THE PERSONAL CONTRACT DOCTRINE:
AN ANOMALY IN AMERICAN MARITIME LAW

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THE extent of the potential liability assumed by the owner of a loaded cargo vessel when she puts to sea prompted Congress more than 100 years ago to afford the shipowner a special privilege. No matter how great was the loss sustained by the owner of the cargo, the shipowner, if he was without "privity or knowledge" of the loss, could not be held liable for a sum greater than the value of his vessel and her freight pending¹ at the end of the voyage.² The immediate purpose of this legislation and of a later statute³ which expanded it was to limit the owner's liability for acts of the master, crew, or agent which were beyond the supervision or control of the owner⁴—i.e., losses caused without his "privity or knowledge."⁵ The ultimate purpose was to bring United States law into harmony with that of other nations⁶ and thus to encourage investment in the shipping industry.⁷

The effect of the legislation is often to deny the owner of the cargo full recovery even though the loss was caused by the fault of the carrier: the combined value of the vessel and her freight earned on the particular voyage may not equal the value of the cargo lost. And if the vessel sinks at sea, the cargo owner's recovery will not even include the value of the vessel. Value for limitation purposes is measured by what the vessel is worth when it reaches its port of destination; a ship that has sunk is valued at zero.⁸ This will be the result even though the vessel is insured and the shipowner is fully in-

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1. "Freight pending" means earnings of a particular voyage whether for the carriage of passengers or merchandise or both. See *The Main v. Williams*, 152 U.S. 122, 131 (1894); *In re Meyer*, 74 Fed. 881, 897 (N.D. Calif., 1896); ROBINSON, ADMIRALTY 932 (1939).

2. REV. STAT. § 4238 (1875), 46 U.S.C. § 183 (1946).

3. 23 STAT. 57 (1884), 46 U.S.C. § 189 (1946).

4. *The Fred E. Hasler*, 65 F.2d 589, 590-1 (2d Cir. 1933).

5. See note 25 *infra* and accompanying text.

6. In 1893 the Supreme Court said "[F]or the purpose of putting American Shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act. . . ." *The Main v. Williams*, 152 U.S. 122, 128 (1893). See also *Butler v. Boston S.S. Co.*, 130 U.S. 527, 551-2 (1889).

7. See *Richardson v. Harmon*, 222 U.S. 96, 104 (1911).

8. ROBINSON, ADMIRALTY 930-2 (1939).

demnified by his hull underwriter. The importance of this result is illustrated by the fact that freight earned today on a general cargo of 10,000 long tons shipped on a Victory type vessel from the United States to Europe will approximate \$140,000 while the value of the cargo will, in the average case, be at least twenty-five times that amount.⁹

Within fifty years of the enactment of this first Limitation Act, there evolved a unique judge-made restriction on this statutory limitation privilege. Our courts, apparently alone among the admiralty courts of the world, developed the doctrine that even though the loss is incurred without the shipowner's "privity or knowledge," limitation of liability will not be allowed if (1) the shipowner's liability is based on a contract and (2) that contract is *personal*.

The practical consequences of this "personal contract" doctrine are great because a vessel owner's liability for damage to cargo is often based on breach of contract. The contract is usually in the form of a bill of lading or a charter. The personal contract doctrine has not been applied to the former,¹⁰ but it has been applied to all three types of charters—bareboat, time, and voyage.¹¹ A substantial portion of the tremendous volume of ocean shipping accompanying the Korean war and post-World War II aid to Europe has involved the use of all three types of charters.¹²

9. This estimate is conservative. The rule of thumb for valuing general cargo for insurance purposes where actual value is not available is that the cargo is deemed to be worth \$500 per ton. A full cargo on a Victory type vessel would, on this estimate, be worth approximately \$5,000,000.

10. See *Earle & Stoddard v. Wilson Line*, 287 U.S. 420, 429 (1932).

11. *Capitol Transportation Co. v. Cambria Steel Co.*, 249 U.S. 334 (1919) (voyage charters); *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139 (1918) (time charters); *The Nat Sutton*, 62 F.2d 787, *modified on rehearing*, 63 F.2d 1021 (2d Cir. 1933) (bareboat charters).

12. On August 7, 1950 there were 95 Government owned vessels—other than tankers—under bareboat charter from the Maritime Administration to private operators in the foreign and domestic trade. U.S. DEP'T OF COMMERCE, MARITIME ADM'N, OFFICE OF SUBSIDY AND GOV'T AID, DIV. OF SHIP STATISTICS, ISSUE No. 116. Over a year later—on September 30, 1951—the number of such vessels had more than doubled—to 223. CONG. INFORMATION BUREAU BULL., No. H-624 1-2 (November 7, 1951), quoting U.S. DEP'T OF COMMERCE, MARITIME ADM'N, QUARTERLY REP. (July 1, 1951 to September 30, 1951).

With the establishment of the Military Sea Transportation Service after the beginning of the Korean War, the Government has commenced chartering privately owned vessels on a time basis. As of October 1, 1951 there were 28 privately owned vessels time chartered to the Military Sea Transportation Service. CONG. INFORMATION BUREAU BULL., No. H-603 6 (October 10, 1951), quoting from NAT. FEDERATION OF AM. SHIPPING, RESEARCH REP. (October 1951).

In the period July 1, 1950 to June 30, 1951, approximately 2.66 million tons out of a total of 4.2 million tons of ECA shipments of dry bulk cargo from the United States were carried in American flag tramps. CONG. INFORMATION BUREAU BULL., No. H-628 2 (November 14, 1951), citing ECA, THIRTEENTH REPORT TO CONGRESS. Tramp vessels carrying bulk cargoes operate under voyage charters. REPORT OF TRAMP SHIPPING COMMITTEES, UNITED STATES MARITIME COMM'N 1, 4-5 (August 5, 1949). See also, Ameri-

A simple illustration of the operation of the personal contract doctrine is provided by the situation where the charterer is himself the shipper. When, for example, the shipowner employs his vessel under voyage charter, *i.e.*, transporting full cargoes for a single shipper (the voyage charterer), a conflict of interests appears. It is to the shipper's interest to ensure that the voyage charter is "personal," for the shipowner will then be unable to limit any liability imposed upon him as a result of loss of cargo. The shipowner, on the other hand, will wish to avoid a charter that is "personal" for he seeks to preserve his limited liability under the statute.

More complicated—and more striking—illustrations are provided by situations where the charterer is not a shipper but a carrier for other shippers. The case of a time charterer who wishes to operate as a common carrier is an example. Under a time charter, the charterer acquires the right to use the cargo spaces within the vessel and to direct her movements from port to port throughout an agreed period of time.¹³ In all other respects, the vessel's operations are under the complete control of the owner, and the master and crew remain in his employ.¹⁴ Charterers, however, usually prefer not to disclose their true status to the shippers with whom they deal. Time charterers take this position solely for business reasons: to prevent their customers (the shippers) from knowing that the essential function of carriage is being performed by a third party. Consequently, a time charterer's bill of lading will often be issued in his own name as carrier, with no reference to the fact that the vessel is owned and operated by a third party. When the charterer holds himself out as owner, he is held to the standard of conduct required of a common carrier,¹⁵ and in shipments to and from the United States his liability—apart from limitation questions—will be controlled by the Carriage of Goods by Sea Act.¹⁶ Under this statute a carrier is liable for damage to cargo resulting from unseaworthiness of the vessel if the unseaworthiness in turn was caused by the carrier's failure to use "due diligence."¹⁷ Because a time charterer never has control over the maintenance and care of the vessel itself, it can never prove that it has exercised "due diligence" to maintain the

can Range Lines Inc., Contract Carrier Application, 260 I.C.C. 362, 365-6 (1944); INTERNATIONAL MARITIME DICTIONARY 788-9 (Van Nostrand, 1948).

13. POOR, CHARTER PARTIES AND OCEAN BILLS OF LADING 4-5 (2d ed. 1930); ROBINSON, ADMIRALTY 593-5 (1939); SCRUTTON, CHARTER PARTIES 5 (14th ed. 1939).

14. See authorities cited note 13 *supra*.

15. Where the carriage is for a single shipper it is private and not subject to statutory regulation. *The Westmoreland*, 86 F.2d 96, 97 (2d Cir. 1936); *The G. R. Crowe*, 294 Fed. 506 (2d Cir. 1923); *KNAUTH, OCEAN BILLS OF LADING* 144-6 (1947). Where there are several shippers the carriage is not private and the time charterer will be treated as a common carrier along with the owner if it held itself out to the shipper as such—*c.g.*—where the bills of lading show the time charterer as carrier. *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266 (2d Cir. 1941); *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949).

16. 49 STAT. 1207 (1936), 46 U.S.C. § 1300 (1946).

17. 49 STAT. 1210 (1936), 46 U.S.C. § 1304(1) (1946).

vessel in a seaworthy condition.¹⁸ Thus the shipper whose cargo is lost by reason of unseaworthiness may seek his recovery directly from the time charterer even if the loss resulted from the owner's failure to use due diligence.

In this situation the question of whether the charter is a personal contract becomes of particular importance. Where the vessel sinks at sea with all her cargo by reason of the owner's failure to use due diligence, the holder of the bill of lading will sue the charterer, and the charterer will implead the owner under the terms of the charter-party. The owner will avail himself of the Limitation Act and will have to pay an amount equivalent to the freight pending. The Act, however, does not grant the limitation privilege to a time charterer.¹⁹ Thus the charterer will be liable for the remainder—by far the greater part—of the loss, despite the fact that it was the owner who was at fault. If, however, the charter is personal, the owner will not be allowed to limit on the charterer's claim over. For the same reason, of course, it is equally to the owner's interest to make sure that the charter is not a personal contract.

It is apparent that the allocation of very substantial losses will depend on the issue of whether a particular contract is or is not personal. Congress, however, did not create this issue; it simply declared that certain maritime losses should not fall on the shipping companies unless incurred with their "privity or knowledge." Thus the effect of the personal contract doctrine is to alter this statutory scheme. So important a common law restriction of a statutory privilege warrants detailed consideration. How did the doctrine develop? What are its limits? Does it further the congressional plan for dividing the burden of loss caused by a maritime disaster? To answer these questions it will be necessary (1) to examine the origin of the rule that denies limitation if liability is founded on a personal contract; (2) to outline the development of the concept of a personal contract since the rule was first formulated; and (3) to consider whether or not the rule should be continued as part of our maritime law.

THE ORIGIN OF THE PERSONAL CONTRACT DOCTRINE

The first generalized statement of the personal contract doctrine appeared in a short phrase of dictum in a Supreme Court case construing a legislative extension of the Limitation Act. In the 1851 Act, limitation had been allowed

18. *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139, 150 (1918). Proof of "due diligence" is not required where the defect in the vessel was of such a nature that it could not be discovered by the exercise of due diligence. In this situation the carrier—whether charterer or owner—is not liable.

19. The privilege to limit liability is available only to the shipowner or the bareboat charterer. The Limitation Act provides that "[T]he charterer of any vessel in case he shall man, victual, and navigate such vessel at his own expense . . . shall be deemed the owner of such vessel within the meaning of the provisions of [that act]." A charterer who mans, victuals and navigates the vessel is a bareboat or demise charterer. *REV. STAT.* § 4286 (1875), 46 U.S.C. § 186 (1946).

only for liability arising out of maritime torts.²⁰ In 1884 Congress enacted a second limitation of liability statute which provided in part that "... the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. . . ." ²¹ In *Richardson v. Harmon*²² appellants asked the Supreme Court to find that the 1884 Act extended the limitation privilege to liability resulting from non-maritime torts, as well as maritime torts. The Court complied. It construed the statute to cover every type of shipowner's liability—contract, maritime tort, non-maritime tort. Said the Court:

"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, *but leaves him liable for his own fault, neglect, and contracts.*"²³

The Court's finding that the statute applied to all of a shipowner's liabilities was clearly in accord with the Act's plain meaning. Not so clear, however, was the reasoning underlying the "but" clause upon which the Court did not elaborate, but which apparently excepted from the limitation privilege liabilities arising out of a shipowner's "... own fault, neglect, and contracts."

To the extent that limitation was denied where the liability was created by the owner's "own fault [or] neglect," the result was consistent with the original Limitation Act of 1851.²⁴ Under this Act limitation was allowed only where the loss was occasioned without the "privity or knowledge" of the shipowner. Prior to passage of the 1884 Act, the phrase "privity or knowledge" had been

20. See *Richardson v. Harmon*, 222 U.S. 96, 102 (1911).

21. The Act of 1884 provides:

"Limitation of liability of owners of vessels for debts. The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: *Provided*, that this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners." 23 STAT. 57 (1884), 46 U.S.C. § 189 (1946).

22. 222 U.S. 96 (1911).

23. *Id.* at 106.

24. The Act of 1851 provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." REV. STAT. § 4283 (1875), 46 U.S.C. § 183 (1946).

In 1935 and 1936 this statute was amended to provide that liability for "loss of life or bodily injury" could not be limited to less than \$60 per ton. See 49 STAT. 960 (1935), as amended, 49 STAT. 1479 (1936), 46 U.S.C. § 183(a) (f) (1946).

defined as "... a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it."²⁵ By using similar language ("fault, neglect") the Supreme Court, in its construction of the 1884 Act, in effect extended the privity or knowledge proviso of the 1851 Act to all manner of a shipowner's liabilities. Privity or knowledge would preclude limitation whether the liability was in tort or contract, maritime or non-maritime. But the Court did not stop here. According to the wording of its opinion, even where the owner is without privity or knowledge of the loss he is nevertheless left fully liable "... for his own ... contracts." This additional qualification on the limitation privilege became known as the personal contract doctrine.

The *Richardson* decision supplied no reason for the rule making an owner fully liable for his own contracts. No cases were cited in support of this statement. But prior to this decision several lower federal courts had held that limitation would not be allowed under the Act of 1884 where liability was based on breach of a shipowner's own contract.²⁶ A shipowner's "own contract" was one made by the owner personally or executed under his supervision and control.²⁷ All of these cases involved claims for services (repairs, supplies, salvage) rendered to the vessel. The rationale is nowhere clearly expressed but the result was apparently derived by analogy from the body of rules which determine when a maritime lien will be implied for repairs and supplies. In the absence of an express agreement creating a lien, no lien would be implied unless the supplier or repairman relied on the credit of the vessel as distinct from the credit of the owner.²⁸ When the supply or repair contract was made by the owner personally or executed under his supervision and control—e.g., in the home port—it was termed a personal contract and the supplier or repairman was presumed to have relied on the credit of the owner, not the vessel.²⁹ The extent to which the problem of the personal contract in the lien cases was considered as analogous to the problem of the personal contract in the limitation cases is shown by a remark of the Sixth Circuit Court of Appeals in the *Great Lakes Towing Co.* case:

"... Query whether this legislation [Act of 1884] does not contemplate that the liability of the ship is to be presupposed, and such

25. *Lord v. Goodall S.S. Co.*, 15 Fed. Cas. 884, No. 8506 (C.C. Cal. 1877), *aff'd*, 102 U.S. 541 (1880).

26. *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11 (6th Cir. 1907); *Gokey v. Fort*, 44 Fed. 364 (S.D.N.Y. 1890); *McPhail v. William*, 41 Fed. 61 (D. Mass 1890); *The Amos D. Carver*, 35 Fed. 665 (S.D.N.Y. 1888).

27. *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11 (6th Cir. 1907).

28. *The St. Jago de Cuba*, 9 Wheat. 408 (U.S. 1824); *The Havana*, 92 Fed. 1007 (3d Cir. 1899); *The Mary Morgan*, 28 Fed. 196 (E.D. Pa. 1886).

29. Cases cited note 28 *supra*.

a liability would not exist in case the owner had personally contracted the debt, and had not stipulated for a lien, either expressly or by fair implication."³⁰

The court's reasoning apparently was as follows: it suspected that the Act of 1884 conditioned the limitation privilege upon the "liability of the ship" itself; the ship itself was liable only where a lien would be implied; standing alone, the existence of a personal contract would defeat the implication of a lien; thus a personal contract would preclude that "liability of the ship" which was a prerequisite for limitation. Whatever the basis of the rule, it was clear after the *Richardson* case that limitation would be denied if liability was based on a personal contract.

THE NATURE OF A PERSONAL CONTRACT

Once the rule became established that the limitation privilege would be lost if liability was based on a personal contract, the problem arose of defining the concept of a personal contract. Upon such a definition courts could not agree. There developed two entirely distinct lines of authority on the subject, with the suggestion of a variation on one of these two themes.

The Making Rule

One line of cases followed the very early decisions dealing with the implication of maritime liens for repairs and supplies, and held the contract to be personal if the owner had executed it personally.³¹ For reference we shall call this view the Making Rule. The clearest statement of this view was made by the Second Circuit in 1914:

"It seems to us that the distinction which the courts have drawn relates to the manner in which the contract is made, rather than to the character of the contract itself. The rule which has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or imputed to him by law; but he may not limit his liability upon contracts which he personally makes or upon obligations which he personally assumes."

"By a 'personal contract' we understand to be meant a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation. . . ."³²

30. 155 Fed. 11, 15 (6th Cir. 1907).

31. See cases cited note 26 *supra*. In *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11 (6th Cir. 1907), a personal contract was defined as ". . . one which the owner himself or itself has made." *Id.* at 21. Also see *The Loyal*, 204 Fed. 930 (2d Cir. 1913); *The Temple Bar*, 45 F. Supp. 608 (D. Md. 1942), *aff'd on other grounds*, 137 F.2d 293 (4th Cir. 1943); *Hockley v. Eastern Transportation Co.*, 10 F. Supp. 903 (D. Md. 1935).

32. *Benner Line v. Pendleton*, 217 Fed. 497 (2d Cir. 1914), *aff'd*, 246 U.S. 353 (1918).

Thus, if the owner is an individual and makes the contract himself, it is personal.³³ If the owner is a corporation, for the contract to be personal the individual who signs on the corporation's behalf must be sufficiently high in the managerial hierarchy to permit a finding that the corporation has itself acted;³⁴ or the signer must be the "managing agent" of the vessel.³⁵ Where the contract is made under the immediate supervision and control of the owner, *e.g.*, in the vessel's home port, it is also deemed personal.³⁶ In short, it is the relationship of the signer to the owner—either in status or situs—that is the essential in determining whether the requisite control of the owner over the signer exists. The nature of the contract and the breach are of no significance, for "[t]he making of the contract is enough to place it outside the statute."³⁷

The Amended Making Rule

Two cases³⁸ have suggested a doctrine that varies slightly from the Making Rule, and which may be referred to as the Amended Making Rule. The making of the contract by the owner (or by a signer closely related in status or situs to the owner) is a necessary but not sufficient reason for barring limitation. To lose the limitation privilege when liability arises out of contract, it must also be shown that the owner had supervision or control over the individuals who actually caused the physical damage. The owner is said to have had supervision or control where the acts causing the damage took place prior to the commencement of the voyage.³⁹ This would be the case where the loss

33. *Pendleton v. Benner Line*, 246 U.S. 353 (1918); *The Yungay*, 58 F.2d 352 (S.D.N.Y. 1932). Also see *Whitcomb v. Emerson*, 50 Fed. 128 (D. Mass. 1892) (allowing two joint owners to limit their liability on a contract made by the third joint owner who was not allowed to limit).

34. In *Hockley v. Eastern Transportation Co.*, 10 F. Supp. 908, 914 (D. Md. 1935), the contract was signed by the secretary of the corporate owner who was "one of the chief managing officers of the corporation." In *The Fred E. Hasler*, 65 F.2d 589 (2d Cir. 1933), the court held that the contract was signed by one in a sufficiently responsible position with the corporate owner to establish that the owner had itself made the contract. In *The Fred Smartley, Jr.*, 108 F.2d 603 (4th Cir. 1940), the contract was made by the president of the owner corporation.

35. *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11 (6th Cir. 1907).

36. *The Fred E. Hasler*, 65 F.2d 589, 591 (2d Cir. 1933); *Gokey v. Fort*, 44 Fed. 364, 366 (S.D.N.Y. 1890). See 3 *BENEDICT, ADMIRALTY* 372-3 (6th ed., Knauth, 1940).

37. *The Loyal*, 204 Fed. 930, 933 (2d Cir. 1913).

38. *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U.S. 82, 88 (1933); *Hockley v. Eastern Transportation Co.*, 10 F. Supp. 908, 915 (D. Md. 1935).

39. "The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to shipowners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control." *Cullen Fuel Co. v. Hedger*, *supra* note 38, at 88-9.

Looking at the reason for the rule, it seems that, with regard to matters of fitting the ship for the voyage in the home port (where the personal contract is made as in this

was caused by unseaworthiness, for unseaworthiness is always determined as of the commencement of the voyage.⁴⁰

The Amended Making Rule seems unworthy of consideration as a separate and distinct construction of the personal contract doctrine. The additional requirement of supervision and control in effect adds nothing to the statutory standard of "privity or knowledge." If supervision and control exist, the right to limit is lost under the "privity or knowledge" proviso, and the personal contract question becomes irrelevant.

The Breach Rule

In 1919, Judge Learned Hand, in deciding *The Soerstad*,⁴¹ set out an entirely different view of the concept of a personal contract, which will be referred to as the Breach Rule. The question in this case was whether or not a tug owner could limit liability for breach of a towage contract; the liability resulted from the negligence of the tug in colliding with its tow. The cargo owner contended that because the tug owner had made the contract personally, he should not be allowed to limit. Under the Making Rule, this contention would have prevailed. The court, however, rejected the cargo owner's argument. Instead of looking to the relationship of the owner to the making of the contract, it examined the owner's relationship to the breach of the contract. Here the breach was of an obligation which the owner was not personally bound to perform—to tow with due care.⁴² Thus limitation was allowed. If the breach had been the owner's failure to perform a duty he was personally obligated to discharge—the court described warranties as imposing such a duty⁴³—the contract would have been deemed personal and limita-

case) the vessel owner has actual personal control or opportunities therefor, and may not delegate to agents the duties he owes to the shipper by personal contract, while with respect to matters happening after the voyage is begun, it is necessarily contemplated by both parties that these must be performed by agents of the owner, beyond his personal control. The dividing line, therefore, between what losses may be limited and what may not will ordinarily be marked by the time of breaking ground on the voyage. In the instant case the personal contract of the vessel owner required it to use diligence to make the barge seaworthy for the voyage to be begun from its home port, where it had opportunities for personal control. There would seem to be no reason to permit limitation of liability in such a case." *Hockley v. Eastern Transportation Co.*, *supra* note 38, at 915-16. This is dicta because the court also found that the owner was in privity with the fault.

40. *The Southwark*, 191 U.S. 1 (1903); *The Willdomino*, 300 Fed. 5, 11 (3d Cir. 1904).

41. 257 Fed. 130 (S.D.N.Y. 1919).

42. "... [N]ow the contract here obviously permitted the respondent to select for the towage any master whom he had good reason to suppose capable, and the breach occurred because that master did not do what the respondent promised to do. This breach was not 'done, occasioned, or incurred' with the respondent's privity, and its liability is limited." *Id.* at 131.

43. "A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for

tion denied. Thus the test of the personal contract and consequently the scope of the right to limit turned on the nature of the obligation whose breach gives rise to the liability.

The principle laid down in *The Soerstad* was accepted by the Second Circuit four years later in *The E. S. Atwood*, when it held that a bareboat charterer of a tug could not limit its liability for damage to a tow caused by the negligence of the tug's master when the towage contract provided that the charterer should indemnify the tow for all damages caused by "himself or his employees."⁴⁴ Limitation was denied because of the charterer's personal failure to discharge its duty to indemnify the tow. Some five years later the same circuit court, in referring to *The Atwood* decision and other decisions which had held a personal contract to exist,⁴⁵ said:

"Those decisions involved personal obligations to pay damages in the event that a vessel was unseaworthy or certain other events happened whether the loss arose from a breach of contract or a violation of a duty imposed by law. The default was a personal one, consisting of a failure to pay. That was a matter within the control of the obligor, and was not the breach of a mere promissory obligation to be performed by his servant without his privity or knowledge. Only in the former class of cases have the courts denied limitation of liability. . . ."⁴⁶

The logical consequence of the Breach Rule is that the relationship of the owner to the individual who signs the contract on his behalf is of no significance in governing the scope of the limitation privilege.⁴⁷ This conclusion seems to have been reached by the Second Circuit in *The Nat Sutton*,⁴⁸

some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary." *Id.* at 130-1. This language is quoted with approval in *The Fred Smartley, Jr.*, 108 F.2d 603, 606 (4th Cir.), *cert. denied*, 309 U.S. 683 (1940). Also see *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946); *W. E. Hedger Transportation Corp. v. Gallotta*, 145 F.2d 870 (2d Cir. 1944); *New England S.S. Co. v. Howard*, 130 F.2d 354 (2d Cir. 1942).

44. 289 Fed. 737 (2d Cir. 1923).

45. The other cases were *Capitol Transportation Co. v. Cambria Steel Co.*, 249 U.S. 334 (1919); *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139 (1918); *Benner Line v. Pendleton*, 246 U.S. 353 (1918).

46. The No. 34, 25 F.2d 602, 607 (2d Cir. 1928).

47. In so far as the creation of the liability is concerned the relationship of the owner and the individual who signs on its behalf is important, for unless the individual acts as the owner's agent, no contractual liability will exist.

48. 62 F.2d 787 (2d Cir. 1933). That part of the mandate denying limitation to the tug owner was struck out on rehearing on the ground that the issue had not, for pro-

where a tug owner was not allowed to limit liability for breach of a promise to indemnify the cargo owner. The promise was contained in a voyage charter executed on its behalf by the bareboat charterer of the tug as the owner's agent. The court remarked that the bareboat charterer's status as agent of the owner entitled it to enter into a contract which would "be as much the personal contract of the owner as any contract a corporation can make,"⁴⁹ but it paid principal attention to the nature of the obligation breached by the owner. Moreover, the bareboat charterer, albeit an agent of the owner, was an entirely distinct legal entity, and under the earlier Second Circuit cases⁵⁰ which relied on the Making Rule there clearly would have been no personal contract.⁵¹

The Supreme Court has had occasion to consider the nature of a personal contract only five times. In four⁵² of these cases liability of the owner was predicated on breach of a warranty of seaworthiness contained in a charter-party executed by it.⁵³ In each, limitation was denied on the ground that liability arose out of a personal contract of the shipowner. The result reached in each case was consistent with all views—with the Making Rule because in each case the shipowner signed the charter; with the Amended Making Rule

cedural reasons, been properly before the court. In the matter of the petition of W. E. Hedger Co., etc., 63 F.2d 1021 (2d Cir. 1933).

49. *The Nat Sutton*, 62 F.2d 787, 790 (2d Cir. 1933).

50. *E.g.*, *Benner Line v. Pendleton*, 217 Fed. 497, 507 (2d Cir. 1914), *aff'd*, 246 U.S. 353 (1918); *The Loyal*, 204 Fed. 930, 932 (2d Cir. 1913).

51. Language in one Second Circuit decision, *The Fred E. Hasler*, 65 F.2d 589 (2d Cir. 1933), seems to conflict with this conclusion. In holding that the owner of a barge under charter and lost due to unseaworthiness could not limit liability because the charter was personal to the owner, the court said:

"Its personal obligations should be determined by the authority of the one making the contract to transact that business and not by the importance of his official position." *Id.* at 591.

The court found, however, that the individual who signed the contract on behalf of the owner was sufficiently high in the managerial hierarchy to enable it to conclude that the owner had itself executed the agreement. The fact that the charter was executed in the home port of the owner would also indicate that the quotation is no more than dicta.

52. In the fifth case, *Earle & Stoddard v. Wilson Line*, 287 U.S. 420 (1932), it was stated that the personal contract doctrine would not be applied to bills of lading.

53. In *Pendleton v. Benner Line*, 246 U.S. 353 (1918), the owner of the vessel was a partnership and one of the partners signed the charter on its behalf, i.e., the charter was signed by a part owner. In *Luckenbach v. McCahan Sugar*, 248 U.S. 139 (1918), the charter was signed on behalf of the owner by its managing agent. See *The Julia*, 235 Fed. 388, 393 (2d Cir. 1916). In *Capitol Transportation Co. v. Cambria Steel Co.*, 219 U.S. 334 (1919), the charter was signed on behalf of the owner by the ship's manager. See *The Benjamin Noble*, 244 Fed. 95, 99-100 (1917). In *Cullen Fuel Co. v. Hedger*, 290 U.S. 82 (1933), the charter was executed by the marine superintendent of the owner in the home port.

because in each case the loss was caused by unseaworthiness; and with the Breach Rule, because in each case the breach was of a warranty and was, therefore, effected by the owner himself.

THE PERSONAL CONTRACT DOCTRINE RECONSIDERED

Obviously no legal doctrine can be satisfactory that does not attain the maximum degree of clarity which the complexity of the subject matter permits. The conflict among the authorities defining the concept of a personal contract should be resolved as soon as possible. As long as there are two or more judicial views on the matter wasted effort will result. Even though convinced that one of the views is correct and eventually bound to prevail, a lawyer cannot disregard the existence of the others in counseling his client. Litigation could result if a contract met one test but not another. Thus arrangements must be made in such a manner as to satisfy the requirement of each of the conflicting authorities. For example, even if one were convinced that the Breach Rule is correct, one would still advise against the personal execution of charter by a shipowner. The wasteful consequences that attend such a split of authority is also illustrated by the problem of insurance coverage. Because no one can be certain which view will be adopted by the court which eventually adjudicates the dispute, a prudent shipowner or charterer will take out more liability insurance than would be necessary if the extent of his liability were clearly defined. In an evaluation of the personal contract doctrine the first problem is to determine which view of the personal contract should prevail.

The Making and the Breach Rules Compared

As the basic problem involves the delimitation of the scope of the limitation privilege established by Congress in 1851 and 1884, the choice between the conflicting views should be based on a determination of which rule most effectively implements the purpose of the Limitation Statutes—to allow limitation whenever the liability is based on the principles of *respondent superior* or agency, and the servant or agent acts beyond the actual control or supervision of the owner.⁵⁴ The “privity or knowledge” proviso of the 1851 Statute clearly effectuates this policy, for it denies limitation whenever the servants or agents causing the loss have acted under the owner’s supervision or control.

The Making and Amended Making Rules. We have already observed that the early decisions defining the scope of the right to limit contractual liability adopted the concept of the personal contract set out in the lien cases⁵⁵—namely, that the manner of making determined the personal nature of the contract. Apparently it was thought that the extent of a shipowner’s right

54. See note 4 *supra* and accompanying text.

55. See pp. 1036-7 *supra*.

to limit his contractual liability should be determined by the same criteria that determined the existence of a repairman's lien.⁵⁶ The ineptness of the analogy is apparent. In the first place, the basic factor governing the determination of the existence of a lien is not at all similar to that which determines limitation of liability under the Limitation Acts. In the lien situation, the controlling consideration is the intent of the parties to pledge the vessel; the important factor in the limitation situation is the absence of privity with, or knowledge of the loss on the part of the owner. Secondly, the nature of the problem in the lien cases is entirely different from that involved in the limitation cases. In the lien cases the problem is whether or not the vessel is to be liable for a liquidated sum named in the contract for services. In the limitation cases the problem concerns the extent of the owner's liability for an unliquidated amount—*e.g.*, for damage to cargo. The limitation privilege, being available to the shipowner, is not dependent on the liability *in rem* on the part of the ship. In failing to distinguish between the owner's liability and that of the ship, the reasoning in the *Great Lakes Towing* case erroneously suggested that the limitation privilege "presupposed" the "liability of the ship."⁵⁷

A more crucial objection to the Making Rule (and the Amended Making Rule) is that it does not further the policy of the Limitation Acts. The question of whether or not the owner (or someone closely identified with the owner in status or situs) signed the contract seems irrelevant to the question of the owner's supervision or control over the cause of the loss. An owner can sign the contract himself and still lack supervision of, or control over the master or crew member who, acting beyond the scope of his duty, causes the loss. Of course, if the Making Rule is described as denying limitation when the owner "supervised or controlled" the signing of the contract, the rule bears a *verbal* resemblance to the concept of "supervision or control" over the cause of the loss. Even if, on this highly artificial basis, the Making Rule can be said to conform to statutory policy, the criterion of supervision or control over the signing of the contract is one which is neither observed at present nor capable of meaningful enforcement in the future. The present Making Rule permits avoidance of such supervision and control by any owner who sees to it that the actual signer is separated from him both in legal status and in distance from the vessel's home port.⁵⁸ Expansion of the Rule's scope to cover

56. See *Great Lakes Towing Co. v. Mill Transportation Co.*, 155 Fed. 11, 15 (6th Cir. 1907), quoted pp. 1036-7 *supra*.

57. *Ibid.*

58. See, *e.g.*, *The Temple Bar*, 45 F. Supp. 603 (D. Md. 1942), *aff'd on other grounds*, 137 F.2d 293 (4th Cir. 1943):

"The charter party . . . was not executed in London by the British company, the owner of the vessel, but in New York City by the Freightage Corporation of America, as brokers for the owner. Therefore, on the authority of the distinction between personal and non-personal contracts . . . this charter party is not to be treated as a personal contract."

Also see, *In re Great Lakes Transit Corp.*, 81 F.2d 441 (6th Cir. 1936).

all cases of supervision or control over the signing would write out of the 1884 Act its provision for limitation of contractual liability where charters are concerned. Because of the wide availability of radio and telegraph, no owner ever loses control over his agents or brokers and, thus, no vessel, wherever she may be, is ever chartered without the owner's supervision or control. Either in its present or expanded form, the Making Rule, which allows limitation when there is no supervision or control over the signing, fails to find justification in the statutory policy which allows limitation when there is no supervision or control over the cause of loss.

In sum, the Making and the Amended Making Rules were founded upon an imperfect analogy from the law of maritime liens. Moreover, they do not further the statutory purpose. Their development has fulfilled the unfortunate prospects of their questionable beginning. They should be eliminated from the law of limitation of liability.

The Breach Rule. The Breach Rule, as we have seen, focuses on the relation of the shipowner to the breach. If the breach resulted from the act of the owner himself, he cannot limit. This, in effect, predicates the right to limit on the terms of the contract. If the promise breached was, by its terms, performable only by the owner himself, limitation is denied. Every case applying this doctrine has involved a breach of a promise to pay in full in the event certain defined losses occur.⁵⁹ The promise has either been express in the form of an indemnity agreement or implied in the form of a warranty. In both situations the breach has consisted of the owner's failure to pay a sum of money. This is, indeed, the only factual situation in which the owner personally can breach the contract and not be in "privity or knowledge" with the loss within the meaning of the proviso in the 1851 statute. The Breach Rule then is, in substance, that whenever the owner promises to pay in full, limitation is denied.

When the Breach Rule is interpreted in this way, it is possible to find consistency between it and the purposes of the Limitation Acts. If "loss" is interpreted to include the loss suffered by the shipper through the owner's own failure to pay as promised in the indemnity agreement or implied warranty,⁶⁰ then the owner was in "privity or knowledge" with the loss. In other words, the owner had supervision or control over the cause of the loss—his breach of a personal obligation—even if the original act of master or crew which caused the damage was beyond the owner's control or supervision.

Because the Breach Rule is susceptible of construction which will harmonize it with statutory policy, and because this is not true of the Making or Amended Making Rules, the Breach Rule should prevail. So long as the personal contract doctrine persists (and unless some other variation on it is suggested), this doctrine should be identified with the Breach Rule.

59. See note 43 *supra*.

60. See note 43 *supra*; The No. 34, quoted p. 1040 *supra*.

To reach this limited conclusion, however, is not to say that the personal contract doctrine (as equated with the Breach Rule) should be continued as a part of our maritime law. The finding that the Breach Rule could be construed consistently with the Limitation Acts depended upon definitions of "loss" and "privity or knowledge," which are not compelled by statutory language and which reasonable men can dispute. This area of interpretive doubt leaves room for reconsideration of the personal contract doctrine (Breach Rule) in terms of the policy problems it creates. It also leaves room for a rephrasing of the Breach Rule in terms which will point up these policy implications. It is to this rephrasing and to a brief look at these policy implications that we now turn.

Should the Personal Contract Doctrine be Retained?

Under the Breach Rule, as it has been defined above, the right to limit is determined by the terms of the contract. The terms are within the control of the parties and are determined in advance of the disaster. How the contract reads is dependent on the relative bargaining power of the parties at the time of agreement. Consequently, the controlling factor under the Breach Rule is the intent—express or implied—of the parties as it is shaped by the bargaining process. While only one case has suggested that the intent of the parties should control,⁶¹ in fact this must be the fundamental consideration under the Breach Rule. The question in each case thus becomes not so much a question of the "personal" nature of the contract or of the unique principles of maritime law, but a question of interpreting a written agreement to determine whether or not the shipowner had waived his statutory right of limited liability.

This analysis indicates that the real question posed by the personal contract doctrine is whether or not such a waiver conflicts with the policy and purpose of the Limitation Acts. Congress has set up a scheme for the allocation of losses, declaring that under certain circumstances it is not in the national interest to have these losses fall on the shipping companies. Can these companies agree by private bargain to assume these losses? The Breach Rule indicates that the answer is yes, but neither it nor the rationale which entitles it to prevail over the Making Rule meets this difficult question of policy. The answer depends on analysis of international maritime competition, of the bargaining status of the various parties to shipping contracts, and of the facts of life of marine insurance. This analysis cannot be made in these pages, but

61. In *The Yungay*, 58 F.2d 352 (S.D.N.Y. 1932), it was held that a shipowner could, by contract, avail himself of the right to limit liability despite the fact that the contract was personal. The case did not reach this result on the basis of the analysis of the Breach Rule set out in the text of this article, but merely on the ground that the personal contract doctrine did not apply to preclude limitation in the face of an express agreement to permit limitation. This case was expressly disapproved in *The Fred Smartley, Jr.*, 108 F.2d 603 (4th Cir. 1940).

one conclusion that can be made is that the personal contract doctrine will not aid in this analysis. Consequently, the term "personal contract" should be dropped from our legal lexicon. The result would be to clarify a most obscure segment of the law and to present clearly the question of whether courts will allow shipowners to assume full liability for a loss when Congress has said that the shipowner's liability "shall" be limited to the value of the vessel and freight pending at the end of the voyage.