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ADMIRALTY—INDEMNITY PROVISIONS IN MARITIME CONTRACTS

An employee of a stevedoring company was injured in the performance of a stevedoring contract between the stevedoring company and a shipowner. The employee brought a libel against the shipowner, who impleaded the stevedoring company pursuant to an indemnity provision in the contract. The federal district court, having dismissed the libel on the merits, found the claim for indemnification to be moot. The court of appeals reversed and remanded the case for an adjudication of the shipowner's petition for indemnification, as well as a determination of the employee's damages. The district court, after determining the amount of damages, construed the indemnity provision to be governed by the law of the State of New York and denied recovery. *Held*, reversed: the shipowner was entitled to full indemnification; an indemnity provision in a stevedoring contract is governed by federal admiralty principles. *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.*, 256 F.2d 227 (2d Cir. 1958).*

The federal judiciary in past decisions has consistently refused to sever an indemnity provision[1] from the text of a contract, cognizable in admiralty,[2] and deny it federal admiralty jurisdiction.[3] A stevedoring contract has been held to be a maritime contract.[4] These principles were demonstrated by the decisions of the various courts involved in the *Porello* case,[5] which dealt with an ambiguous indemnity provision in a stevedoring contract. The court of appeals in *Porello v. United States*[6] assumed federal admiralty

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* Since the writing of this casenote the parties settled the case and the petition for certiorari which had previously been filed was discontinued. 1959 Am. Mar. Cas. 545.

1. "INDEMNITY. A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person. . . ." BLACK, LAW DICTIONARY (4th ed. 1951).

2. For contracts not cognizable in admiralty in the first instance see Admiral Oriental Line v. United States, 86 F.2d 201 (2d Cir. 1936); The Wonder, 79 F.2d 312 (2d Cir. 1935); Pacific Coast S.S. Co. v. Moore, 70 Fed. 870 (N.D.Cal. 1896), *aff'd*, 76 Fed. 993 (9th Cir. 1896); see also Moran Towing & Transp. Co. v. United States, 56 F.Supp. 104 (S.D.N.Y. 1944).

3. American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947); Moran Towing & Transp. Co. v. Navigazone Libera Triestina, S.A., 92 F.2d 37 (2d Cir. 1937); Finley v United States, 130 F.Supp. 788 (D.N.J. 1955); Severn v. United States, 69 F.Supp. 21 (S.D.N.Y. 1946); Gheen v. War Shipping Administration, 66 F.Supp. 393 (E.D.N.Y. 1946).

4. American Stevedores, Inc. v. Porello, 330 U.S. 446, 456 (1947); Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 62 (1913); Jarka Corp. v. Hellenic Lines, 182 F.2d 916, 919 (2d Cir. 1950); The Muskegon, 275 Fed. 348 (2d Cir. 1921).

5. The *Porello* case appeared on all three levels of the federal judiciary. American Stevedores Inc. v. Porello, 330 U.S. 446 (1947); American Stevedores Inc. v. Porello, 328 U.S. 827 (1946); Porello v. United States, 153 F.2d 605 (2d Cir. 1946); Porello v. United States, 94 F.Supp. 952 (S.D.N.Y. 1950); Porello v. United States, 53 F.Supp. 569 (S.D.N.Y. 1943).

6. 153 F.2d 605 (2d Cir. 1946).

jurisdiction[7] and undertook to fashion the rule that despite the ambiguity in the provision, full indemnification was required.[8] When the *Porello* case reached the United States Supreme Court,[9] Justice Reed, speaking for the majority, rejected the stevedoring company's contention that the court of appeals as an admiralty court did not have jurisdiction of the indemnity provision of the stevedoring contract stating:

> A stevedoring contract is maritime. . . . And although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful the cases raising such doubts are concerned only with contracts for the performance of partly non-maritime activities. . . . To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. . . .[10]

There is reason to believe that the United States Supreme Court in future cases may sever an indemnity provision from a maritime contract and exclude it from federal admiralty principles. A current trend of the Supreme Court in admiralty cases toward resolving doubts in favor of applying state law[11] lends support to this belief. The outstanding case representing this trend is *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[12] Decided eight years after *Porello*, the *Wilburn* case held that a maritime insurance policy must be construed under the law of the state where made. The prompting factor for this decision was undoubtedly the historical role the states had played in the regulation of all phases of the insurance industry and insurance contracts,[13] but the states have also regulated the

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7. The court of appeals was not overly concerned about the admiralty jurisdictional issue, since the jurisdiction could rest on the fact that the indemnitee was the United States. *Id.* at 609.

8. Compare United States v. Wallace, 18 F.2d 20 (9th Cir. 1927); Shamrock Towing Co. v. City of New York, 16 F.2d 199 (2d Cir. 1926). For an example of a case where the indemnity provision was not ambiguous see United States v. Arrow Stevedoring Co., 175 F.2d 329 (9th Cir. 1949).

9. American Stevedores Inc. v. Porello, 330 U.S. 446 (1947). The Supreme Court partially reversed the court of appeals on grounds not necessarily destructive of the interpretation given by the court of appeals to the indemnity provision. For the final disposition of the case see Porello v. United States, 94 F.Supp. 952 (S.D. N.Y. 1950), which in effect followed the court of appeals' construction in *Porello v. United States*, 153 F.2d 605 (2d Cir. 1946).

10. American Stevedores Inc. v. Porello, 330 U.S. 446, 456 (1947); *Cf.* Justice Reed's dissent in Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 324-35 (1955). In *Finley v. United States*, 130 F.Supp. 788 (D.N.J. 1955), the federal district court held that a contract to convert a vessel was maritime, that an indemnity provision ought not be severed from the contract, and that the indemnity provision was maritime. See also Mangone v. Moore-McCormack Lines, 152 F.Supp. 848 (E.D.N.Y. 1957).

11. This trend is noted in Comment, 50 Nw. U. L. REV. 677, 683-84 (1955).

12. 348 U.S. 310 (1955); see also Saskatchewan Govt. Ins. Office v. Ciaramitro, 234 F.2d 491 (1st Cir. 1956).

13. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316-20 (1955); see VANCE, INSURANCE 36-51 (3d ed. 1951).

business and activities of stevedores and longshoremen.[14] Further indication of the current trend may be found in *Madruga v. Superior Court*,[15] which upheld a state court's jurisdiction to order the partition of ships in a proceeding in personam, and *Maryland Casualty Co. v. Cushing*,[16] where the Supreme Court seemed to decide that the Federal Limited Liability Act did not foreclose an action brought directly against marine insurers under a Louisiana statute.

Similar to *Porello*, the court of appeals in the instant case was confronted with a stevedoring contract containing an indemnity provision susceptible to more than one interpretation.[17] If federal admiralty principles applied, the shipowner would be entitled to full indemnification,[18] but if the law of the State of New York (where the contract was negotiated and performed) applied, the shipowner would be entitled to no indemnification.[19] The court was troubled as to whether the *Wilburn* case required a reconsideration of *Porello*.[20] In solving the problem the court of appeals reasoned that the Supreme Court in *Wilburn* "was balancing two divergent considerations — the continuance of traditional state power to regulate all kinds of insurance . . ., as against the desirability of uniform admiralty rules [and] did not intend to rule on the propriety of state regulation of other types of maritime contracts."[21] Limiting the *Wilburn* case to the area of maritime insurance, the court reaffirmed its decision in *Porello v. United States*.

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14. *E.g.*, N.Y. UNCONSOLIDATED LAWS §6700aa-zz. §6700aa 4 reads: "The States of New York and New Jersey hereby find and declare that the occupations of longshoremen, stevedores . . . are affected with a public interest requiring their regulation and that such regulation shall be deemed an exercise of the police power of the two states."

15. 346 U.S. 556 (1954).

16. 347 U.S. 409 (1954).

17. The shipowner had been held liable for personal injuries suffered by an employee of the stevedoring company. *Amador v. A/S J. Ludwig Mowinckels Rederi*, 224 F.2d 437 (2d Cir. 1955), *cert. den.*, *A/S J. Ludwig Mowinckels Rederi v. Amador*, 350 U.S. 901 (1955). The stevedoring company argued that since the indemnitor and the indemnitee were joint-tortfeasors, full indemnification should not be required. The indemnity provision was not clear whether the absence of negligence on the part of the indemnitee was a prerequisite to recovery. *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.*, 256 F.2d 227, 228-29 (2d Cir. 1958).

18. Porello v. United States, 153 F.2d 605 (2d Cir. 1946).

19. Mostyn v. Delaware L.&W. R.R., 160 F.2d 15, 19 (2d Cir. 1947), especially n. 9.

20. The court of appeals initially raised the issue in *Amador v. A/S J. Ludwig Mowinckels Rederi*, 224 F.2d 437, 441 (2d Cir. 1955). This was a previous appeal of the instant case.

21. A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 256 F.2d 227, 231 (2d Cir. 1958). The district court in the instant case felt that there was less reason for uniformity in the law governing the indemnity provisions in stevedoring contracts than there was in the law governing contracts for marine insurance. *Amador v. The Ronda*, 146 F.Supp. 617, 622 (S.D.N.Y. 1956). The court of appeals believed otherwise. *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.*, *supra* at 231 n. 1.

The Supreme Court opinion in the *Wilburn* case engendered much unfavorable comment.[22] The court of appeals in the *A/S J. Ludwig Mowinckels Rederi* case appeared determined that the *Wilburn* rule should not be recklessly expanded. The fact situation before the court was ideal to defeat any possible extention of the *Wilburn rule. An* indemnity provision in any contract approaches the field of insurance as close as possible without actually entering the realm of that subject.[23] Should the decision of the court of appeals be either affirmed by the Supreme Court[24] or followed by the other circuits, the day of *Wilburn* with its tendency toward the application of state law in the field of maritime contracts may well be in its twilight.[25]

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DIVORCE—DECREE MUST SPECIFY PREVAILING PARTY

In a divorce action the complainant wife alleged extreme cruelty and requested custody of the child. Her husband counterclaimed for divorce on the ground of extreme cruelty and also sought custody of the child. The court entered a decree granting a divorce without specifically adjudicating the equities for and against the parties and granted temporary custody of the child to the husband. *Held,* the chancellor must reconsider and specifically determine by his final decree the party entitled to the divorce. *Friedman v. Friedman,* 100 So.2d 167 (Fla. 1958).[1]

English ecclesiastical courts allowed a defendant to counterclaim for affirmative relief in a divorce suit by setting out the misconduct of the

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22. For a severely critical analysis of the *Wilburn* case see GILMORE & BLACK, ADMIRALTY 61-63 (1957); see also Comment, 50 NW. U. L. REV. 677, 681-83 (1955); Note, 1 N. Y. L. F. 360 (1955). For a more favorable comment see Note, 103 U. PA. L. REV. 813 (1955); see also Note, 35 B. U. L. REV. 435 (1955).

23. An insurance contract contains five elements: one party possesses an insurable interest; the interest is subject to some well-defined peril, which may cause loss to the riskbearer; the other party to the contract assumes the risk of loss ;the contract is an integral part of a general scheme for distributing the loss; and the insured makes a ratable contribution. Where only the first three elements are present, a risk shifting device results. An indemnity provision in a contract belongs to the category of risk-shifting devices. VANCE, INSURANCE 1-5 (3d ed. 1951).

24. *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.* has been filed on the appellate docket of the Supreme Court on a petition for certiorari. 27 U. S. L. WEEK 3057 (Sept. 9, 1958).

25. Gilmore and Black in their recent hornbook on admiralty inquire as to the meaning of the *Wilburn* case: "Wilburn may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes." GILMORE & BLACK, ADMIRALTY 63 (1957). The *A/S J. Ludwig Mowinckels Rederi* case, limiting the *Wilburn* case to maritime insurance, appears to answer this inquiry.

1. The court also reversed a companion case, on the same grounds, Howell v. Howell, 100 So.2d 170 (Fla. 1958).