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FEDERAL MARITIME JURISDICTION OVER INLAND INTRASTATE LAKES

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The silver oar, long the historic symbol of admiralty practice in federal courts in the coastal districts, would hardly have been recognized fifteen years ago in a federal court in Nevada, Wyoming, or any of the other inland states not bordering on the Great Lakes or the Mississippi River. In recent years, however, the inland waters of this country have been increased by the development of new man-made lakes and have been exploited by the increased maritime traffic of recreational boating. This inland marine activity has increased to the extent that the admiralty law has found its way upstream and is becoming an important field of law in all the districts of the federal judiciary.

The two most important factors in this development are (1) the construction of large hydro-electric and flood control systems by which streams were made into large lakes, and (2) the increased popularity of pleasure boating.

Before the advent of electricity and the hydro-electric power plant most of our inland states' water resources were limited to natural ones. A certain amount of damming of streams was accomplished on a small scale to set up milling operations and for flood control, but it was not until the 1930's that the inland waters of the United States were significantly increased. During the 1930's the depression brought about extensive public works projects including the Tennessee Valley Authority, which is typical of the many hydro-electric and flood control projects undertaken by the federal government. A 1963 article about cruising on the lakes of the Tennessee Valley Authority project is evidence of the tremendous scope of this single government project:

> The TVA lake system has a shoreline of over 10,000 miles in Virginia, North Carolina, Alabama, Georgia, Kentucky, Ten-

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> nessee and Mississippi... a vast, uncrowded and beautiful cruising ground exists within trailering distance... a cruising ground which extends over 350 miles from east to west and nearly 200 miles from north to south.... There are 29 TVA reservoirs which similarly combine unspoiled and beautiful cruising waters with camping and launching sites, and modern shopping, vacation and lodging facilities. There are some 350 fishing camps, marinas, and resorts on the TVA lakes, 40 group camps, 13 state parks, 67 county and municipal parks, and 400 access areas maintained by state and local governments.[1]

Other areas where federal hydro-electric and flood control projects have increased the inland boating areas available are the far west and the Boulder Dam area.[2] Lake Springfield in central Illinois is another example of the creation of an inland boating area. This artificial lake was created by the damming of two streams, and the lake now contains 21.4 billion gallons of water and has a shoreline of 57 miles. The lake is used by many varied craft including cruisers, sail and motorboats, pontoon and small fishing craft. Other uses of the lake include a United States Naval Training Center, a Coast Guard Center, an Air Force Reserve Center, and a station of the civilian Illinois Naval Squadron.[3]

The examples above indicate the far-reaching impact of the many recent projects, federal and state, to harness the undeveloped and uncontrolled water power of the United States. Some of these new waterways have been developed commercially, but the largest increase in inland water traffic which has caused the need for admiralty practice in these inland districts has been the growth of pleasure boating traffic made possible by post-war prosperity and developments in boat manufacturing.[4]

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[1]MOTOR BOATING, June, 1963, at 92.

[2]Witness to the increased importance of western boating resulting from the dam is found in the following quotation: "Western boating has exploded over every wet spot this side of the Rockies, but the Lake Mead, Colorado River, and Salton Sea regions will continue to play host to the most, with millions of boat owners annually." YACHTING, July, 1962, at 130.

A federal project has also brought water resources to the inland areas of Texas. The change took place "when the U.S. Corps of Engineers began completing vast flood control impoundments such as Lake Texoma, Possum Kingdom Lake, Grapevine, Whitney, and dozens of others which today dot the countryside." MOTOR BOATING, Jan., 1963, at 74. These lakes, which also include the largest lake wholly within the state, Lake Texarkana, are so extensive that together they control "almost every major river in Texas." *Id.*

[3]MOTOR BOATING, June, 1963, at 124.

[4]TVA Annual Report for 1962: in 5 fiscal years 1957-1961, commercial traffic on the Tennessee River Complex exceeded 2 billion ton-miles per year.

A reliable 1962 estimate stated that the total number of non-commercial boats in use on all waters of the United States was 7,468,000, which represented an over-all gain of 293,000 boats over the 1961 estimate. This 1962 figure was broken down into the following type craft:

Inboard motor boats	795,000
Outboard motor boats	4,085,000
Sailboats, w/o aux.	483,000
Rowboats, canoes, etc., including many outboard powered	2,105,000[5]

From the above figures it is obvious that outboard powered craft account for over 80% of the pleasure craft in use, and, as another index of the boating industry's growth, the following statistics for outboard motors are helpful:

Outboard motors in use — 1950 — 2,811,000
Outboard motors in use — 1967 — 6,904,000[6]

Besides the availability of consumer capital due to the post-war boom years, this tremendous growth in the use of pleasure craft can be explained by the improvement of pleasure-type boats and motors. Furthermore, the introduction of boat trailers which are light and maneuverable, and equipped with winches, has opened up the vast area of recreation waters to those people who live within driving distance of these new lakes. This new mobility is expounded in the following excerpt from an article on western boating in *Yachting* magazine:

> Los Angeles boat owners think nothing of hitching on the boat trailer on Friday night, driving 300 miles to Boulder Beach outside Las Vegas, Nevada, boating for two days, and returning home in time for work Monday morning.[7]

The possible expansion of federal maritime jurisdiction coupled with this increase in maritime traffic in our inland waters and the inevitable increase in boating accidents on these waters may well result in litigation which will place many land-loving general practitioners in the strange maritime world of proctors, libellants and respondents.

Lake complexes such as those of the TVA and Boulder Dam projects often touch more than one state, and sometimes are provided with a connecting river or a series of locks by which interstate commerce can be carried on. In these situations there is no question of

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[5] MOTOR BOATING, Jan. 1963, at 404.

[6] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1968 STATISTICAL ABSTRACT OF THE UNITED STATES 208 (89th ed. 1968).

[7] YACHTING, July, 1962, at 83.

admiralty jurisdiction.[8] On the other hand, it is obvious from a well established Supreme Court decision[9] interpreting article III, section 2 of the Constitution[10] that completely intrastate lakes which are small and which have no significant interstate connection are not generally considered to be within the federal maritime jurisdiction. In between these extremes there are numerous man-made lakes of considerable size, but which lie wholly within one state and are without a direct channel or other means of navigation into interstate commerce.

There are two surrounding circumstances which present the most formidable bars to the extension of federal maritime jurisdiction to these man-made lakes: first, these lakes usually require a boat portage around the dam to "navigate" the lake's outlet into interstate commerce; and second, these lakes are predominantly used for recreational purposes only. In the following discussion the general question of federal maritime jurisdiction over inland waters will be considered first. Certain policies and trends will come to light which aid in finding an answer to the question raised by this article, *viz.*, will federal maritime jurisdiction be extended to man-made recreational lakes lying wholly within one state, and without direct means of interstate navigation other than by portage?

The judicial power of the United States was extended to "all cases of admiralty and maritime jurisdiction" by article III, section 2 of the Constitution. This grant of judicial power was implemented by section 9 of the Judiciary Act of 1789 which gave the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction...."[11] Although changed in wording by the Judiciary Code of 1948,[12] the Supreme Court of the United States construed the new language to mean the same thing as section 9 of the 1789 Act.[13] The extent of this jurisdiction over civil cases of admiralty and maritime law was finally delineated in the landmark decision of *De Lovio v. Boit*,[14] which held that admiralty jurisdiction in the federal courts comprehended all maritime contracts, torts and injuries. The extent of the admiralty jurisdiction to particular

[8]The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 233 (1851).

[9]The Daniel Ball, 77 U.S. (10 Wall.) 557, 561 (1870).

[10]Art. III, section 2 provides: "The judicial power [of the United States] shall extend... to all cases of admiralty and maritime jurisdiction...."

[11]Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77, *as amended*, 28 U.S.C. § 1333 (1965).

[12]28 U.S.C. § 1333 (1965) (corresponds to Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77).

[13]Madruga v. Superior Court, 346 U.S. 556 (1954).

[14]7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

"waters" and "vessels," which must necessarily be involved here, was under early influence of English admiralty law. However, the English exclusion from admiralty of all waters not tidal in nature, carefully guarded by the common law courts, was finally eliminated in the United States in *The Propeller Genesee Chief v. Fitzhugh*.[15]

The Genesee Chief was concerned with the constitutionality of the Act of February 26, 1845,[16] which extended jurisdiction of the district courts to certain cases upon lakes and navigable rivers connecting them. After stating that the grounds for the constitutionality of the statute must be that these waters were within the scope of admiralty and maritime jurisdiction as comprehended by the framers of the constitution, the Supreme Court discussed the major obstacle to such recognition when it said: "[T]here is no tide in the lakes or the waters connecting them."[17] The Court summarily rejected the contention that this requirement existed when the constitution was adopted and held that the fact that there is an ebb and flow of tide does not make waters "peculiarly suitable" for inclusion within admiralty jurisdiction. Likewise, the Court specifically held that the absence of tides did not make inland waters "unfit" to be included within federal maritime jurisdiction. Furthermore, the Court said that there cannot be any reason for allowing admiralty jurisdiction over "public tide water" but not over "any other public water used for commercial purposes and foreign trade." The Court concluded: "The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the constitution of the United States."[18]

Two important jurisdictional elements are indicated in *The Genesee Chief*: first, the inclusion of lakes and connecting waters used for commercial purposes within the federal maritime jurisdiction; and second, the public nature of these waters so included. The first element was discussed in 1870 in *The Daniel Ball*[19] where the Supreme Court pointed out the need for a different test to be applied in determining the navigability of certain rivers, and then stated that this test is based upon "navigable capacity;" that is, "[R]ivers must be regarded as public navigable rivers in law which are navigable in fact."[20] The Court then said that rivers are "navigable in fact" when

[15] 53 U.S. (12 How.) 233 (1851).
[16] Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.
[17] 53 U.S. at 238.
[18] *Id.* at 241.
[19] 77 U.S. (10 Wall.) 557 (1870).
[20] *Id.* at 563.

they are actually used, "in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[21] The test for navigability was then more specifically defined in terms of navigability under federal statutes as distinguished from navigable waters as determined by the states. This test of federal navigability is that the rivers "form in their ordinary conditions by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."[22] Thus the requirement of interstate commerce was imposed upon federal maritime jurisdiction.

Less than one year after this important decision the Supreme Court closed the question of federal maritime jurisdiction over inland lakes and rivers, under the "navigability in fact" test. *Insurance Co. v. Dunham*,[23] considered the overall United States view of federal maritime jurisdiction, as it differed from the English tide-water test, and said that "a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide."[24] *Dunham* concluded that with *The Genessee Chief* and "several cases since decided, ... [the English tide-water test] must be considered as no longer open for discussion in this court."[25]

This question of federal maritime jurisdiction over inland waters held in *Dunham* to be "no longer open for discussion," still presents a problem of major proportions in consideration of the jurisdictional status of man-made lakes. "Navigability" was assumed in *Dunham*, but the navigability of a body of water must always be assessed in a federal context, and in accordance with the standard of *The Daniel Ball* when the question of federal maritime jurisdiction arises. That is, the waters must "constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States ...."[26] This navigability must exist despite the fact that the dams which create the lakes in question are without locks or channels and therefore obstruct direct interstate water commerce. This fact must be considered in light of the predominance

[21]*Id.*
[22]*Id.*
[23]78 U.S. (11 Wall.) 1 (1870).
[24]*Id.* at 25.
[25]*Id.* at 26.
[26]The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

of the recreational use of the man-made lakes under consideration here.

The Supreme Court's attitude toward channel obstructions was expressed in *The Montello*[27] where the Court indicated its tendency to overlook minor impediments to clear navigation and to extend the federal maritime jurisdiction to inland waters whenever possible. In that case the Court referred to contentions that the river involved was not navigable because of sand bars and other obstructions and said, "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."[28] The Court then discussed the navigation which took place before the river was improved, which navigation the Court considered sufficient to render the river capable of interstate commerce. This navigation was by certain boats which were "propelled by animal power, [and] were able to navigate the entire length of Fox River, with the aid of a few portages . . . ."[29] The Court next considered waters which are obstructed, and incapable of completely clear navigation, but which are still considered "navigable" for purposes of federal maritime jurisdiction. After pointing out that there are few fresh water rivers which in their natural state are capable of "uninterrupted navigation," the Court stated, "[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce."[30] If the river is such a "channel for useful commerce" then the all-important holding of this case pertains; that is, that the river is then "navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars."[31] This apparent dismissal of sand bars and rapids as obstructions for commerce, although the case specifically refers to rivers, is a strong indication of a liberal Supreme Court attitude toward extending federal maritime jurisdiction to inland waters of all kinds.

However, *The Montello* leaves the important question unanswered as to the extent to which the Supreme Court today would follow a similarly liberal attitude and extend maritime jurisdiction to the man-made lakes under consideration here. Although these lakes can provide interstate connections only for the pleasure craft which dominate them by means of portages around dams, a further examination

[27] 87 U.S. (20 Wall.) 430 (1874).
[28] *Id.* at 441.
[29] *Id.*
[30] *Id.* at 443.
[31] *Id.*

of cases nevertheless indicates the probability of this jurisdictional extension. The approach to navigational obstructions in *The Montello* was still pertinent in 1921 when *Economy Light & Power Co. v. United States*[32] was decided. That case considered the navigability of the Des Plaines River in a question of federal jurisdiction and the power to enjoin the construction of a private dam on that river. The Court referred to the proper test laid down in *The Daniel Ball* and *The Montello*: "[T]he test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water."[33] More importantly the Court specifically dismissed the objections to navigation because of portages and obstructions by saying: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages . . . ."[34]

It is conceded that most of these earlier cases involve natural obstructions and are not concerned with hydro-electric dams, but a sound analogy to man-made dams can arguably be made. In *United States v. Utah*,[35] a suit to quiet title to land forming the bed of the Colorado River, *The Montello* was cited in part, but the Supreme Court went further and held that "[e]ach determination as to navigability must stand on its own facts."[36] This indicates a very flexible attitude toward the question of navigability, and an attitude by which the Court will not only consider each situation under the broad scope of *The Daniel Ball* and *The Montello*, but also will carefully weigh the particular facts involved. The standard will thus be of broad scope, as is demonstrated in *United States v. Appalachian Electric Power Co.*[37]

In that case, which involved federal power jurisdiction over the New River in Virginia, the Supreme Court considered in detail the concept of navigability as dealt with in prior decisions. It is obvious throughout the opinion that the Court did not want to be bound by a narrow test. For example, when the court discussed "navigability" as a legal concept it said that navigability is "not to be determined by a formula which fits every type of stream under all circumstances and at all times."[38] That the Court could find navigability even in

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[32]256 U.S. 113 (1921).
[33]*Id.* at 121-22.
[34]*Id.* at 122.
[35]283 U.S. 64 (1931).
[36]*Id.* at 87.
[37]311 U.S. 377 (1940).
[38]*Id.* at 404.

an unusual fact situation of the type we are considering here is made clear in the statement that, "Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test."[39] Instead, the Court stated its intention to "draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem, to the particular circumstances presented . . . ."[40] Having made it clear that not only judicial precedent, but also the particular fact situation, will be considered, the Court then re-emphasized the importance of the particular set of facts when it said: "Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied."[41] The *Appalachian Power* case drew from the admiralty jurisdiction cases in expanding federal power jurisdiction. Citing *The Montello* it pointed out: "There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents."[42]

From this discussion it is evident that the Supreme Court does not consider natural obstructions, carries and portages as significant bars to the navigability of a particular body of water. This liberal attitude toward extending maritime jurisdiction to inland waters, coupled with the Court's view that the nature of the problem requires a flexible fact situation analysis, points to a favorable consideration of a portage around a dam in the instant problem. That is, from the precedents dealing with natural obstructions, it appears that a short portage would not be considered a significant obstruction which would bar maritime jurisdiction. But aside from the portage problem, there still exists the requirement first laid down in *The Daniel Ball* that the navigable waters form "a continued highway over which commerce is or may be carried on with other States or foreign countries . . . ."[43] This "commerce" requirement must be considered in relation to the predominantly recreational use of the lakes in question here.

Any possible doubt as to the inclusion of "lakes" in general within federal maritime jurisdiction was dismissed in *Wilburn Boat Company v. Fireman's Fund Insurance*,[44] where the Court noted that it was

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[39]*Id.*
[40]*Id.*
[41]*Id.*
[42]*Id.* at 408-09.
[43]77 U.S. (10 Wall.) 557, 563 (1870).
[44]201 F.2d 833 (5th Cir. 1953).

"settled doctrine that navigable lakes are public waters and are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."[45] An important phase of this question of lake jurisdiction can be approached by drawing an analogy to *The Robert W. Parsons*.[46] There, the Supreme Court considered the existence of federal maritime jurisdiction over the portion of the Erie Canal, wholly within the state of New York. Although the portion of the canal in question was concededly navigable in an interstate manner through a series of locks, the Court still thought it necessary to clear up the question of a possible bar to maritime jurisdiction because that canal link was isolated within the state of New York. Accordingly, even though the portion of the canal involved was wholly within the state of New York, it was still found to form a "highway of commerce" between ports of different states and also foreign countries. Thus, it appears that a contention that the wholly intrastate character of a body of water barred its inclusion in federal maritime jurisdiction would not be successful, provided that navigability in the sense of a "highway of commerce" existed thereon.

If the commerce requirement mentioned so often in the cases dealing with jurisdictional problems first imposed restrictions on the scope of federal maritime jurisdiction, it has been narrowed by a trend evident in the important cases discussed above in relation to navigability and portages. As early as 1870 in *The Daniel Ball,* the Supreme Court referred to navigable water as "highways for commerce," not only in the sense of highways for "trade" but also as highways for "travel."[47] Conceding that this perhaps referred to travel by fare-paying passengers, "travel" is nevertheless a deviation from a concept of "commerce" which includes only trade in material good. *The Montello* refers to the "true criterion of the navigability of a river" in terms of not only the capability for public use for commerce, but also public use for "transportation."[48] Again, this cannot be presumed to include pleasure craft and recreational use, but it is still a definite exclusion of a narrow commercial trade requirement for navigability.

The matter has been approached in more detail in the lower courts. In *The Francesca*,[49] where a boat owner was sued for the death of a passenger, the court, while referring to the Limitation of

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[45]*Id.* at 835.
[46]191 U.S. 17 (1903).
[47]77 U.S. (10 Wall.) 557, 563 (1870).
[48]87 U.S. (20 Wall.) 430, 441 (1874).
[49]19 F. Supp. 829 (W.D.N.Y. 1937).

Liability Act,[50] pointed out that there was no reference at all to the types of vessels to be covered by that Act. Then, discussing the amendment to the Act which included canal boats and "any vessels on rivers and in inland navigation" the court stated, "[I]t has uniformly been held by the courts that the question of the right to limitation of liability is not based upon the engagement of the vessel in maritime commerce, and further it is not based upon the question of the size of the craft."[51] The Supreme Court alluded to this same problem in *Appalachian Power* where, in considering the navigability of the river, it summarized the federal maritime view of the so-called "commerce" requirement: "Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."[52]

Perhaps the most complete judicial recognition of the importance of traffic other than commercial traffic on our inland waters is found in *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*[53] There, the Ohio court held that the navigability of certain waters decided solely upon the basis of commercial use "fails to take cognizance of the tremendous increase in the public use of water ways .... And this increased recreational use of our waters has been accompanied by a corresponding lessening of their use for commerce."[54] The court reflected a growing trend stating, "We are in accord with the modern view that navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose."[55]

An analysis of the foregoing material in relation to the jurisdictional problem under consideration here leads to two basic conclusions.

First, the Supreme Court in all of its decisions concerned with federal maritime jurisdiction over inland waters has shown a tendency to extend that jurisdiction in spite of natural obstructions which would seriously impede commerce and traffic on those allegedly navigable waters. *The Genesee Chief* led off the line of decisions holding "lakes and the waters connecting them" to be navigable. Then *The Daniel Ball* laid down the "navigability in fact" test. Finally, the court in

[50]46 U.S.C. § 183 (1965) limits the liability of the owner of a boat or ship to an amount equal to his interest in the vessel.

[51]19 F. Supp. at 832.

[52]311 U.S. at 416.

[53]170 Ohio St. 193, 163 N.E.2d 373 (1959).

[54]*Id.* at 378.

[55]*Id.*

The Montello, Economy Light and Power Co. v. United States, and *United States v. Appalachian Electric Power Co.* made little of natural obstructions, including portages, in extending federal maritime jurisdiction to various undeveloped rivers and streams. This certainly would indicate that the Court might consider a short portage around a man-made dam as insufficient to bar a holding that that waterway was non-navigable.

Second, the Supreme Court's holding in *Appalachian Power* shows that a lack of commercial traffic alone does not bar admiralty jurisdiction over certain waters; and the *Mentor* case indicates a trend to find recreational use within the commerce requirements of the constiution for federal maritime jurisdiction.

Whether these two conclusions will be adopted when the Supreme Court decides that a body of water made interstate by a man-made dam is or is not within the federal maritime jurisdiction, remains to be seen. A recent case indicates that sound reasoning and the precedents discussed above could lead the Court to such an adoption. *Loc-Wood Boat & Motors, Inc. v. Rockwell*[56] was decided in the Eighth Circuit Court of Appeals in 1957. The problem under consideration there was approached and almost summarily disposed of as the court held a man-made intrastate lake to be within the federal maritime jurisdiction. The case was heard on appeal from *In re Wood,*[57] a petition for limitation of liability under the Limitation of Liability Act heard in the United States District Court for the Western District of Missouri. The lower court decision, discussed first below, gives considerably more detail as to the fact situation involved.

The original petition for limitation of liability arose from a boating tragedy in which a passenger boat overturned and a considerable number of persons drowned. This accident occurred on the Lake of the Ozarks, a lake in central Missouri created by the Bagnell Dam on the Osage River. The lower court opinion states that as a result of the dam on this "navigable stream.... [I]t is physically impossible for boats to operate freely up and down the Osage River."[58] Then the court turned to the foremost question of navigability, holding that the impossibility of river navigation "does not destroy the legal concept of navigability...."[59] The lower court

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[56]245 F.2d 306 (8th Cir. 1957).
[57]145 F. Supp. 848 (W.D. Mo. 1956).
[58]*Id.* at 854.
[59]*Id.*

then gave two reasons for so holding. The first reason is that "the Osage River is an historically navigable stream, and remains under the control of the Department of Commerce, which licenses boats and vessels operating upon the Lake of the Ozarks."[60] The second reason listed is that the boats operating on the lake "are also subject to inspection as to seaworthiness by the United States Coast Guard."[61]

The first and apparently controlling reason for the decision on this point is a new and interesting ground for maritime jurisdiction. Although not used by courts in the important cases discussed above, if judicially accepted, the fact that a particular stream or river was once navigable and is still under government control of some sort would mean an unquestionable extension of federal maritime jurisdiction to that body of water. This would include the extensive system of lakes formed within the United States by federal power and flood control projects. When taken up by the court of appeals, however, neither of the grounds for decision used by the district court were considered. Rather, in a summary manner, the court disposed of the question of federal maritime jurisdiction over the Lake of the Ozarks: "The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the state of Missouri, but is navigable water within the admiralty and maritime jurisdiction of the United States."[62]

Since the *Loc-Wood* case, the conclusions drawn above have been reinforced by numerous decisions in the federal courts.[63] *In re Howser*[64] considered the navigability of Lake Hickory, North Carolina, which was created by the damming up of the Catawba River. The fact situation in the *Howser* case was similar to that in the *Loc-Wood* case in that Lake Hickory was both man-made and intrastate. After citing the general rule of *The Daniel Ball* and setting forth the history of the Catawba River as personally known to the judge presiding, the court held that Lake Hickory was not navigable. This decision was supported by the fact that the Catawba was a shallow and shoaling river before it was developed for hydro-electric use, and

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[60]*Id.*

[61]*Id.*

[62]Loc-Wood Boat & Motors, Inc. v. Rockwell, 245 F.2d 306, 307 (8th Cir. 1957).

[63]*E.g., In re* Builders Supply Co., 278 F. Supp. 254 (N.D. Iowa 1968); Madole v. Johnson, 241 F. Supp. 379 (W.D. La. 1965); Ingram v. Associated Pipeline Contractors, Inc., 241 F. Supp. 4 (E.D. La. 1965); Marine Office of America v. Manion, 241 F. Supp. 621 (D. Mass. 1965); *In re* Howser, 227 F. Supp. 81 (W.D.N.C. 1964); Johnson v. Wurthman, 227 F. Supp. 135 (D. Ore. 1964); Shogry v. Lewis, 225 F. Supp. 741 (W.D. Pa. 1964).

[64]227 F. Supp. 81 (W.D.N.C. 1964).

further by findings of the Federal Power Commission and the Corps of Engineers that the Catawba was not considered to be navigable above Camden, South Carolina, far below Lake Hickory. Although the court did not discuss the lack of a historically navigable channel, this fact must be considered along with the facts above in distinguishing *Howser* from *Loc-Wood.*

Johnson v. Wurthman,[65] like *Howser*, approached the question of the navigability of a small lake lying wholly within the State of Oregon. The only outlet of the lake was a ditch in which the water was never more than four or five inches in depth; and there were two main inlets, neither of which touched navigable waters or were navigable in themselves. The court distinguished *Loc-Wood* by repeating the assertion of the lower court in that case that the river in question "was historically a navigable stream."[66] The court concluded with a rule "applicable to the facts in this case... that small bodies of water, wholly in one state and not navigable in interstate or foreign water commerce, are not included in any common sense definition of navigable waters of the United States."[67] The precedent of the *Loc-Wood* case is thus still intact in those situations where a stream was "historically" navigable.

Federal maritime jurisdiction over Lake Winnipesaukee in New Hampshire came into question in *Marine Office of America v. Manion.*[68] The United States District Court of Massachusetts held that lake to be non-navigable, despite contentions of the libellant that "navigation can proceed from it to the sea by way of the Winnipesaukee and Merrimack Rivers."[69] Evidently, no proof of this fact was offered and the libellant's reliance on *Loc-Wood* was dismissed as follows: "*Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957), cited by the libellant, does hold otherwise; but I do not find it persuasive."[70] The reasoning for the district court's holding in this case, contrary to *Loc-Wood*, is unclear and it can only be assumed that the elements of a historically navigable stream and continued government supervision were not present here.

A recent case which most nearly approximates the fact situation in *Loc-Wood* is *Madole v. Johnson*[71] which involved an accident on Lake Hamilton in Arkansas. Formed by the Ohachita River behind

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[65]227 F. Supp. 135 (D. Ore. 1964).
[66]*Id.* at 137.
[67]*Id.* at 138.
[68]241 F. Supp. 621 (D. Mass. 1965).
[69]*Id.* at 622.
[70]*Id.*
[71]241 F. Supp. 379 (W.D. La. 1965).

Carpenter Dam near Hot Springs, Arkansas, Lake Hamilton was found to be a part of the navigable waters of the United States. The court set forth the traditional rule of navigability from *The Daniel Ball* and *The Montello,* and then proceeded to apply the concept used by the court in *Loc-Wood.* That is, regardless of present obstructions to navigation, the navigability of a stream or river, once considered navigable, is not necessarily lost. Specifically, the court quoted this concept as stated in *Appalachian Power* and *Economy Light & Power.* After following *Loc-Wood,* the court distinguished three cases, decided on similar but not precisely corresponding fact situations.

Shogry v. Lewis,[72] which was cited as authority for the court's decision in *Manion*[73] above, was distinguished as involving a lake which was landlocked and not part of a navigable stream.[74] Likewise the historical non-navigability of the subject stream and rivers was pointed out in reference to the *Johnson* and *Howser* cases, both discussed above.

The most recent case involving these questions is *In re Builders Supply Co.*[75] In holding a small landlocked Iowa Lake to be non-navigable, the court distinguished *Loc-Wood* as being "critically factually divergent" in that it "had historically been navigable and it remained under the control of the Commerce Department which licensed and inspected vessels operating on the Lake of Ozarks."[76]

The cases just discussed which were decided subsequent to *Loc-Wood* have been in accord with that decision, or are distinguishable from that case on the facts. Therefore, the conclusion can be drawn that the federal maritime jurisdiction may well be extended to man-made intrastate bodies of water, including those obstructed from interstate commerce by dams, where the stream or river involved is historically navigable and there exists any degree of government control, such as that which existed in *Loc-Wood.* It is obvious that the federal courts have cracked, if not opened, the door of the vast inland recreation centers of America to the jurisdiction of federal maritime law.

CONCLUSION

The extension of federal admiralty and maritime jurisdiction to intrastate, man-made lakes will have two significant consequences for litigants, one of a procedural nature and the other substantive.

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[72] 225 F. Supp. 741 (W.D. Pa. 1964).
[73] 241 F. Supp. 621 (D. Mass. 1965).
[74] 225 F. Supp. 741, 742 (W.D. Pa. 1964).
[75] 278 F. Supp. 254 (N.D. Iowa 1968).
[76] *Id.* at 257.

If the fact situation involved places the case within federal maritime jurisdiction, the plaintiff will have the following choice of forums: (1) file his suit in a state court and obtain a trial by jury;[77] (2) file suit in federal court in the usual manner, provided the requirements of diversity and jurisdictional amount are present;[78] or (3) file suit in admiralty by filing his suit on the admiralty side of the federal district court docket.[79]

Regardless of the forum chosen by the plaintiff, the substantive rules differ from those in the ordinary personal injury case. The defendant owner of a vessel involved in a personal injury suit enjoys an advantage unique in the law of admiralty provided by the Limitation of Liability Act.[80] This act provides, *inter alia,* that where the owner is not operating the vessel, the defendant owner can limit his liability to his interest in the vessel which may be zero in cases where the boat sinks. Furthermore, case law has provided that under certain circumstances quite common to pleasure boating mishaps, the Limitation Act allows the defendant to enjoin any pending state court actions against him[81] and have the entire case decided by the admiralty court.[82] Therefore, the defendant has not only limited his liability but has also deprived the plaintiff of his jury trial in state or federal court civil action.

Equally as important as limitation of liability in admiralty cases is the non-applicability in most cases of the common law rule of contributory negligence which completely bars recovery to an injured person. Unlike the common law, "admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."[83] On the other hand, if the negligence consists of the violation of one of the Rules of the Road (which is highly probable in a motor boat accident) then the admiralty rules are more strict than common law rules would be.[84]

The two consequences summarily discussed above are an indication of the great importance of the extension of federal maritime jurisdiction considered in this article.

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[77]28 U.S.C. § 1333 (1964).
[78]*Id.*
[79]*Id.*
[80]46 U.S.C. § 183 (1964).
[81]The San Pedro, 223 U.S. 365 (1912).
[82]Hartford Accident & Indem. Co. v. Southern Pac. Co., 273 U.S. 207 (1927).
[83]Page & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953).
[84]A. Gilmore & C. Black, The Law of Admiralty, § 7-5 (1957).