wreck is a mandatory obligation personal to the

It should be noted that neither § 409 of the 1899 Act nor the *Wyandotte* opinion conditions the owner's duty of removal on fault. However, both *Wyandotte* and *In re Far East Pacific Lines* involved owners of negligently sunken vessels seeking to escape liability for removal expenses incurred by the government. No doubt the equities of the two situations influenced the two Courts' decisions to impose liability for the entire cost of removing the wrecks.[22] For that reason, the true extent of the shipowner's duty would have to be revealed in a case where the fault for the sinking had not been determined. *In re Chinese Maritime Trust, Ltd.*[23] presented such an opportunity. The Court of Appeals for the Second Circuit, quoting from Justice Fortas' opinion in *Wyandotte*,[24] held that the duty of clearing a wrecked ship is imposed on all shipowners regardless of fault. Such a duty prevents an owner from being "without privity or knowledge," a condition precedent to an owner successfully using the provisions of the 1851 Act.[25] The Court found untenable the alternative of allowing a shipowner to limit his liability to the value of the wreck since such a decision would stymie the strong judicial current in favor of creating a motivation on the part of the owner to promptly remove a sunken vessel.[26] The Court termed this responsibility to remove a wreck a statutory duty.[27] Such an interpretation necessarily implies that the "without privity or knowledge" requirement of the 1851 Act can never be met by any shipowner, at least in regard to the limitation of liability for removal costs. Judge Mansfield's opinion stresses that the 1851 Act must be construed in light of subsequent legislation and regulations,[28] and, he might have added, the *Wyandotte* and *In re Far East Pacific Lines* decisions. The Court also found a duty to remove on the part of the owner[29] based on a federal regulation[30] governing the Panama Canal. The regulation allows the Canal authorities to take charge of a sunken ship and to

owner and the failure to so remove is within the privity and knowledge of the owner." *Id.* at 1349.

[22] The Supreme Court in *Wyandotte* was adverse to the idea of allowing a wrongdoer to escape full liability for his acts:

> Denial of such a remedy to the United States would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim. It might in some cases permit the negligent party to benefit from commission of a criminal act.

389 U.S. at 204.

Expressing similar views the court in *In re Far East Pacific Lines* stated, "It would be highly inequitable for one who tortiously causes an obstruction and willfully refuses to remove the same, to be able to thereafter limit his liability for the reason that the removal was accomplished by an agency of the government other than the Corps of Engineers." 314 F. Supp. 1339, 1350 (N.D. Cal. 1970).

[23] *In re* Chinese Maritime Trust, Ltd., 478 F.2d 1359 (2d Cir. 1973).

[24] *Id.* at 1359.

[25] *Id.* at 1361.

[26] *Id.*

[27] *Id.* at 1360.

[28] *Id.* at 1359.

[29] *Id.* at 1360-61.

[30] 35 C.F.R. § 117.5. See note 3 *supra*, for text of § 117.5.

recover the expense of removal from the owner unless the Canal Company is subsequently found to have been negligent in regard to the sinking. In addition to the previously discussed statutory duty, the Court found this regulatory duty further prevented the owner from fulfilling the "without privity or knowledge" requirement of the 1851 Act.[31]

The facts of the case involving the Panama Canal and the removal regulation special to that waterway should not deflect attention from the general state of affairs after *In re Chinese Maritime Trust*. Without benefit of the 1851 Act, a shipowner faces in personam liability for removal expenses. A preliminary question to the examination of the wisdom of that judicially created predicament revolves around the clarity of the shipowner's duty to remove. At least as far as the 1899 Act is concerned, there seems to be strong authority for the proposition that a non-negligent owner has a right to abandon his vessel and be subject only to in rem liability.[32] The principal case is the first to find a duty on the part of an owner not otherwise indicated on the facts to be connected with a negligent sinking.[33] The court is therefore applying the Rivers and Harbors Act in a manner that has little or no basis in precedent and which is the reverse of earlier authority and interpretation of the 1899 Act.[34] Furthermore, the duty established by the Court from § 117.5 of the Canal regulations is difficult to find. The regulation speaks in terms of the right and authority of the Canal Company to commandeer vessels and salvage them rather than as an obligation of the shipowner to remove the wreck.[35]

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[31] The opinion of the court of appeals seems to use the Canal regulation as a supplementary argument while resting its main contention on the *Wyandotte* decision and the 1899 Act while the District Court emphasized that the Canal regulation imposed an absolute duty to remove a sunken vessel regardless of fault.

[32] *See*, Comment, *Removal of Obstructions from Navigable Waters: Shipowners' Liability and the Wreck Act*, 48 N.C.L. REV. 552, 557-58 (1970).

[33] *In re Far East Pacific Lines* and *Wyandotte* involved negligent owners. Indications from the District Court opinion were that the Canal Company was negligent in causing the sinking. *In re* Chinese Maritime Trust, Ltd., 361 F. Supp. 1175, 1179 (S.D.N.Y. 1972).

[34] *See, e.g.*, Petition of Boat Demand, Inc., 174 F. Supp. 668 (D. Mass. 1959), where it was stated that there is no liability for wreck removal unless the owner was guilty of willful misconduct or negligence to which he was privy. In even sharper conflict with the principal case is *In re* Highland Navigation Corp. 24 F.2d 582 (S.D.N.Y. 1927), where the traditional doctrine on the subject was stated:

> It is well settled that a shipowner whose vessel has been wrecked and sunk without his fault has a right to abandon it, and that after abandonment he is not under any obligation whatsoever to raise or remove it, and is not personally liable for the expense of removal. This is so, through an act of Congress (Rivers and Harbors Act of 1899, . . . 33 U.S.C. § 415) [which] authorizes the Secretary of War to remove obstructions to navigation, and provides that the expense shall be a charge upon the vessel raised by the government, and that, if the owner fails to reimburse the United States for such expense within a certain time after notification, the vessel may be sold and the proceeds covered into the Treasury of the United States.

Id. at 584. The trial court in *In re Chinese Maritime Trust* interpreted *Wyandotte* as only imposing a duty of removal of an owner of a negligently sunken ship under the 1899 Act. *In re* Chinese Maritime Trust, Ltd., 361 F. Supp. 1175, 1178 (S.D.N.Y. 1972).

[35] See note 3 *supra*, for text of regulation § 117.5. That section does provide for *in personam* liability for recovery of removal expenses.

The thrust of the Canal regulation suggests that those who conceived the grant of authority to the Canal Company saw the responsibility which that agency had to keep such an important waterway clear. Perhaps an obstruction in the Panama Canal or any navigable waterway should be seen as a "matter of public concern,"[36] for which the government rather than an individual shipowner should take primary responsibility. The owner is clearly not able to escape substantial liability since the government has an in rem action against the vessel and its contents which in most cases is equal to the expense of removal.[37]

The duty found by the Court in the principal case was based primarily on the 1899 Act and its interpretation in *Wyandotte*, which involved a barge sunk by the negligence of the owner. It should be noted that the duty the Court found in *Wyandotte* as required by the 1899 Act involved a somewhat extraordinary situation. The sunken vessel in that case contained 2,200,000 lbs. of chlorine which presented a serious health hazard to the surrounding residents on land. The barge was raised by the government at a cost of over $3,000,000.[38] Certainly a duty to remove and increased liability on the part of the owner would seem in order for a situation involving such a hazardous activity as transporting large amounts of a poisonous chemical. Such a state of facts seems an unstable basis upon which to impose an absolute duty on the part of all shipowners, including those without fault, that prevents them from limiting their liability. Notions of enterprise liability and making industry pay its own way are fashionable at the moment. However, it should be remembered that the American shipping industry is encountering serious financial trouble[39] and the added burden of an absolute duty to remove a sunken vessel without limitation of possible liability will certainly detrimentally affect the industry's position. It would be unfortunate if such a hindrance is allowed when it is not clearly mandated by legislation or case law. The public has an independent interest in keeping waterways clear, and the *Wyandotte* opinion does not clearly require a penalty for owners in addition to their previous in rem liability.[40] A thorough reconsideration of factors is in order to determine who should pay for removal costs. Such a study could very well indicate that the original intention of the Shipowners' Limited Liability Act to encourage American shipping[41] should be given renewed support and that the consequences of *Chinese Maritime Trust* are unduly harsh toward shipowners.

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[36] Ray, *The Removal of Obstructions from Navigable Waters — Who Pays*, 34 IN. C.J. 28, 36 (1967).

[37] *Id.*

[38] Wyandotte Transportation Co. v. United States, 389 U.S. 191, 195 (1967).

[39] Comment, *Limitation of Liability in Admiralty: An Anachronism From the Days of Privity*, 10 VILL. L. REV. 721, 733, n.99 (1965).

[40] See note 20 *supra* and accompanying text.

[41] See note 8 *supra* and accompanying text.