

Proportional Damage Rule in Collisions at Sea

Alfred Huger

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Alfred Huger, *Proportional Damage Rule in Collisions at Sea*, 13 Cornell L. Rev. 531 (1928)

Available at: <http://scholarship.law.cornell.edu/clr/vol13/iss4/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE PROPORTIONAL DAMAGE RULE IN COLLISIONS AT SEA

ALFRED HUGER*

In the bleak waters of the North Sea, some thirty years or more ago, a collision occurred which gave rise to lawsuits in London, Antwerp and Rotterdam. One of the shipowners brought suit in the Court of Admiralty in London; owners of cargo sued in the Commercial Court of Antwerp; and the Dutch relatives of a seaman who had lost his life in the disaster brought suit in Rotterdam. All three Courts found both the colliding vessels in fault for the collision, holding one of the ships grossly negligent and the other guilty of a technical violation of the navigation rules. Although the three decisions were the same on the question of fault, the practical results of the several litigations were entirely different. In Antwerp the cargo owners recovered four-fifths of their damages; in London the shipowner one-half; in Rotterdam the family of the deceased seaman recovered nothing. At that time the English rule was the same as the American rule,—that in case of mutual fault damages are divided equally between the offending vessels without regard to the degree of fault. In Belgium, where damages were apportioned according to the gravity of fault, the defendant vessel was made to respond to the extent of four-fifths of the plaintiff's damages. In Holland, where the Roman law prevailed, where both vessels are to blame, neither party is permitted to recover.¹

It was to end this chaotic condition in the laws affecting international ocean commerce that there was eventually organized, in 1896, what is known as The International Maritime Committee, a highly representative body of merchants, shipowners, underwriters and lawyers. The objective of this Committee is to discuss reforms, pronounce upon their value, and, in so far as reasonably practicable, bring about uniformity of law. A great deal of preliminary work has been done by this Committee, and as a result of its deliberations there came before what is known as the International Diplomatic Conference (*Conférence Internationale de Droit Maritime*) which convened in Brussels in 1909 and 1910, several proposed International Conventions. Two of these, one on Salvage and one on Collisions at Sea,

*Of the Bar of Charleston, South Carolina.

¹See Franck, *A New Law for the Seas* (1926) 42 L. Q. REV. 25. This article gives an excellent history of the Comité Maritime International.

were signed by representatives of the principal maritime nations of the world, including the United States, in September, 1910, and in due course were submitted to their respective governments for ratification.² The Salvage Convention was ratified by the United States, January 18, 1912 and on August 1, 1912, a bill to give effect to this Convention became a law.³

The Convention on Collisions has been ratified by nearly all the great maritime nations, except the United States, but has never been submitted to our Senate.⁴ This Convention adopted the principle of proportional liability in cases of collisions at sea due to mutual faults of the colliding ships.

If the Brussels Collision Convention should be ratified by the United States Senate and made effective by appropriate legislation, the result would be to change radically the rights and obligations of the parties involved in a collision between two or more vessels guilty of fault. The present American rule, derived from Great Britain and known as *judicium rusticum*, requires an equal division of damages no matter what the degree of fault. Thus, if ship A sustains damages in \$100,000 and ship B in \$50,000, ship A will recover \$25,000 from ship B, being one-half of the difference. If cargo is involved in the disaster, it is regarded as "innocent" and its owner is permitted to recover in full from either vessel, which in turn is entitled to obtain contribution from the other vessel held in fault. If ship A were sunk by the collision and with her cargo became a total loss, the owner of the cargo of ship A could recover in full from ship B, which in turn would be permitted to set off one-half of the amount paid to the cargo against the balance in favor of ship A.

Under the Brussels Convention, in case the Court should hold ship B three-fourths and ship A one-fourth in fault, ship A's recovery from ship B would be in proportion to the gravity of fault found

²The delegates duly accredited by the United States were the Hon. Walter C. Noyes, United States Circuit Judge, of Connecticut; Charles C. Burlingham, Esq., a distinguished lawyer, leader of the Admiralty Bar of New York City; Edwin W. Smith, a distinguished lawyer of Pittsburgh, Pa., and Hon. A. J. Montague, Ex-Governor of the State of Virginia and now a member of Congress.

³"An Act to Harmonize the National Law of Salvage with the Provisions of the International Convention," etc., being Act of August 1, 1912, 37 Statutes at Large, c. 268.

⁴The following countries have ratified the Convention on Maritime Collisions: Argentine, Austria, Belgium, Brazil, Denmark, France, Germany, Great Britain, Greece, Holland, Hungary, Japan, Mexico, Nicaragua, Norway, Portugal, Roumania, Russia, Sweden.

The following countries have not yet ratified: The United States of America, Chile, Cuba, Italy, Spain.

against ship B; or \$75,000 ($\frac{3}{4}$ of \$100,000). Ship B's recovery from ship A would be in proportion to the gravity of fault found against A; or \$12,500 ($\frac{1}{4}$ of \$50,000). Thus, ship A's net recovery would be \$62,500. If cargo were involved, its owner would recover in like proportions from the respective ships, unless they were protected by statutory exemptions—(The Harter Act—The Limited Liability Act). The Harter Act,⁵ section 3, relieves a shipowner from liability for faults or errors in navigation or in management of a vessel provided he has used due diligence to make her seaworthy and in all respects properly manned, equipped and supplied for the voyage. The Limited Liability Act⁶ prescribes certain circumstances under which the shipowner may limit his liability to the value of his ship and the amount of her pending freight at the place of and immediately after the accident;⁷ when, if his ship be sunk and a total loss and there is no pending freight, nothing can be recovered by anyone from her owner. Until the ratification of the Collisions at Sea Convention by Great Britain and the subsequent Maritime Conventions Act, 1911, the law of Great Britain and of the United States was

⁵The Harter Act of February 13, 1893, U. S. Comp. Stat. (1916) §§ 8029-8035.

See *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516 (1896) which sets forth the situation which induced the Harter Act. There the court, as a part of the history of the times, quotes from the petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury. This petition sets forth the complaint of merchants against sea-carriers because of the increasing number of shipowners' exemptions from all sorts of liability provided in bills of lading.

In 1924 the English Parliament passed the "Carriage of Goods by Sea Act." It substantially embodies "The Hague Rules 1921" as modified in 1922 and 1923. "The Hague Rules 1921" may be read in 1923 A. M. C. 63. They have not yet been adopted in the United States but are now before Congress. Terms of the act imposing responsibilities and liabilities of carriers are compulsorily added to bills of lading and are absolute and unalterable. The rights and immunities given the carrier, however, may be surrendered by special terms embodied in the contract. The act restricts freedom of contract, but fixes the carrier's minimum responsibilities. It makes more certain the rights of the holder of a negotiated bill of lading. The act represents a compromise between shipowners and shippers respecting the various provisions in bills of lading limiting liability and is said to reflect the spirit of our Harter Act.

See COLE, CARRIAGE OF GOODS BY SEA ACT (2d ed. 1925), *Hague Rules Explained*, which book gives a good review of the history of the act and the disputes involved between various interests.

⁶The Limited Liability Act, Act of March 3, 1851, U. S. Comp. Stat. §§ 8021, *et seq.*, supplemented by Act of June 26, 1884, U. S. Comp. Stat. § 8028, c. 121, and amended by Act June 19, 1886, c. 421.

⁷*Place v. Norwich & N. Y. Transp. Co.*, 118 U. S. 468, 6 Sup. Ct. 1150 (1886); *Thomasen v. Whitwill*, 118 U. S. 520, 6 Sup. Ct. 1172 (1882); *Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co.* 197 Fed. 703 (C. C. A. 9th, 1912).

the same as regards ships, but very different as regards the rights of a cargo-owner. In Great Britain the rule, before 1911, was that the owner of cargo could recover only one-half his damages from each of the vessels, because the liability of each ship to the cargo-owner was held to be several, and not as in the United States where such liability is held to be joint and several.

This article will sketch the origin and development of what is known as the Admiralty Collision damage rule, show wherein the English and American rules differ and with what results; also wherein the Maritime Convention Rule differs from the old rules of the Admiralty and what changes adoption of the Convention rule would bring about in the admiralty law as administered in the United States. This will be followed by a discussion of some of the reasons advanced for and against a ratification of the Convention.

ORIGIN OF THE RULE DIVIDING LOSS⁸

The first instance of the rule dividing loss appears in the early codes founded upon the Laws of Oleron. In 1505 there was printed the Code of Wisby, which was an important commercial centre in Gottland in the 13th and 14th centuries. This Code provided that if a ship under way collides with one at anchor she must make good the whole of the damage to the anchored ship, unless her master and crew swear the collision was *accidental*, in which case she is only to pay one-half. In some of the other codes the rule is not confined to one ship being at anchor. In the Hamburg, Hanseatic and Danish Codes, *Consolato del Mare*, Ordonnance of Louis XIV., various circumstances are provided for and the proportions recoverable fixed. In Malacca in the 13th century, in certain cases of collision, when ships were sailing in company for protection against pirates, the colliding ship pays one-third of the damage. In other Eastern codes the injured ship recovers two-thirds of the damage. Bynkershoek, in 1629, attempted to persuade the Judges of the Supreme Court of the Netherlands to adopt a proportionate rule in accidental collisions, but those Judges strongly dissented.⁹

The Rule in England

In the English Admiralty the rule had an interesting development. Prior to 1614, in collision cases, the English Courts gave either full

⁸See MARSDEN, COLLISIONS AT SEA (8th ed.) 134-167, especially note pp. 153 et seq., for a full account. The writer acknowledges indebtedness to its authors.

⁹*Ibid.* 155.

damages or none at all. In that year for the first time a sentence, affirmed on appeal, condemned the defendant, who was *alone* to blame, to pay *one-half* the loss to cargo of the other ship and the *whole* of that ship's damage. From 1623 to 1645, where the defendant's ship was found to blame, sometimes half and sometimes whole damages were granted the plaintiff. In 1647, for the first time half damages were given because the cause of the collision was *uncertain*. In the 17th century the losses were divided or apportioned in many cases, but the various reasons given cannot be reconciled. Some of them were: that the collision was not wilful; that there was difficulty in proving negligence; that it was too difficult to apportion the loss to the gravity of fault. As late as 1789 damages and costs were equally divided in a collision case due to *inevitable accident*.¹⁰ Finally, in 1816, in a decision by Lord Stowell, there appeared an *obiter dictum* which declared that the rule of division of loss could *only* be applied in cases of collision caused by the *fault of both ships*.¹¹ The rule was apparently not in accord with the prior High Court of Admiralty decisions¹² but was approved by the House of Lords¹³ and has ever since been the rule. This rule was stigmatized by Cleirac¹⁴ as *judicium rusticum* as also by Chancellor Kent,¹⁵ and has been criticized by Lord Denman,¹⁶ Lord Selborne, L. C.,¹⁷ Lord Blackburn,¹⁸ and others.¹⁹ In applying this rule in a case of a cargo loss in 1861, Dr. Lushington held²⁰ that, although the cargo owner was innocent, he could recover only one-half of his loss, because the court "can affix to the vessel proceeded against only half

¹⁰Nom. c. Fawcett in the Ass. Book. See 2 BROWN, ADMIRALTY LAW, 206: "In case of accident the loss was divided between both parties in equal proportions."

¹¹Lord Stowell (then Sir W. Scott), *The Woodrop Sims*, 2 Dodson, Adm. 83, 85 (1815). In *The Lord Melville*, 2 Shaw's App. Cas. 402 (1816), is a like dictum.

¹²MARSDEN, *op. cit. supra* note 8, at 135.

¹³*Hay v. Le Neve*, 2 Shaw, 409 (Sc. A. C. 1824).

¹⁴*The Chartered Mercantile Bank v. Netherlands India Co.*, 10 Q. B. D. 521 (1883). Etienne Cleirac, early French writer on marine insurance and sea laws. He published several books and in 1671, *US ET COUTUMES DE LA MER*.

¹⁵3 KENT, COMM. § 231.

¹⁶*Devaux v. Salvador*, 4 Ad. & El. 420, 5 L. J. K. B. 134 (K. B. 1836).

¹⁷*Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co.*, 7 App. Cas. 795, 799 (H. L. 1881). See especially at 819.

¹⁸See ROSCOE, *THE MEASURE OF DAMAGES IN MARITIME COLLISIONS*, 20 et seq.; MARSDEN, *op. cit. supra* note 8, at 137-138.

¹⁹See discussions of delegates in London in 1899, published as follows: *International Maritime Committee, London Conference 1899, on the Law of Collisions at Sea and Shipowners Liability*, published in Antwerp, by J. E. Buschmann.

²⁰*The Milan, Lush*, 388 (Adm. 1861).

the blame." The rule finally became statutory in England in 1873.²¹ In the *Milan*, the plaintiff, a cargo owner, had sued the non-carrying ship. The cargo owner in a contract action, however, could recover his whole damage from the carrying ship²² unless limited by contract or law.²³ The rule in England, and Canada, and all His Majesty's Dominions, except South Africa now is the Proportional Liability Rule as fixed in the Brussels Convention of 1911.²⁴

The Rule in the United States

The United States inherited its rule of equal division of damages, as between vessels mutually at fault, from the English admiralty. In some early cases damages were divided in cases of *inscrutable fault*²⁵ as in cases of negligence, but this practice was abandoned and fault had to be proved.²⁶ Before 1854 the general practice in the lower courts had been to divide the damages equally in cases where both ships were in fault. In that year the case of the *Schooner Catherine* reached the United States Supreme Court, and the rule was finally settled and has since been adhered to.²⁷ In personal injury cases, however, our courts have not felt bound by the rule.

²¹(1873) 36 and 37 Vict. c 66, 525 (9). This rule absolutely confirmed in *The Chartered Mercantile Bank v. Netherlands India Co.*, 10 Q. B. D. 521 (1883), and in *The Drumlanrig*, [1911] A. C. 16.

²²*The Bushire*, 5 Asp. Mar. L. Cas. 416 (1886); *The Chartered Mercantile Bank v. Netherlands Co.*, *supra* note 21.

²³*Jenkins v. G. C. Ry.*, [1912] 1 K. B. 1.

²⁴Maritimes Convention Act [(1911) 1 & 2 Geo. 5, c. 57]. This act incorporates the doctrine of the *Milan*, *supra* note 20, and *Drumlanrig*, *supra* note 21. See MARSDEN, *op. cit. supra* note 8, at 145; *The Umona*, [1914] P. 141, 145 where right of recovery against noncarrying vessel limited to proportion of that ship's fault. See also MARSDEN, at 225.

²⁵*The Sciota*, 2 Ware, (Dar. 359) 360, Fed. Cas. No. 12, 508 (1847); *The Fern and The Swan*, Newb. Adm. 158, Fed. Cas. No. 8,588 (1854); *The John Henry*, 3 Ware, 264, Fed. Cas. No. 7,350 (1860)

²⁶*The Jumna*, 149 Fed. 171 (C. C. A. 2d, 1906); *The Sunnyside*, 91 U. S. 208, 215-216 (1875); *The Clara*, 102 U. S. 200, (1880).

²⁷*The Schooner Catherine v. Dickinson*, 17 How. 170, 177 (U. S. 1854); *The Maria Martin*, 12 Wall. 31 (U. S. 1870); *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41 (1882); 24 R. C. L. 1242. Some cases had apportioned damages in proportion to degree of fault. See *e. g. The Mary Ida*, 20 Fed. 741 (D. C. S. D. Ala. 1884). See a very interesting discussion by the late Wilhelmus Mynderse of the Victory-Plymothian collision in the report of the *London, 1899, Conf. of the Int. Mar. Committee*, *supra*, note 19, at 70. In that case, the Supreme Court gave additional time for argument of the question on the foreign cases and reports of conferences were submitted, but the court *escaped* the question by reversing the lower court and holding only *one* ship to blame. 168 U. S. 410, 18 Sup. Ct. 149 (1897). Also MARSDEN, *op. cit. supra* note 8, at 150 n.

But while our courts have followed the English admiralty rule in applying this equal division rule as between ships, they have departed sharply from the policy of the English courts in establishing the rights of what they have termed "innocent" cargo. Like Dr. Lushington in *The Milan*,²⁸ our courts have denied the validity of any theory which would create such identity of ship and cargo as would impute negligence of the ship to the cargo,²⁹ whereby cargo's right to recover from the carrying ship would be defeated. But differing from Dr. Lushington, our courts adopted the rule of common law, as urged by Edward James, Q. C., plaintiff's counsel in *The Milan*, that the offending ships are tortfeasors and "are jointly and severally liable. The plaintiff may choose whom he will of his wrong-doers to sue, and he generally chooses not him who did the most wrong, but him who is most solvent."³⁰ The owner of cargo, therefore, under the American admiralty law, may now (subject to statutory exemption) recover his whole loss from any one ship singly or all jointly at fault for a collision, and our courts have repeatedly declined to conform to the English rule.³¹ The best expression of our courts' view of

²⁸*Supra* note 20.

²⁹This was the English common law position taken in *Thorogood v. Bryan*, 8 C. B. 115 (C. P. 1849), and *Armstrong v. L. & Y. Ry.*, L. R. 10 Ex. 47 (Eng. 1875). See CARVER, *CARRIAGE OF GOODS BY SEA* (7th ed.) 967. See the *Bernina*, 6 Asp. Mar. L. Cas. 112 (1886).

³⁰The *Milan*, *supra* note 20, at 394. Common law rule, see POLLOCK, *THE LAW OF TORTS* (11th ed.) 198-201; also HUGHES, *ADMIRALTY* (2d. ed. 1920) 282-283. See also *Goldman v. Mitchell-Fletcher Co.* 292 Pa. 354, 141 Atl. 231 (1928).

³¹The *Bristol*, 29 Fed. 867 (S. D. N. Y. 1887); The *Britannic*, 39 Fed. 395 (S. D. N. Y. 1889); The *Steamer New Philadelphia*, 1 Black 62, 76 (U. S. 1861); The *Washington & Gregory*, 76 U. S. 513 (1869); The *Alabama and Gamecock*, 92 U. S. 695 (1875); The *Atlas*, 92 U. S. 302 (1876); The *Sterling and Equator*, 106 U. S. 647, 1 Sup. Ct. 89 (1882); The *Virginia Ehrman and Agnese*, 97 U. S. 309 (1877); The *North Star*, 106 U. S. 17, 1 Sup. Ct. 41 (1882); The *City of Hartford*, 97 U. S. 323 (1877); The *Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1158 (1887); The *Chattahoochee*, 173 U. S. 540 19 Sup. Ct. 491 (1898); The *City of New York*, 175 U. S. 187, 20 Sup. Ct. 67 (1899); *Erie R. R. Co. v. Erie & Western Transp. Co.*, 204 U. S. 220, 27 Sup. Ct. 246 (1907); The *Eugene F. Moran*, 212 U. S. 466, 29 Sup. Ct. 339 (1909); The *George W. Roby*, 111 Fed. 601 (C. C. A. 6th, 1901); *Great Lakes Towing Co. v. Massaba S. S. Co.*, 237 Fed. 577 (C. C. A. 6th, 1916); The *Sif*, 266 Fed. 166 (C. C. A. 2d, 1920); The *John F. Wilson*, 84 Fed. 204 (D. M. 1897).

But in the *Eagle Point*, 142 Fed. 453 (C. C. A. 3d 1906), the British rule was applied in the case of two British ships. In the *Magmeric* (*Galef v. The United States*, not yet reported), argued last March (1928) by the writer, at Charleston, S. C., before Judge Hale of Maine sitting there, the court refused to apply the German proportional rule in a case by an American citizen against an American ship, one of two ships at fault in a collision happening in *German* waters. An appeal is to be taken.

the rights of an injured third party is found in the case of the *Atlas*, where it was said in part:

"Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue them separately, or if he sues one separately and has judgment, he cannot afterwards sue them all in a joint action; because the prior judgment against one is, in contemplation of law, an election as to that one to pursue his several remedy, but it is no bar to a suit for the same wrong against any one or more of the other wrongdoers." *Murray v. Lovejoy*, 2 *Cliff.* 196; *s. c.* 3 *Wall.* 19; *Smith v. Hines*, 2 *Sumn.* 348; *Webster v. Railroad*, 38 *N. Y.* 261.

"Acts wrongfully done by the co-operation and joint agency of several persons constitute all the parties wrongdoers, and they may be sued jointly or severally; and any one of them, said Spencer, C. J., is liable for the injury done by all, if it appear either that they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others. *Guile v. Swen*, 19 *Johns.* 382."

In the United States, when more than two ships are at fault, each one is liable for an equal share of the damage, irrespective of their ownership.³² But our admiralty courts, in an attempt to reach more equitable results than the common law courts, depart from the doctrine generally there applied³³ and allow *contribution* between the wrong-doers.³⁴ This right of contribution exists notwithstanding the carrying slip is exonerated by the terms of the Harter Act, and thus that Act is indirectly nullified through judicial legislation.³⁵

³²The *Eugene F. Moran*, *supra* note 31; The *Atlas*, *supra* note 31; The *Charles Allen*, 11 *Fed.* 317 (S. D. N. Y. 1882). See cases *supra* note 31.

³³For an excellent review of the right of contribution at common law as between joint tortfeasors, see the very recent case of *Goldman et al v. Mitchell-Fletcher Co.*, 292 *Pa.* 354, 141 *Atl.* 231 (1928) where His Honor Judge Edwin O. Lewis allowed contribution between wrongdoers, and his able opinion was unanimously affirmed on appeal.

³⁴The *Chattahoochee* and other cases cited *supra* note 31. In this case Chief Justice Fuller and Associate Justice Peckham dissented.

³⁵The Harter Act, Act of Feb. 13, 1893, c. 105, 27 *Stat.* 445, U. S. *Comp. Stat.* (Supp. 1923) §§ 8029-8035. See the *Chattahoochee*, *supra* note 31. The late Wilhelmus Mynderse, of the New York Bar, a great admiralty lawyer, said the doctrine of the *Chattahoochee* results unjustly; that the "honest and fair rule" is the one which would put upon each vessel "primarily and finally a proportionate share of the resulting damage." *London Conference Int. Mar. Com.*, *supra* note 19, at 81.

The doctrine of contribution is firmly established, in our country, and is believed by our judges to be eminently just,³⁶ and underlies the Admiralty Rules of the United States Supreme Court.³⁷

THE MARITIME CONVENTION RULE AND THE CHANGES ITS ADOPTION
WOULD EFFECT IN THE ADMIRALTY LAW AS NOW ADMINISTERED
IN THE UNITED STATES

Having sketched briefly the origin and development of the admiralty equal division rule in collision cases, and having shown wherein that rule as applied in the United States differs from the English rule, we may now consider the changes in our law which would be brought about by the adoption of the Maritime Convention proportional rule.³⁸ The following is from the convention, *article 4*.³⁹

"If there is mutual fault, the liability of each vessel is in proportion to the gravity of the faults respectively committed; but, if, according to the circumstances, the proportion cannot be established, or if it appears that the faults are equal, the liability is 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, are borne by the vessels in fault in the above proportions, without joint liability toward third parties."

"In respect of damage caused by death or personal injury, the vessels in fault are jointly liable to third parties without prejudice, however, to the right of contribution belonging to 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 rights to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel toward persons on board."⁴⁰

³⁶The *North Star*; The *Chattahoochee*, both *supra* note 31; *In re N. Y. & Porto Rico S. S. Co.*, 155 U. S. 523 15 Sup. Ct. 183 (1895); *The Ira M. Hedges*, 218 U. S. 264, 31 Sup. Ct. 17 (1910).

³⁷See Admiralty Rule 56 (Old Rule 59), U. S. Comp. Stat. (1916) p. 2705.

³⁸See *Foreign Relations of the United States*, 1911 at 20. Also same for 1909, at 660, but phraseology here is somewhat different. It is to be noted that the United States delegates reserved unimpaired the Harter Act of Feb. 13, 1893, *supra* note 35. See *For. Rel. U. S.* 1911, at p. 18 for Reservations. Recommendation of the delegates is that the rule be made to apply only in litigations in United States Courts of admiralty and maritime jurisdiction. Is this wise? The writer *cannot believe* that it is for reasons which would appear obvious.

³⁹It is not thought in England that the Convention rule changes the rule that an innocent third vessel damaged in collision has a joint and several right to claim against the other two which will still have contribution—see *MARSDEN*, *op. cit. supra* note 8, at 197n.

That the adoption of this rule would bring about radical changes in the maritime collision laws of this country cannot for a moment be doubted. The most important of these changes will now be discussed: 1. From the point of view of the shipowner, and 2. From the point of view of the cargo-owner.

1. *From the point of view of the shipowner.*

(a) There will be no change, except as to proportions, in calculating ship damage. The damage sustained by each ship will be first ascertained. Recovery will then be allowed each ship from the other in accordance with the proportional gravity of the fault of that other. Recovery may be for one-half, as under our present rule; or, in proportions of more than one-half, or less than one-half, depending upon the gravity of fault. Thus, as shown in the illustration already given, recovery under the new rule would be:

Assumed facts:

Ship A held $\frac{1}{4}$ to blame—damaged	\$100,000.
Ship B held $\frac{3}{4}$ to blame—damaged	\$ 50,000.
Ship A would recover from Ship B	
$\frac{3}{4}$ of \$100,000	\$ 75,000.
Ship A would have to pay ship B	
$\frac{1}{4}$ of \$50,000	12,500.

Difference \$62,500.—A's net recovery.

Thus the change in rule will have caused ship A to gain in recovery \$37,500 more than she would have recovered under the present rule; and, of course, the change will have caused ship B to pay \$37,500 more than under the present rule.

(b) In case, however, cargo aboard ship B should be damaged in the collision, say to the extent of \$50,000, the situation would be as follows:

Assumed facts:

Ship A $\frac{1}{4}$ to blame—no cargo damage, but ship damaged		\$100,000.
Ship B $\frac{3}{4}$ to blame—ship damaged	\$50,000	
her cargo damaged	50,000	
Total B—	\$100,000	Total A— \$100,000

⁴⁰The writer will not discuss in this paper personal injury or death claims; nor any provision affecting collisions other than the proportional rule of the Convention as to damages as it affects ships and cargoes. There are other provisions of the Convention affecting collisions.

Settlement of Decree⁴¹

Ship A's account would stand:

Ship A recovers $\frac{3}{4}$ of \$100,000 from ship B for ship damage		\$75,000.00
Ship A pays to ship B $\frac{1}{4}$ of \$50,000 for ship damage	\$12,500.00	
Ship A pays to cargo owner $\frac{1}{4}$ of \$50,000	12,500.00	
	<hr/>	
Total payments by ship A	\$25,000.00	\$25,000.00
		<hr/>
Ship A's net recovery.....		\$50,000.00
So that ship A's loss will be ship damage	\$100,000.00	
Less net amount of recovery	50,000.00	
	<hr/>	
Ship A's actual loss	\$50,000.00	

Ship B's account would stand:

Ship B recovers $\frac{1}{4}$ of \$50,000.00 from ship A for ship damage		\$12,500.00
Ship B pays to ship A $\frac{3}{4}$ of \$100,000.00 for ship damage	\$75,000.00	
Ship B pays nothing to cargo owner, if we assume ship B to be protected against liability by virtue of The Harter Act, for example.		
	<hr/>	
		\$62,500.00

So that ship B's total loss will be:

Loss by damage to herself	\$50,000.00
Payment to ship A for ship damage	75,000.00
	<hr/>
Total	\$125,000.00
Ship damage recovered from ship A	12,500.00
	<hr/>
Ship B's net loss	\$112,500.00

⁴¹In all probability our courts will retain a discretionary power with respect to costs which will have some restraining influence as regards the prosecution of cases and appeals on speculative chances.

In the English courts the parties in these cases usually paid their own costs until recently. A decision under the Convention rule has now held the court had power to divide them. In the English courts litigation costs are very much greater than in American courts; and some here think that the question of court costs in the United States will not play much part in restraining litigation; others have a contrary view.

Cargo-owners Account:

Total loss in collision	50,000.00
Amount of recovery from ship A (non-carrying ship) $\frac{1}{4}$ of loss, be- ing in proportion to the gravity of fault adjudged against ship A	12,500.00
Actual loss to cargo-owner for which he has no right of recovery against either ship or their owners	\$37,500.00

These results will, naturally, vary under the operation of the rule, depending upon the assumed facts of each case. Always, however, the *carrying* ship is likely to escape liability altogether for such part of her cargo loss as the proportion of her fault for the collision bears to the amount of that loss. In the case assumed, cargo would, under the *present rule*, in the United States, recover the whole amount of its loss from ship A and ship A would have contribution from ship B for one-half the amount paid to the cargo owner. The account would under that rule appear as follows:

Ship A damaged	\$100,000.00
Ship B damaged	50,000.00
Ship B's cargo damage	50,000.00

Ship A's Account:

Ship A recovers $\frac{1}{2}$ the difference be- tween her own damage and that of ship B, <i>viz</i> :	\$25,000.00
Ship A, as the non-carrying ship, has to pay the whole cargo damage	50,000.00
But is permitted by way of contri- bution to recover $\frac{1}{2}$ or \$25,000 thereof from Ship B, making Ship A's total recovery from Ship B	50,000.00
Ship A's actual loss is her own damages	\$100,000.00
plus the amount she paid B's cargo	50,000.00
Total	150,000.00
Less	50,000.00
The net loss of ship A therefore is	\$100,000.00

Ship B's Account:

Ship B pays her own ship damage	\$50,000.00
Ship B pays ½ of balance of ship damage which is in favor of ship A, <i>i. e.</i> ½ of \$50,000	25,000.00
Ship B makes good to ship A by way of contribution ½ of the amount of cargo damage paid by ship A to her cargo	25,000.00
	<hr/>
Ship B's actual loss	\$100,000.00

It appears, accordingly, that a change to the Convention rule will be, as chance may have it, distinctly advantageous to ship-owners whenever cargo is aboard either one or more of the colliding ships. In short, the Convention rule *permits*, as between ships, an equitable distribution of the collision loss upon the wrongdoing ships in proportion to the degrees of fault for which they are respectively held guilty and does not arbitrarily say: you must find each ship one-half to blame. The rule will also prevent a cargo owner recovering from a ship by indirection what could not be recovered directly on account of the Harter Act's exemptions, which, of course, is an advantage to the ship-owner, and would at least seem to be in accord with our national policy as expressed in the Harter Act.⁴²

2. *From the point of view of the cargo-owner.*

The admiralty law of the United States has always, as shown, given the cargo-owner full protection against his losses in collisions. The cargo owner has been regarded as "innocent." The liability of the colliding ships has been held to be *joint* and *several*. The "general ship" was a common carrier with the usual liability of such⁴³ and, prior to the Harter Act, responsible for all losses, however occasioned, unless by the act of God, public enemy or by some other cause or accident, without any negligence of the ship, expressly excepted in the bill of lading.⁴⁴ Stipulations exonerating a ship from losses due

⁴²Notwithstanding the *Chattahoochee*, *supra* note 31. See the discussions in the Report of the London Conference of the International Maritime Committee, 1899, *supra* note 19. There both sides of the question were presented and had as advocates some of the most eminent judges, lawyers, text-book writers, and practical steamship men.

⁴³Law prior to Harter Act. *The Propeller Niagara v. Cordes*, 21 How. 7 (U. S. 1858).

⁴⁴*Liverpool & Great Western S. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469 (1889); *The Guildhall*, 58 Fed. 796 (S. D. N. Y. 1893), *aff'd* 64 Fed. 867 (C. C. A. 2d, 1894); *The Glenmavis*, 69 Fed. 472 (E. D. Pa. 1895); and this was so notwithstanding stipulation may have been valid where contract of

to negligence were, and still are, always held void in the United States courts as contrary to public policy. The Harter Act, passed in 1893, prohibited the insertion of negligence clauses, but prescribed the conditions under which, if complied with, a shipowner might escape liability for negligence.⁴⁵ This act does not protect a ship against loss due to negligent loading, stowage, custody, care or proper delivery of cargo, so that the carrying vessel is liable for losses due to such negligence, and the Convention Rule is not likely to affect recovery for such losses.⁴⁶

The Maritime Convention rule will result in giving full and no doubt intended effect to the Harter Act by doing away with the doctrine announced in the *Chatahoochee*, whereby indirect recovery is allowed through the theory of contribution against the carrying ship. It may be safely asserted, therefore, that the Maritime Convention rule will result *disadvantageously* to cargo interests and their underwriters in any view which may be taken of the application of that rule.

The foregoing discussion and what will now follow, taken together with the above consideration of the subject from the point of view of the *shipowner*, sufficiently suggests how the Convention rule will affect cargo interests.

SOME CONSIDERATIONS FOR AND AGAINST ADOPTING THE PROPORTIONAL DIVISION RULE

The equal division rule, as it finally emerged in the admiralty practice and was inherited by us from England, represents, in its

carriage was made. See *Liverpool & Great Western S. S. Co.* and cases in which that case had been followed. Otherwise, if ship is private carrier or voyage is between foreign ports and stipulation valid where made. *The Fri*, 154 Fed. 333 (C. C. A. 2d 1907), certiorari denied, 210 U. S. 431, 28 Sup. Ct. 761 (1908); *Golcar S. S. Co. v. Tweedie Trading Co.*, 146 Fed. 563 (S. D. N. Y. 1906); *The Royal Scepter*, 187 Fed. 224, (S. D. N. Y. 1911); *The Miguel di Larrinaga*, 217 Fed. 678 (S. D. N. Y. 1914).

⁴⁵Some of leading cases on carriage of goods under the Harter Act are: *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516 (1896); *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753 (1898); *Knott, Pelihoner v. Botany Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30 (1898); *Gvt. Nav. Co. v. Farr & B. M. Co.*, 181 U. S. 218, 21 Sup. Ct. 591 (1901); *The Wildcraft*, 201 U. S. 378, 26 Sup. Ct. 467 (1906); *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102 (1902); *The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363 (1909); *The Aprillao*, 270 Fed. 426, (C. C. A. 2d, 1920); *Herman v. Compagnie General Transatlantique*, 242 Fed. 859, (C. C. A. 2d, 1917). These cases are taken from LORD & SPRAGUE'S admirable little book *CASES ON ADMIRALTY*, and are very good selections. Reference is made to the excellent foot-notes therein to be found.

⁴⁶See § 1 of the Harter Act and the cases *supra* note 44. For the modern English view see COLE, *op. cit. supra* note 5.

departure from the common law rule, simply an attempt to make a more equitable distribution of the losses among the wrongdoing ships. The Maritime Convention rule is likewise nothing more than a further attempt to attain that ideal—exact justice. Accordingly, there is no need to fear that a change will violate any “principle,” certainly in so far as the relation between ships is concerned. It has long been recognized that in application the equal division rule frequently brings about grossly inequitable results. In 1873 the Supreme Court of the United States⁴⁷ laid down the rule that when a ship in collision is at the time violating a *statutory* rule intended to prevent collisions, it is a reasonable presumption that the fault was at least a contributory cause of the disaster, and, therefore, that the ship must show not merely that her fault *might* not have been one of the causes or that it probably was not, but that “*it could not have been.*” A similar rule was by statute adopted in England.⁴⁸ Therefore, even though one ship may have been guilty of very slight fault and the other of very gross fault, they *pay the same*. This happened in the S. S. Selja and S. S. Beaver collision⁴⁹ and in the S. S. Pomaron and S. S. Alleghany collision.⁵⁰ In this last case proctors for the S. S. Pomaron urged in their brief application of a proportional division, but, of course, the plea was disregarded. In that case the S. S. Alleghany’s liability was limited, which resulted in considerable hardship for the other vessel. In commenting upon the case the district court for the Southern District of New York said that the case is one “*which shows the necessity for the proposed new rule which will not hold each ship in solido, but will apportion liability according to fault.*” The operation of the present rule may often make it to the advantage of the *carrying* ship to admit entire fault for a collision—she may then get off from all cargo payment. England has, by adopting the Convention proportional division rule abolished, says Mr. Marsden,⁵¹ an arbitrary rule and leaves the

⁴⁷The Pennsylvania, 19 Wall. 125 (U. S. 1873).

⁴⁸Merchant Shipping Act, 1894, § 419 (4), (1894) 57 & 58 Vict. c 71, § 419 (4).

⁴⁹Lie, Master of S. S. Selja, etc., v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270 (1917).

⁵⁰Yang-Tze Ins. Ass’n. v. Furness Withy & Co., 215 Fed. 859 (C. C. A. 2d, 1914), certiorari discussed and dismissed, 242 U. S. 430, 37 Sup. Ct. 141 (1917). See also Richelieu Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 674, 10 Sup. Ct. 934 (1890); and Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264 (1893); and the English rule was (prior to 1911) the same, The Agra, L. R. 1 P. C. 501, 504, 505 (Eng. 1867).

⁵¹MARSDEN, op. cit. *supra* note 8, at 66. But Mr. Marsden thought the cargo should always have right to recover. See his statement *London Conf. 1899, Int. Mar. Com., supra* note 19, at 84, 85.

court to follow "what is a reasoning judgment and to say: 'Did this want of obeying the regulations in any way contribute to the collision?' not 'Might it possibly have done so.' "

Some years ago it is known that a communication was addressed to a number of United States judges in different parts of the United States asking their views upon the proposed convention rule as it would affect ships. Of the answers received, 26 favored, and two opposed, the change. Many of those favoring change were eminent judges of very considerable admiralty experience, especially in collision cases. Shipowners contend that the change will correct an unjust application of the Harter Act, namely, the indirect recovery by cargo through the doctrine of contribution already referred to as established by the *Chattahoochee*; also that the change will prevent shipowners having to pay a part of the loss largely in excess of their ship's proportionate degree of fault, and also the highly inequitable results in cases where the grossly negligent vessel cannot or does not respond for her share of the loss. This change, it is said, will affect only underwriters, and that they are in no way interested in legal principles which form the basis of liability.⁵²

In application, the proportional rule is working satisfactorily in the countries which have adopted it, and no difficulties are being experienced.⁵³ The writer has seen letters to this effect written by eminent foreign admiralty lawyers, insurance officers and shipping men. The American delegates signing the Convention reported that judges were having no difficulty in applying the rule and that it was a rule which in practice is often followed in reaching compromise settlements. Our judges are frequently doing just as difficult things in making apportionments in salvage and personal injury⁵⁴ awards as they will be called upon to do in fixing the degrees of fault of colliding vessels.⁵⁵

In the event, however, that it is not possible to determine the degree of fault the rule itself makes provision that the *equal division* rule shall apply. In the English cases reported in Lloyd's List Law

⁵²Roscoe, *op. cit. supra* note 18, at 22.

" . . . In our courts (U. S.) 99/100ths of the maritime litigation is promoted by underwriters and 99/100ths is defended by underwriters." London Conference, 1899. *Int. Mar. Com.*, *supra* note 19, at 137.

⁵³Foreign Relations of United States (1909) 657.

⁵⁴Merchant Marine Act 1920, § 33, 41 S. L. 988. Also personal injury cases in admiralty; also salvage cases.

⁵⁵See *London Conf. 1899, Int. Mar. Com.*, *supra* note 19, at 71n.

Reports for the years 1922 to 1927 inclusive, there appear 316 collision cases, divided as follows:

- 247 cases one ship is held solely to blame;
- 40 cases the damages are equally divided;
- 13 cases the damages are divided $\frac{1}{3}$ and $\frac{2}{3}$;
- 13 cases the damages are divided $\frac{3}{5}$ and $\frac{2}{5}$
- 1 case the damages are divided $\frac{1}{5}$ and $\frac{4}{5}$.

In at least one very important manner, however, the change might affect the relations between shipowners and their underwriters. The decisions now hold that a collision, both vessels at fault, gives rise to a *single liability* and not to *cross liabilities*. It is not clear what effect the Convention rule will have upon these decisions, bearing in mind that ships are often insured in different insurance companies in various parts of the world. There is here involved the construction and practical operation of what is known as the "collision" or "running down clause." The question arises upon the construction to be placed upon the expression which requires the underwriters to pay "the sum which the insured becomes liable to pay, and shall pay." It would require too much space to discuss this problem here, but those who wish to consider the matter in its legal aspects are referred to the authorities.⁵⁶ The change of rule in England has not, so far as known, brought about any change in the "collision" clauses in that country and London is the marine insurance center of the world. But whatever effect the change might have would probably soon be adjusted by underwriters through appropriate contract provisions and agreements, as they have heretofore met changes in the law.⁵⁷

Some opponents of the change say that there will be uncertainty on appeals and weakness in judgments, because judges are not likely to be in accord in their estimates upon the degrees of fault of the respective ships. The response made to this is that there is not likely

⁵⁶See 38 C. J. 1102-1103; I ARNOULD, LAW OF MARINE INSURANCE AND AVERAGE (10th ed.) §§ 791-796; GOW, MARINE INSURANCE (3d ed. 1903) c. XV, especially pp. 248 and 251 *et seq.*; MARSDEN, *op. cit. supra* note 8, at 145-150 inclusive; MCARTHUR, LAW OF MARINE INSURANCE (2d ed. 1890) 358, and Appendix II and Appendix III, pp. 370-378, inclusive, and the cases cited by the authors named; ELDRIDGE, MARINE POLICIES (2d ed.) 153.

See the following cases: *Peters v. Warren Ins. Co.*, 14 Pet. 99 (U. S. 1840); *General Mutual Ins. Co. v. Sherwood*, 14 How. 351 (U. S. 1852); *Western Transit Co. v. Brown*, 161 Fed. 869 (C. C. A. 2d, 1908). See note 2 ARNOULD, MARINE INSURANCE (11th ed.) 1018, comparing English and American cases.

⁵⁷It is thought by Mr. Marsden that the Convention rule will affect the decisions and that the liabilities may under it be held to be *cross* instead of, as now, *single*. See MARSDEN, *op. cit. supra* note 8, at 147-148.

to be more divergencè of view than now exists when appeals are prosecuted in mutual fault cases. The English courts have held, in cases since adoption of the Convention rule, that the decision of the judge of first instance should not lightly be interfered with,⁵⁸ but in the case cited the court did interfere. And see the *Clara Cadmus*,⁵⁹ where there is a criticism of the rule and a warning against too great refinement in determining degrees of fault.

In England in the trial of actions for collisions and salvage the judges of the Admiralty Division (Probate Divorce and Admiralty Division) of the High Court of Justice are usually assisted by two Elder Brethren of the Trinity House, which was incorporated in 1516 by a charter from Henry VIII. In 1673 nautical experts were for the first time called in to advise. Nautical assessors now assist the Court of Appeal and the House of Lords in admiralty cases. The assessors who advise are two of the Elder Brethren of the Trinity House. The courts may call for advice and assistance. The judges are not bound by the advice, for decisions rest entirely with the judges. There are often disagreements. Where these advisers are sitting upon a trial, expert evidence is inadmissible.⁶⁰ In the United States there are no similar officials whose function it is to aid our courts in nautical matters, and it is asserted that our Judges are not prepared for determining niceties of fault on the part of several vessels in collision. This objection was considered at the 1899 London Convention of the International Maritime Committee. The late Wilhelmus Mynderse, a distinguished admiralty lawyer of New York, who represented

⁵⁸The Peter Benoit, 84 L. J. R. 87 (1914), Court of Appeals (with nautical assessors). This was an appeal in which the lower court was reversed. The House of Lords, on appeal, affirmed the decision of the Court of Appeals which had changed a 1/5 and 4/5 decision to equal division. The House of Lords also held that the fault to degree of which liability is to be apportioned means a fault causing or contributing to the collision.

⁵⁹The Clara Cadmus, 26 Lloyd's List L. R. 39.

⁶⁰Some cases are given for those interested in the subject. The Hankow, 4 P. D. 197 (Eng. 1879); The Hannibal, L. R. 2 Ad. & El. 53, 56 (1867); The Assyrian, 6 Asp. Mar. L. Cas. 521 (Eng. 1889); The Banshee, 6 Asp. Mar. L. Cas. 130 (Eng. 1889); The Hounthandel, 1 Spinks, Eccl. & Adm. 25 (Eng. 1833); The Princess Alice, 3 W. Rob. 138 (Eng. 1848); The Christiania, 7 Notes of Cases, 2, at 7 (Eng. 1847); The Gannet, [1900] A. C. 235; The Beryl, 9 P. D. 137 (Eng. 1884); The City of Berlin, (1908) P. 110; The Philotaxe, 3 Asp. Mar. L. Cas. 512 (Eng. 1877); The Magna Charter 1, Asp. Mar. L. Cas. (1871); The Bella Donna, No. 6072 (1869) (case reheard with three Trinity Masters); The Ann & Mary, 2. W. Rob. 189 (Eng. 1843); The Sir Robert Peel, 4 Asp. Mar. L. Cas. 321 (Eng. 1880); The Marathon, 4 Asp. Mar. L. Cas. 75 (Eng. 1879); In the Olaf Nickelsen, Fo. 50 (1894), the Trinity Masters went to inspect the place of a grounding. See also the Victor Govacevich, 10 P. D. 40 (Eng. 1885).

with Ambassador Choate, the Maritime Law Association of the United States at that meeting, said:

"This does not appear to me as an individual nor does it appear to our Admiralty Judge in New York nor to many others that there would be any practical difficulty in applying the rule. It seems to me that you leave to the discretion of the Judge a good many things, and if you included this there would not be wider questions involved than he has to pass upon in Salvage actions and in cases of personal injury. So that if it comes to a vote, I am entirely free to cast my personal vote in favor of the proportional rule. I should like it to be understood that my association has adopted the rules as to its justice, but it is divided in opinion as to the practicability of the application of the rule."⁶¹

In practice in the United States litigants introduce expert testimony upon matters involving seamanship to aid our courts which consider but may disregard such expert opinions.⁶²

But it is not likely that objections to a change to the proportional rule will come from shipowners and their insurers, for such a change would be really in the nature of an aid to the shipowning interests. It is really, as stated, largely a matter for underwriters, although it is believed there are some interests which carry their own insurance on their ships and the cargoes which they transport as incident to their business. Still, they really become in this way insurers and stand like them. Objection will unquestionably come, however, from shippers of cargo and their underwriters, for as shown cargo will lose some of the protection which it enjoys under the present rules. About 1911, after the Convention was signed and submitted to our state department, it was rumored that certain milling interests made concerted protests against ratification of the Convention. It did not appear what influences were at work to bring these protests about. But since 1910, the United States has become, as later shown, the second largest owner of the world's sea tonnage and great efforts are now under way to maintain our merchant flag on the seas. Congress has passed the so-called Jones-White Bill, which has been signed by the President, and is now the law. This bill and the large appropriations contemplated in aid of our Merchant Marine seem to assure a determination on the part of the American people to maintain our merchant fleet. So it may be that our national policy is now to be one which will give far more consideration than heretofore to the position of the ship under our maritime

⁶¹Report of London Conference, *supra* note 19, at 71.

⁶²See generally *The Conqueror*, 166 U. S. 110, 133, 17 Sup. Ct. 510 (1896).

laws, in order to encourage shipowning and operation. But it will be urged that thus far our national policy has certainly been directed to cargo protection as against ship protection for the reason that the United States is largely a cargo-shipping nation; that the reason for that policy still exists since we are still essentially shippers of cargo and not carriers of cargo. That we are great shippers of cargo cannot be gainsaid. Let us examine for a moment our cargo tonnage, its value and the tonnage of our ships and what they carry. From these it will appear how largely we still remain shippers as against carriers of cargo. These figures are as follows: The water borne foreign commerce of the United States⁶³ increased 18.7% from 1921 to 1926, excluding coal shipped on account of the British strike,—or, from 81,824,834 cargo tons in 1921 to 97,125,756 tons in 1926. In value this trade was \$6,888,080,000 in 1921, whereas in 1926 (excluding coal) it was \$9,045,869,000. This represents an increase over 1921 of 31.3%. Including the United States, thirty-three countries participated in the carriage of our foreign trade of 1926. This resulted in almost 58,500 entrances and clearances involving 5,761 vessels (100 gross tons or over) of over 112,800,000 cargo tons (including coal). Of this number of vessels the United States has 1676 vessels (100 gross tons or over) carrying 38,200,000 cargo tons, representing about 34% of our total foreign trade. In the foreign trade of the United States, trans-Atlantic, trans-Pacific and east and west coast of South America (overseas foreign trade) there were engaged 3,830 vessels (100 gross tons or over) carrying 69,821,000 cargo tons. Of these vessels the United States had 596 which carried only about 22% of this total tonnage transported. The water borne foreign import and export cargoes carried in foreign vessels increased 87.4% from 1921 to 1926. While American vessels carried 51% of our total foreign import and export cargo tonnage in 1921, in 1926 they transported only 25%. On the other hand, and considering our ship owning interests⁶⁴ the merchant seagoing tonnage of the United

⁶³These and the following figures are obtained from *Part 2, Merchant Marine Hearings* before the House Committee, Washington, March 2-14, 1928. The cargo figures are from *Report Economist, Bureau of Operations*, U. S. Shipping Board. See *Part 2, Merchant Marine Hearings*, 766.

⁶⁴These figures have been taken from schedules filed by Homer L. Ferguson, President New Port News Shipbuilding Dry Dock Company, and President of the National Council of Shipbuilders, who is highly regarded in shipping circles. These schedules, as well as many other interesting statistics, from various sources, are in *Part 2*, at 294. *Hearings before Merchant Marine & Fisheries Committee of House of Rep. March 2-14, 1928*, which may be obtained from Government Printing Office at Washington.

States (1,000 and above gross tons) July 1, 1927 was 2,226 ships (excluding Great Lakes) of a total of 10,872,539 gross tons against British Empire 4,319 ships totalling 19,924,953 (excluding Canadian Lake shipping) gross tons. But of that tonnage the average tonnage laid up, as of July 1, 1927, was for the United States, including ships privately owned and those owned by the United States Shipping Board, 694 ships of 3,183,318 tons, while for the British Empire the number of laid up ships was 111 with a tonnage of only 387,256. These figures for the United States exclude shipping on the Great Lakes.

Since the problem involved in this change of rules largely concerns insurance, we may very well consider the two interests from the point of view of insurance premiums. It is estimated that there is available in the United States from \$15,000,000 to \$17,500,000 of insurance *premiums* for ship, and about \$40,000,000 of *premiums* for cargo insurance; that of the former only about \$10,000,000 represent premiums from ocean going tonnage, of which two-thirds at present go abroad, while of the latter (cargo) about 90 to 95 per cent. is retained in the United States.⁶⁵ The premiums represent, of course, many millions property value. In ship insurance the premiums are usually yearly, while in cargo insurance the turnover is rapid.

When it is stated that objections to the change are likely to come from cargo shipping interests, it is highly important to understand that this does not mean the American individual or corporate shipper of cargo. On the contrary, it may be safely asserted that the American owner and shipper of cargo, *i. e.*, our merchant, is not in general interested at all. Practically all cargoes are insured. In this day of keen competition by insurance companies for cargo insurance in this country, as well as elsewhere, such insurance may be obtained, and usually is obtained, covering every conceivable risk to which cargo is likely to be subjected in course of its transportation. In fact, insurance documents form in most cases part of our banking scheme whereby merchants are enabled to secure at once payment for their goods. So that the merchant who does not insure his goods for the voyage is speculating for small gain contrary to sound business practice. There are many forms of cargo marine insurance, but this is no place to discuss these various forms. It is sufficient to say

⁶⁵Charles R. Page, President Fireman's Fund Ins. Co., Home Fire & Marine Ins. Co., Chairman American Marine Insurance Syndicate and President Board of Marine Underwriters of New York, testifying before Merchant Marine Committee on Friday, March 9, 1928. See Part 2, *Hearings supra* note 64, at 509-510.

that practically all shipments are insured to full value against all sorts of causes of loss. The insertion in marine cargo policies of what are known as "institute causes" and the like, which admit the seaworthiness of the ship as between the cargo owner and his insurer, has taken from the shipper the burden imposed upon him by the implied warranty of seaworthiness.⁶⁶ So that now when a loss occurs due to the happening of a marine peril the merchant turns at once to his insurer who pays him, in the absence of fraud, promptly. The insurer then fights out the legal questions with the shipowner who is nearly always represented in like manner by his insurer or the mutual protection company or club in which his ship is entered. The legal contests are, therefore, contests between insurance companies on the one hand and ship protection clubs and ship insurers on the other. The actions are prosecuted under rights of subrogation either in the name of the insurance company or the insured, as convenience or policy might dictate—the expenses of the litigation being born by the insurers or the club. Insurance companies usually do both a cargo and a ship insurance business, so that at one moment a company will be for the ship and the next for cargo,—or, one company may be on both sides of the fence as the result of a single disaster. American marine insurance companies, and foreign marine insurance companies accredited for doing business in the United States, are naturally more interested in *cargo* insurance because in that there is a far greater volume of business offered to them in this country and the cargo business is said to be more profitable to the companies than is ship insurance.

The insurance companies, it is urged, will increase the premiums which merchants have to pay, if the Convention rule is adopted, since those premiums are based upon recoveries in litigation, and such recoveries will be greatly reduced where there is only a several liability imposed. The writer has failed in an effort to secure any information in regard to the proportion of marine losses attributable to mutual fault collisions; and careful inquiries at well informed sources do not confirm the apprehension that a change of rule will increase cargo premiums. All the authorities conferred with seem to agree that the spread in cargo insurance is so great, owing to the large volume of such business, that even if any increase of premium should

⁶⁶See the *Clinchfield Fuel Co. v. Aetna Insurance Co.*, 121 S. C. 305, 114 S. E. 543 (1922), argued by the writer. This case shows one construction of the Institute clause. See also WINTER, *MARINE INSURANCE* (1919) 177; also 12 *Asp. Mar. L. Cas.* 246 (Eng. 1912). 1 ARNOLD, *op. cit. supra* note 56, at 19. The Institute clauses do not affect the relations between the insured and the ship.

come it would be entirely too small to become a factor in business transactions. They seem also to be agreed that, while recoveries in this litigation may theoretically play a part in premium fixing, in practice they really do not. In this connection it should be recalled that it usually takes years to adjust annual accounts in these particular matters, so that it would seem difficult to believe that recoveries in litigations have any real influence in determining the amount of the premium charge. This change in the rule of damages will surely not increase losses, and if cargo insurance takes thereby a greater load then, theoretically at least, there should be a corresponding release of that load from hull insurance—and the insurance companies are generally engaged in both kinds of insurance.

It has likewise been urged that a change to the proposed rule will not be in the interest of public policy since shipowners will not use the same degree of care exercised under the old rule. The operation of the Convention rule in other countries applying it does not seem to justify any such fear. It is submitted that there are too many impelling reasons of both business and policy which require a shipowner to use care for the safety of his ship for him to be affected in this respect by a change to the new rule.

Whether the proportional damage rule in collisions should be adopted in the United States is after all a question of *expediency*—a matter of *policy*. Are the objections offset by the advantages to be gained from unification of the laws of sea trade? That is the real question. The writer does not share the feeling that a change will violate some great "principle" of law. It is urged that it does especially because cargo has always been allowed to make its loss good as against any or all joint tortfeasors; and that in Admiralty the principle of contribution between wrongdoing ships is firmly established. But old principles as regards negligence are being constantly modified whenever expediency seems to demand a modification. Where, for example, are now our principles of the law of tort in respect to contributory negligence, the fellow servant rule, etc.? We departed from *principle* when we passed the Harter Act. That operates very much like the negligence clause and yet our principle had always been against permitting a shipowner to exempt himself from liability for the negligence of his servants. Do we not also depart from principle (notwithstanding its history) when we say a steamship owner shall not be liable when his ship has sunk through the negligence of her master and crew, his agents? The English require their shipowners to pay a certain amount per ton. If we now say cargo cannot recover from the noncarrying ship, the amount which

by law it cannot recover from the carrying ship, is not that really putting into effect a principle already adopted in well considered legislation which itself is already a departure from principle? It may not be expedient as a matter of national business policy to adopt the new rule and apply it to cargo. The predominant insurance business interests of our country may insist upon retaining the present rule, but we should not confuse our reasoning in the matter by declining to make the change under a claim that some great principle is involved. It is a duty of the legal profession to discard mere principle when the demands of a new age require change. Legal tradition may retard but it cannot, in the long run, prevent changes in fixed rules of law when demand for a change is apparent.⁶⁷

If it should be found desirable to change our law to the Convention rule as regards ships, but not as regards cargo, cargo could be excepted from the operation of the rule in the same manner that claims due to death and personal injury have been excepted in the 3d paragraph of Article 4 of the Convention.⁶⁸

Since a change from our present rule to the Convention rule is a matter of policy or business expediency, the general public will, of course, be afforded in due time an opportunity to express its views for and against ratification of the Convention. This opportunity will come when the State Department transmits the proposed Convention to the Senate and the usual proceedings get under way for consideration of the matter. Then shipowners, underwriters of both hull and cargo, protection and indemnity companies and clubs, interests which are uninsured (if any), partly insured or which carry their own insurance, small craft interests, and persons generally concerned with maritime affairs will have a chance to point out what the real interest of our commerce demands. There has already been some consideration given the subject in the United States. For example, the Maritime Law Association of the United States, a body of admiralty lawyers, underwriters, etc., has at various times for some years considered this proposed rule. In 1899 that Association sent Wilhelmus Mynderse, Esq.⁶⁹ to the London Conference of the International Maritime Committee which discussed the proposed rule. He presented the Association's action which had been taken on June 28, 1899 upon a circular of the Executive Council of

⁶⁷See Pound, *The Task of the American Lawyer* (1926) 20 ILL. L. REV. 439, especially at 444 et seq.

⁶⁸See the 3d paragraph of Article 4 of the Convention quoted above.

⁶⁹See above reference to Mr. Mynderse, *supra* note 35. He had had a great deal of experience in collision trials in different parts of the country.

the *Comité Maritime International* which had propounded the questions. This action reported was to the effect that as to vessels the Maritime Law Association of the United States recognized the more exact theoretical justice of degrees of apportionment, but "are so nearly divided in opinion as to the difficulties of such a rule in practice that they are not prepared to make any positive recommendation in regard to it." As to cargo, the reported action was that the innocent third party injured by the joint fault of two vessels should have the right to hold them and their owners responsible jointly and severally, with the right of contribution as between the vessels. Mr. Mynderse presented this report, but stated his personal views which he said were contrary to the action of the Association and so he refrained from voting in London.⁷⁰ In 1922, this Association again considered the subject. This time the special committee appointed to study and report upon the matter reported favorably upon the adoption of the Convention rule. The report was received and ordered filed, printed and distributed and the committee continued. In 1927, a new special committee having been appointed, another report was presented in which the majority was against adopting the Convention. The considerations actuating the majority in this report were: (a) that the rule imposed too great a *burden* on our judges; (b) that *The City of New York* rule⁷¹ that Courts should not look for minor faults, is sufficient for practical purposes; (c) that the *in extremis* rule would be emasculated; (d) that collision litigation would be carried to common law courts; (e) that appeals would be increased and compromise settlements made more difficult. The report also cites an English court criticism of the working of the rule.⁷² Upon this report of the special committee the Association by majority vote passed a resolution against adoption by this country of the Convention rule. The American Bar Association has had the matter under consideration for several years and a bill was drafted, but the association has not yet finally acted.⁷³ The report of the executive committee of that association, dated July 14, 1926, states that because of many apparently well considered protests against the bill "Relating to the Maintenance of Suits for Damages by Collision on the High Seas and other Navigable Waters," recommended for approval by report

⁷⁰See *Report of London Conference 1899 Int. Mar. Com.*, *supra* note 19, at 21, and the debates presented in the volume.

⁷¹147 U. S. 72, 13 Sup. Ct. 211 (1892).

⁷²The *Clara Cadmus*, *supra* note 59.

⁷³See AM. B. A. REP. for past several years, especially reports of Committee on Commerce, Trade and Commercial Law and of the Committee on Admiralty and Maritime Law.

of the committee on admiralty and maritime law, that the bill be not approved and the subject matter be referred to the committee on admiralty and maritime law. In 1927 this committee did not report upon the subject and it is still before that committee for report to the association.

Very considerable public discussion of the subject of this Convention is certain to come in due course. In the meantime there may be some advantage in considering part of the debate in the House of Lords in England before Great Britain changed its rule and adopted the rule of the Convention.⁷⁴

In the House of Lords on October 31, 1911, Lord Herschell, former L. C. said:

"The first criticism was that this proportional rule was not founded on principle. I think that to a certain extent this is true, but one might suppose that those who advanced this argument in order to retain the present rule—the Admiralty rule—were under the impression that the Admiralty rule was founded on principle. This I do not think anybody could maintain, for it has been known for many years as *rusticum judicium*, a rough-and-ready form of justice. On the other hand, there does seem to be in the proportional rule, a certain amount of what one might, perhaps, call principle, in the fact that the proportional rule endeavors to make the greater sinner pay the penalty."

In the course of the same debate Lord Gorell criticized the proposed rule. The Lord Chancellor (Earl Loreburn) stated that Lord Gorell (formerly Sir John Gorell Barnes) was the first authority in England and probably one of the first anywhere upon the matter. Lord Gorell said the rule endeavors to establish a form of liability practically impossible to apply with any degree of accuracy, and that in this:

"I have the authority of Judges of the Admiralty Court in former days . . . and the older Judges in the Admiralty Division, or the Admiralty Court as it then was, got rid of all that difficulty by declaring that no human being could say how much blame was to be attached to each of the vessels. They, therefore, adopted the rule that if both contributed to the collision each should bear one-half the loss, and that has been the English rule."

Then Lord Gorell said it had been reported that ninety per cent of the "both to blame" cases on the continent had been divided by

⁷⁴The following quotations and references are taken from: Parliamentary Debates, 9 H. L. OFF. REP. No. 72, and 10 *ibid.* No. 78, for 15 August 1911 and 31 October, 1911, respectively.

the judges equally. In other words, that meant simply that the judges could not determine the degree of fault of each vessel and "consequently they have jumped it, as our old Admiralty judges did, by saying each pays half." He felt, he said, that a judge should not be placed in an arbitrator's position to make a "rough-and-ready shot as to blame" for that would tend to weakness of decision. And, moreover, that on appeals great difficulty would be encountered because he could not see how two men will necessarily come to the same conclusion "on the question of proportion of fault, or how there is to be any definite certainty of decision." Criticisms were also directed at the rule by the Lord Chancellor and Earl Halsbury. Lord Herschell, in answer, said that the bill had a distinct provision which allowed the court to give a half-and-half decision where it cannot arrive at a conclusion as to what is the proportion of fault; that the foreign cases having been decided ninety per cent half-and-half division there was only a small minority where presumably the judge had no difficulty.

"It is, of course," said he, "impossible to expect Courts to work out the proportion of blame with mathematical accuracy, but at any rate the provisions of this clause do admit of some differentiation being made where the greater culpability of one vessel is flagrant and proved beyond all doubt."

Lord Gorell, however, in his concluding remarks made this notable statement:

"There has also been a feeling amongst a large section in England that it is an advantageous rule to have, and I do not think I can say that in the objections I have stated that I have had that support which resists a general agreement all over the ocean; you have, on the one hand, the great desire for uniformity of the law all over the ocean; you have an agreement by the nations which will produce that uniformity; and you have, as against that, the objections which I have stated. While probably your Lordships will think that the advantages of uniformity outweigh the objections I have suggested, I have felt it a duty that one who has a great deal to do with these cases should state the objections so that the House should be in full possession of the general considerations applicable to this question before coming to a definite conclusion upon it."

In answer to the charge that litigation would be increased, Lord Herschell said:

"This is, of course, a matter which can only really be decided by experience. But it is contended that there may be some inducement under this rule to contest a case in the hope of only having to pay a minority of the damages. On the other

hand, by adopting this rule there will be no longer the incentive which there is under the existing law to proceed with an action in the hope of getting off with half of the damages instead of the whole amount because the other vessel concerned was in fault in a small or technical degree."

The subject of this article is complex, with many difficult legal and business problems which cannot be treated adequately in limited space. It is the hope of the writer, however, that what has been set down here shall prove of aid (by way of suggestion) to those concerned or interested in maritime affairs.