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Ownership at Sea: Identifying Those Entitled to Limit Liability in the Admiralty

*Alfred S. Pelaez*

PROLOGUE

The admiralty has long permitted some of those legally responsible for harm caused by vessels to limit their liability to the after the occurrence value of the vessel. If limitation is proper, a ceiling is placed on the recovery that can be obtained. That ceiling cannot be raised no matter how great the wrong, how immense the damage, or how little the vessel causing it may be worth. Where there has been a catastrophic loss, and where the vessel causing that loss has been severely damaged or destroyed, the most significant aspect of any subsequent legal proceedings will center upon whether limitation is appropriate, and the identity of those entitled to seek limitation. In such cases, and in many others where the value of the vessel is disproportionate to the loss inflicted, the issue of limitation subsumes all other legal concerns. Yet, more than a century after limitation of liability became a part of the American admiralty, it too frequently remains difficult to determine who is entitled to limit liability.

Both the Limitation of Liability Act1 and Supplemental Rule F2

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* This article will appear in 7A J. MOORE & A. PELAEZ, FEDERAL PRACTICE ¶I F.04-.05 (2d ed. 1983). The author is Professor of Law at Duquesne University School of Law, B.A., J.D., University of Pittsburgh; LL.M., Yale University.

1. Act of March 3, 1851, ch. 43, §1-7, 9 Stat. 635-36 (current version at 46 U.S.C. §§ 181-95 (1976 & Supp. V 1981)). Prior to enactment of the American statute, limitation had become a prominent feature of the maritime law of most seafaring nations. Our courts, however, refused to judicially implement the concept. See The Rebecca, 20 F. Cas. 373 (D. Me. 1831) (No. 11, 619). The statute was thus enacted to prevent foreign carriers from obtaining a competitive advantage over domestic carriers. The statute was so obscurely drafted and created such confusion as to how its benefits could be obtained that use of the limitation device did not become widespread until the Supreme Court, in 1872, amended its Admiralty Rules to specifically set forth procedures for limiting liability. See 80 U.S. (13 Wall.) xii-xiv (1872). Ever since, limitation has been governed as much by the judicially promulgated rules as by the Act.

2. The 1966 unification of admiralty and civil procedures was made possible only by the creation of special provisions applicable to the unique facets of the admiralty. These provisions, entitled "Supplemental Rules for Certain Admiralty and Maritime Claims," are
make clear the right to limit is reserved to owners of vessels. However, a century of effort by jurists and scholars has very nearly succeeded in obscuring the meaning of that term. Thus, it is appropriate to sift through the wreckage of past maritime catastrophes to see if some light can yet be shed upon the matter.

I. THE BASIS OF THE CONFUSION

The Supplemental Rule provides no assistance whatsoever in defining an "owner." And the Limitation Act\(^4\) provides only that a charterer who "...shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner...."\(^4\) Beyond that meager direction the courts have been left to fend for themselves.

The difficulty arises because ownership is not a clearly defined concept capable of precise definition for all legal purposes. Ownership encompasses a bundle of rights which, separately or collectively, enable one to effectuate some control over the involved property. And, as often as not, those rights will not all be possessed by the same person or entity. Thus, it becomes necessary to determine which of the rights, separately or in combination, are sufficient to warrant limitation. As might be expected, the courts have not yet completely resolved that issue. And, because ownership can determine whether one's liability shall embrace the full consequences of his acts, or be limited only to his interest in the vessel causing the alleged losses, resolution of that issue is often of paramount importance.\(^5\)

\(\text{Footnotes:}\)

3. See supra note 1.


5. One who is not entitled to limit liability is fully accountable for the adverse consequences of his wrongful actions. Conversely, with a few statutory exceptions, the maximum liability of a vessel owner or charterer entitled to limit liability is the value of his interest in the vessel, including its freight then pending, immediately after the occurrence giving rise to the limitation proceeding. See 46 U.S.C. § 183 (1976 & Supp. V 1981), reproduced in pertinent part in infra text accompanying note 14. Thus, the right to limit liability can greatly...
That something short of full legal title to the vessel will at times suffice for limitation purposes is made clear by the Act itself, which provides that some charterers who, clearly, are not possessed of legal title, can limit. Moreover, the cases have made clear that the specific inclusion of charterers who man, victual and navigate vessels has not exhausted the ranks of those possessing an interest short of, or other than, legal title who are permitted to limit their liability. Thus, in *Flink v. Paladini* the issue was whether shareholders of a corporation which was the titled owner of the tugboat Henrietta were "owners" of that vessel for limitation of liability purposes. In concluding that the shareholders could properly limit their liability, the Court noted that the Congressional intent in enacting the Limitation Act was to encourage investment in maritime enterprises, and concluded that implementation of that intent required that the exposure of the individual shareholders be no greater than the exposure of those jointly owning a vessel. Justice Holmes, speaking for a unanimous Court, then said:

> We are of the opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent. This is not to ignore the distinction between a corporation and its members, a distinction that cannot be overlooked even in extreme cases . . . but to interpret an untechnical word in the liberal way in which we believe it to have been used—as has been done in other cases.

Much water has flown over the limitation dam since *Flink v. Paladini*, and it is no longer fashionable to liberally construe the Limitation Act. Moreover, it is clear that the term owner has not affect one's exposure to liability.


7. 279 U.S. 59 (1929).

8. *Id.* at 63. At the time, California law made shareholders of corporations personally liable for the corporation's obligations. That, in the absence of such a provision, status as a shareholder will not enable one to benefit from the Limitation Act is illustrated by Calkins v. Graham, 667 F.2d 1292 (9th Cir. 1982). Thus, if a shareholder is to bring himself within the ambit of section 183 ownership, it must be for reasons such as the nature of his possession and control of the vessel, and not merely because of his stock ownership.

9. See G. Gilmore & C. Black, Jr., *The Law of Admiralty* 822 (2d ed. 1975). There is at least some reason to believe that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute, even without further limiting amendments, will be narrowly and not expansively construed.

See also Comment, *Shipowners' Limited Liability*, Colum. J.L. & Soc. Probs. 105, 107-09 (1967), which indicates that this changing judicial attitude has been most visible in the concepts of privity or knowledge. It has long been the law that an owner is entitled to limit his
always been applied "in a broad and popular sense" for limitation purposes, since those in whom legal title reposes have at times been prevented from limiting liability while that right has been conferred upon others who by no "popular sense" would likely be labeled owners. If boundaries are to be drawn around the concept of ownership for limitation of liability purposes, then, we must go beyond the "popular usage" test espoused by Justice Holmes and search for more precise guideposts.

The complicated in itself problem of determining "ownership" for limitation of liability purposes is made even more difficult because that term also has relevance to many other matters of concern to those involved directly or indirectly in the shipping industry. And, the parties may structure their organizations and the "ownership" of their vessels with an eye to one or more of those "other" and more immediate matters, and not with concern of the limitation issue that is usually far removed from their minds when the significant legal relationships are formed. Thus, by way of illustration, American "owners" may place legal title to a vessel in a wholly owned foreign corporation to avoid compliance with United States shipping laws; a vendor of a vessel may retain legal title until the purchaser has completed payments; and sale and lease-back agreements may be created to maximize tax savings. Obvi-
ously, these relationships—and a host of others created for tax benefits, corporate management, and accessibility to certain markets—were not devised with an eye toward the remote likelihood that it might one day prove economically desirable for one or more of the affected parties to limit liability in order to avoid an as yet undreamed of future liability. Yet, these relationships, often if not usually formed for reasons having little or nothing to do with the right to limit liability, must be sifted through in order to see if the latter right exists. It is, undoubtedly, for these reasons that the courts have expressed a healthy reluctance to place the entire emphasis upon the situs of the legal title and have shown a clear willingness to be governed by more pragmatic considerations.

In beginning any attempt to unravel the meaning of the word "owner" for limitation of liability purposes, it is necessary to keep clearly in mind the fact that the Act itself separates ownership into two separate and distinct categories. Since 1851, certain charterers who lack any of the common indicia of ownership other than a qualified right to possess and use the vessel pursuant to a specific authorization of another in whom the remaining indicia of ownership reposes, have been statutorily designated as owners for limitation purposes. Thus, 46 U.S.C. § 186, as did its antecedents, provides that:

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

11. See infra text accompanying notes 123-72 for a discussion of the right of charterers to limit liability.

Many other statutes directly related to or touching upon the maritime industry also contain the term "owner." See, for example, § 311(b)(6) of the Federal Water Pollution Prevention and Control Act which deals with the liability of, inter alia, the owner of a vessel for discharge of oil or hazardous substances. 33 U.S.C. § 1321(b)(6) (1976 & Supp. V 1981). It is not at all clear whether one deemed a vessel owner for the purposes of such statutes will also be deemed an owner for limitation of liability purposes. It is to be hoped, however, that courts will look to the underlying purpose of each such statute in deciding whether to extend decisions thereunder to another area of maritime law, and not do so in a thoughtless and haphazard manner.

12. The language of 46 U.S.C. § 186 has remained unchanged except for "housekeeping purposes" since its enactment. See the Act of March 3, 1851, ch. 43, § 5, 9 Stat. 636. In the original "this chapter" reads "this title."
Application of section 186 poses its own problems, which will be dealt with subsequently. However, that section sheds no light on the question of which persons other than charterers within its scope can be deemed owners for limitations purposes; nor on the question of whether it exhausts the lists of those possessing something short of legal ownership who may be entitled to limit liability. Thus, the answers to these questions must be gleaned from other sources.

To fully understand the concept of ownership for limitation of liability purposes, then, it must be constantly remembered that there are those who are owners for section 186 purposes, and those who are owners within the scope of 46 U.S.C. § 183, which provides that:

(a) 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 not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Cases dealing with either of those distinct categories of "owners" are not likely to be of much assistance in drawing boundaries around the other group which, unfortunately, is described by the same term.

II. "OWNERS" WITHIN THE SCOPE OF 46 U.S.C. § 183

A. Legal Title as an Indicia of Ownership

We will begin by exploring "ownership" for section 183 purposes and leave for later discussion those charterers who too may be treated as owners for limitation purposes.

In attempting to more precisely define the term "ownership" for section 183 purposes, there is a temptation to begin by asserting

13. See infra text accompanying notes 123-72.
15. Ownership for section 186 purposes is largely, if not exclusively, limited to demise charterers who, in actual fact, are not possessed of any of the traditional aspects of legal ownership. The courts have not shown any indication whatsoever to expand the concept of ownership for section 186 purposes beyond demise charterers, although there are decisions indicating that, perhaps, there may exist a type of ownership pro hac vice that is separate and distinct from that of a demise charterer and which may be embraced within the scope of section 183. See infra text accompanying note 66.
16. See infra text accompanying notes 123-72.
the frequently encountered principle that "bare legal title," standing alone, is insufficient. That premise finds "lip service" support in many cases and is compatible with *Hyde v. Shine* where, in a totally different context, the Supreme Court said: "[a]lthough the word 'owner' has a variety of meanings, and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title. . . ." Support for that position can be found in the court of appeals' decision in *American Car & Foundry Co. v. Brassert*. There the court, citing *Hyde v. Shine*, held that a vessel manufacturer who retained legal title solely as security for payment of the balance of the purchase price could not limit its liability for personal injuries and property damage caused by the vessel's explosion. But the *Brassert* court was careful not to state as a flat rule that the possessor of a bare legal title could never limit his liability, concluding instead that "under the circumstances of this case appellant [the possessor of the legal title] cannot be considered as the owner of the vessel in controversy within the meaning of the [limitation of liability] statute." Indeed, the *Brassert* decision as a whole does not indicate that dismissal of the manufacturer's Petition to Limit Liability was premised upon petitioner's lack of more than a bare legal title so much as upon the fact that the injured party's suit was not in any way dependent upon American's ownership and, perhaps, upon the fact that the cause of action was then believed to be beyond the court's admiralty jurisdiction. Thus, the court said:

> It must be borne in mind that appellee's [Brassert's] cause of action is not based on appellant's [American Car & Foundry Co.'s] ownership. Appellant is not sued as an owner, but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equipment, and

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18. 199 U.S. 62 (1905). This case arose out of the indictment of Frederick Hyde for defrauding the United States out of the possession and use of certain tracts of public land. It involved, *inter alia*, interpretation of a statutory provision providing certain rights to the settler or owner of lands, and it was concluded that Hyde, as the possessor of land under a void title, did not come within the scope of the statute. *Id.* at 82. Although *Hyde v. Shine* in no way attempted to define ownership for limitation of shipowners' liability purposes, it has repeatedly been cited as analogous authority in limitation cases. This has no doubt been influenced by the Supreme Court's failure to definitively discuss the concept of ownership in a limitation of liability context.

19. *Id.* at 82 (emphasis added).

20. 61 F.2d 162 (7th Cir. 1932), *aff'd*, 289 U.S. 261 (1933).

21. 61 F.2d at 165.
inspection, a failure of a duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership.\textsuperscript{22}

And, it was under those circumstances that the court believed permitting the bare title holder to limit its liability would be "going further than the statute warrants."\textsuperscript{23} Thus, the court of appeals' decision in \textit{Brassert} does not close the door upon limitation attempts by holders of bare legal title under other circumstances, such as where the action asserted is either deemed as being within the admiralty's jurisdiction or is a type that is peculiar to those who own or operate vessels and not such an action as could just as readily be asserted against one who never indulges in such salty pursuits.

American Car & Foundry Company challenged the court of appeals' decision and, in a unanimous decision authored by Chief Justice Hughes, the dismissal of the Petition to Limit Liability was affirmed.\textsuperscript{24} The Supreme Court stressed that the liability the statute was intended to limit was "a liability imputed by law by reason of the ownership of the vessel."\textsuperscript{25} And, since the liability of the manufacturer-owner was not imputed to it by reason of its status as an owner, but was instead grounded upon its status as a negligent manufacturer, the right to limit was not deemed to exist.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} (emphasis added). Authority that one possessing the equivalent of bare legal title, but who is sued solely as a result of that rather limited ownership interest, can limit liability is found in Petition of Colonial Trust Co., 124 F. Supp. 73 (D. Conn. 1954). Similarly, there is no dearth of authority permitting limitation by owners who were not in possession and control of the vessel at the time of the occurrences giving rise to the claims for which limitation is sought. See \textit{Rice v. New York Trap Rock Corp.}, 198 F. Supp. 346 (S.D.N.Y. 1959), \textit{aff'd}, 294 F.2d 272 (2d Cir. 1961); \textit{Rautbord v. Ehmann}, 190 F.2d 533 (7th Cir. 1951); Petition of Anthony O'Boyle, Inc., 51 F. Supp. 430 (S.D.N.Y. 1943).
\item \textsuperscript{23} 61 F.2d at 165.
\item \textsuperscript{24} 289 U.S. 261 (1933).
\item \textsuperscript{25} \textit{Id.} at 264 (emphasis added).
\item \textsuperscript{26} \textit{Id.} at 265. The Court stated:
\end{itemize}

What, then, is the liability which petitioner seeks to limit? It is manifestly not a liability imputed to petitioner as shipowner. With respect to respondent, the mere fact that petitioner retained the legal title to the vessel, in order to secure the payment of the remainder of the price, neither created liability for the injury alleged to have been sustained on account of the explosion nor conferred immunity. \begin{itemize}
\item \textsuperscript{If such liability existed, it arose not because petitioner reserved title, while delivering possession and control of use, but because it was manufacturer and vendor. The question of liability would be determined with reference to the obligations which were expressly assumed by the vendor, or were inherent in the transaction, irrespective of the title retained as security. Similarly, as to other persons who are alleged to have suffered injury from the accident . . . petitioner's liability, if any, had no relation to any responsibility of petitioner as holder of the naked title, but would depend upon
\end{itemize}
It is possible, however, that one in the position of the manufacturer in *Brassert* could be subjected to liability on some basis distinct from its status as a manufacturer and that, in such an instance, he could successfully petition for limitation of liability despite his "naked title" ownership status. That likelihood seems

petitioner's conduct as maker of the vessel. . . .

*Id.* (emphasis added).

27. The *Brassert* court seemed somewhat swayed by the fact that the action against American Car & Foundry Company was not then believed to have been within the court's admiralty jurisdiction. See 61 F.2d at 165. *See also supra* note 20 and accompanying text.

It has subsequently been made clear that tort causes of action premised upon negligence or design failures occurring during the manufacturing stage resulting in injury during the pursuit of undoubted maritime ventures are within the admiralty jurisdiction. See Sperry Rand Corp. v. Radio Corp. of America, 618 F.2d 319 (5th Cir. 1980), and the authorities cited in *Moore & Pelaez, supra* note 2, ¶.220[3.-2]. Thus, to the extent *Brassert* can be construed as indicating that the owner's inability to limit liability was barred because of the non-maritime nature of the claim asserted, it is today suspect.

It is questionable, moreover, that such an interpretation of *Brassert* was ever warranted since, at the time, it was widely believed that the shipowner's right to limit existed even if the claims asserted against him were not "maritime claims." See the impressive list of authorities cited in Petition of Colonial Trust Co., 124 F. Supp. at 75, for the proposition that a vessel owner can limit his liability "without regard to whether the claims limited against are such as might be sued upon in admiralty or not" (quoting 1 *Benedict, Admiralty* 232 (6th ed.)). The foundation for that contention is the pre-*Brassert* case of *Richardson v. Harmon*, 222 U.S. 96 (1911), which did in fact construe section 18 of the Act of June 26, 1884, ch. 121, 23 Stat. 57 (current version at 46 U.S.C. § 189 (1976)), as enlarging the protection afforded vessel owners in the previously enacted Limitation Act by providing for the limitation of non-maritime torts and other liabilities beyond the scope of the original Act. As stated by 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." 222 U.S. at 106. Since that "broadening" legislation has remained an uninterrupted part of our law, *see* 46 U.S.C. § 189 (1976), and has been declared constitutional as an exercise by Congress of powers given to it in both the admiralty and commerce clauses of the Constitution, it is unlikely that the inability of the American Car & Foundry Company to limit its liability was in any way premised upon the nonadmiralty nature of the claim asserted against it. *See The Hamilton*, 207 U.S. 398 (1907), making clear that the Limitation Act of 1851 was enacted pursuant to both the commerce clause and implied Congressional powers in the clause granting admiralty jurisdiction to the federal courts; and Goodrich Transit Co. v. Interstate Commerce Commission, 190 F. 943 (Comm. Ct. 1911), *rev'd on other grounds*, 224 U.S. 194 (1912), holding that section 18 of the Act of June 26, 1884 was a legitimate exercise by Congress of its power to regulate commerce.

Although the above cases indicate that the vessel owner will be able to limit liability where there is no privity regardless of the non-maritime nature of the asserted claim, it is probable that today courts would be prone to place limitations upon so expansive an interpretation of the applicable legislation. Thus, by way of illustration, it is at least questionable whether, today, a vessel owner could use the Limitation Act to insulate himself from liability for injury to third persons caused by the negligent actions of a seaman traveling through Kansas to pick up equipment needed by the vessel for the continuation of its maritime pursuits. Yet, read literally, *Richardson v. Harmon* and its progeny would apparently sanc-
especially possible in this day when counsel, in filing suit, are not likely to first sort out the intricacies of ownership and control but, instead, are more wont to use a shot-gun approach that entails dragging every potential defendant into the litigation. In such a situation, it might well be that the basis for the suit against the manufacturer would not be for activities beyond the scope of the Limitation Act but, instead, premised on its status as a vessel owner. In such a case, the manufacturer-owner-holder of a bare legal title would seem as entitled to use the limitation device as would any other owner of a vessel. Thus, precedent seems to make clear that the nature of the claim asserted against the person or entity possessed of some facet of ownership is more determinative of the right to limit than the legal nature of the title or "ownership." Brassert, then, seems to offer strong support for the conclusion that it is the susceptibility to suit because of one's ownership status, coupled with at least one of the traditional indicia of ownership, that is required for limitation of liability purposes.

The Brassert opinions thus make clear that one possessing a legal title that will automatically terminate upon the completion of...
contemplated scheduled payments and who is not directly involved in the vessel's navigational or commercial enterprises cannot limit where the claim asserted against him has nothing to do with his status as owner and could just as readily have been asserted against the purported "owner" even if he had long ceased to occupy that status.29 However, Brassert can also be read as providing to anyone who is sued as an owner—even if that ownership interest is nothing or little more than a bare legal title—the right to limit liability. This potential facet of Brassert finds judicial support in Petition of Colonial Trust Co.30 There, the Colonial Trust Company held legal title to the yacht "Charlotte" in trust for the spouse of the deceased trust settlor during her lifetime, with the remainder interest in other persons. In an action against the cestui que trust and the trustee brought by a repairman injured while winterizing the Charlotte's engines,31 the court had little difficulty in concluding that the Colonial Trust Company was an owner for limitation of liability purposes. It is significant that the Colonial Trust court, although citing and obviously approving of Brassert,32 was unswayed by the fact Colonial Trust's ownership interest in practical effect gave it little if any more right over the operation and control of the Charlotte than did the ownership of the American Car & Foundry Company which the Brassert court dismissed as amounting to nothing more than a "bare legal title." The clear indication, then, is that the "bare" or "full" nature of the ownership interest is not nearly so critical as the fact that the vessel owner's subjectability to suit arises out of and is premised upon that ownership, no matter its nature, and is not premised upon other activities.

Thus, Brassert and its progeny provide support for the contention that anyone in whom some facet of legal ownership reposes can make use of a section 183 limitation proceeding if subjected to

29. While it is clear that a former owner can limit liability for damages caused by that ownership, see infra note 107, the liability of the manufacturer in Brassert—whether asserted during or after his ownership—was not premised either upon that entity's activities as an owner or as a result of its status as an owner. Thus, it is difficult to justify its having any greater rights than negligent manufacturers in general.


31. Id. It is significant that, at the time of the injury, the Charlotte was in storage in a boat house on dry land. Thus, the court recognized that the repairman's claim was probably not within the admiralty's jurisdiction, but thought that factor of no consequence since filing of the Petition to Limit Liability satisfied the jurisdictional pre-requisites. Id. at 74-75.

32. 61 F.2d 162 (7th Cir. 1932), aff'd 289 U.S. 261 (1933).
suit as a result of that legal ownership and not for activities distinct or remote from the status as legal owner. Those decisions do not, however, provide much help in determining whether persons or entities in whom none of the legal title reposes may also be deemed owners for section 183 limitation of liability purposes. To answer that most significant question demands additional investigation.

B. Ownership Unrelated to Legal Title

Support for the contention that “ownership” sufficient to permit section 183 limitation of liability may in some instances be unrelated to legal title and turn instead on the petitioner’s subjectability to suit for occurrences arising out of the use of a vessel is first seen in The Milwaukee, another often cited decision in this arcane yet important corner of maritime law. There, the entity seeking to limit its liability—the Grand Trunk Milwaukee Car Ferry Company—executed an agreement of sale dated November 33.

In concluding that the Colonial Trust Company was an owner for limitation of liability purposes, the court noted only that “[t]he Trust Company held legal title, as trustee, and the vessel was numbered in its name, as trustee.” 124 F. Supp. at 76. The bulk of the discussion focused upon the right to limit of the cestui que trust, who was possessed only of an equitable interest. Id.

As outlined supra note 27, 46 U.S.C. § 189 (1976) also provides the shipowner the right to limit his liability. That section has been construed as an expansion of the right to limit originally set forth in the 1851 Limitation Act. Thus, when speaking of “owners” for section 183 purposes, we are also speaking of “owners” within the scope of 46 U.S.C. § 189. In short, the latter section creates no additional category of persons permitted to limit liability.

As has been previously discussed, it seems reasonably safe to conclude that one in whom some facet of legal ownership reposes can seek to limit liability for claims asserted against him as a consequence of that legal ownership status. Conversely, the possession of a legal interest in the vessel will not likely enable the “owner thereof” to successfully limit liability if the claim asserted is in no way dependent upon activities of that person as an owner, but, instead, results from a wholly separate enterprise—such as the claim for negligent manufacture and design asserted against the American Car & Foundry Company in the Brassert case. That this distinction may invite pleading “niceties” is illustrated by the district court’s opinion in In Re Barracuda Tanker Corp., 281 F. Supp. at 228.

The moving claimants may have recognized this, [the rule that if the petitioner may be held liable because of his ownership or control of the vessel he may limit his liability] for their claims against Union are very carefully worded so as to avoid allegations that Union’s liability flows from its “ownership” or “control” of the Torrey Canyon. Nevertheless, analysis of their claims leads to the inescapable conclusion that, if they are successful in holding Union accountable, it will probably be because Union was “owner” of the vessel as that term has been construed in the past.

Id. As the decision of the court in In Re Barracuda Tanker Corp. illustrates, however, vigilant courts are not likely to permit pleading form to prevail over substance!

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36. 48 F.2d 842 (E.D. Wis. 1931).
15, 1928, intended to be effective at the close of business on December 31, 1928. Under this agreement, the seller conveyed all its assets and indebtedness, including the vessels subsequently alleged to have caused damage to the claimants, to the Grand Trunk Western Railroad Company. The agreement of sale, however, was but part of a much broader general plan of consolidation and unification of railroads under the aegis of the vendee corporation, and the entire plan was submitted for approval to the Interstate Commerce Commission.37

As luck would have it, the incident out of which the maritime suits arose occurred between the date the conveyance was to become effective and the date on which the I.C.C. approved the consolidation plan. And, during that period, the books of the Car Ferry and the Railroad were kept separately and the affected vessels, although their ownership was shrouded in confusion, were operated exactly as they had been in the past by the Grand Trunk Milwaukee Car Ferry Company.38

The Car Ferry Company sought to limit its liability for the damages alleged to have been caused by the vessels and the injured claimants challenged its ability to do so on the ground that, at the time of the occurrence, it was no longer an “owner” within the scope of the Limitation Act.39 The court first observed that the limitation statute and case law “disclose liberality toward scope and applicability”40 of the term “owner;” and that the right to limit should turn upon whether the petitioner’s relationship to the vessel, “whatever it is found to be, might reasonably furnish ground upon which a claim of liability for damage could be asserted.”41

37. Id. at 842-44.
38. Id.
39. Id. at 842.
40. Id. It is significant that, at the time, the courts gave a liberal interpretation to all facets of the Limitation Act. While it is no longer fashionable to liberally interpret the substantive provisions of the Act, it is not clear whether the current retrenchment extends to the previous inclination to liberally interpret owners for limitation purposes. See supra note 9.
41. 48 F.2d at 842. In expanding upon the latter criterion, the court commented that Flink v. Paladini, 279 U.S. 59 (1929):
s seems to indicate that whether or not one is to be deemed an “owner” depends largely upon the possibility that he may be subjected to a liability which ordinarily is assertable against one having, or claiming to have, proprietorship or dominion over the subject of the proceeding. It negatives the thought that “owner” of, or to “own” a vessel means the situs of full title, interest, or dominion, and that nothing else is within the definition of the right or the range of the statute.
Id. at 842 (emphasis added).
However, virtually anyone in possession of a vessel may be sued for injuries or damage to third parties arising out of that possession, and it is reasonably clear that not all such persons are "owners" for section 183 limitation of liability purposes. Thus, in *Vang v. Jones & Laughlin Steel Corp.* a barge broke away from Jones & Laughlin's landing causing damage to property owned by, *inter alia*, the libellant Vang. The respondent Steel Corporation sought to limit its liability to the after-the-occurrence value of the barge and was denied the right to do so. The court noted that:

> [I]n view of the fact that the respondent had possession of Barge 608 merely for the purpose of unloading coal after the barge had been delivered at its landing place . . . it was not a charterer of the vessel. The respondent had custody of the boat solely to unload it, and its duty was to hold the boat safely at its landing place until that unloading was accomplished.  

Based upon those facts, and notwithstanding that Jones & Laughlin "of course, would be liable for the damage resulting from the breaking away of this boat from this landing place," the court found it to be a bailee and as such beyond the scope of the Limitation Act. Similarly, in *The Severance* one seeking to limit liability was denied that right because, although in possession of the vessel at the time of the occurrence in issue, "[h]e was at best a mere bailee or trustee ex maleficio. Thus he cannot claim the benefit of the Limited Liability Act."  

Thus, *Vang* and *The Severance* indicate that the interest sufficient to constitute ownership for section 183 limitation of liability

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42. 7 F. Supp. 475 (W.D. Pa.), aff'd, 73 F.2d 88 (3d Cir. 1934).
43. 7 F. Supp. at 477. It is significant that Jones & Laughlin sought to place itself within the scope of 46 U.S.C. § 186, which compelled it to prove that it was a demise charterer of the barge in question. Subsequent decisions give some indication that one failing to prove he was a demise charterer could yet assert he was an owner *pro hac vice* and, as such, within the scope of 46 U.S.C. § 183. See *infra* text accompanying note 66.
44. *Id.* at 477-78. It is significant that the liability of Jones & Laughlin in such an instance would be premised on its activities while lawfully in possession of the barge, and not because of any interest it had in the vessel. Indeed, even one wrongfully in possession of the barge would have the same liability to third persons injured during such use and possession. Thus, at least arguably, it might be said that Jones & Laughlin's liability had nothing to do with its status as an owner. The same argument could, however, be made where the person filing the Petition to Limit Liability possessed all legal indicia of ownership.
45. 152 F.2d 916 (4th Cir. 1945).
46. *Id.* at 921. Indicative of the confusion courts encounter in placing labels on those possessing vessels, however, is *Marstaller v. Albina Dock Co.*, 191 Or. 145, 229 P.2d 269, 273 (1951) where the court said, "[t]he legal effect of a demise is to put the parties, as between themselves, in the position of bailor and bailee of the vessel . . . ." That statement notwithstanding, it seems reasonably clear that for limitation of liability purposes a demisee and a bailee stand in quite distinct positions!
purposes must be greater than the interest sufficient to subject one to liability for damage caused by a vessel, and must entail at least one or more of the traditional facets of ownership in addition to the immediate right to possession, at least where the right to possess is of a relatively short duration. However, other cases, including *The Milwaukee* itself, cast doubt upon the accuracy of that statement.

The usefulness of *The Milwaukee* as a guide for ascertaining the interest required to qualify as an owner for limitation purposes is lessened because the court made no attempt to clearly define the nature of the petitioner Car Ferry Company's interest in the subject vessels. There is emphasis on the fact that the parties themselves believed the sales agreement to be executory pending occurrence of the ICC's approval and, if that is so, their intent would have to prevail over the apparently contradictory language of the sales agreement. Thus, the court said:

The question is not whether a title, speaking in strictness, remained in abeyance, but whether, notwithstanding words of present purchase and sale, the parties considered the whole arrangement as executory and as necessarily awaiting the doing of some future act upon which, it may well be said, it was all conditional.\(^4\)

If that was the basis of the court's decision, it would be authority only for the proposition that, for matters of private contract, the clearly ascertained intentions of the contracting parties should control the question of when title to the vessels passes and that the Car Ferry Company as both the owner and possessor of the vessels until the occurrence of the contemplated contingency was the proper party to limit liability.\(^4\) However, in another part of the opinion the court clearly indicated that the passage of title or even possession is largely irrelevant in determining ownership for limitation purposes.\(^4\) Thus, the court clearly thought the "ownership"

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\(^{47}\) 48 F.2d at 844-45.

\(^{48}\) It could be argued, however, that since the right to limit liability directly affects the interests of the third party claimants, the subjective intentions of the parties to the contract should give way to an objective determination of whether or not title passed. It is at least questionable whether the unexpressed private intentions of the parties to an agreement such as that entered into in *The Milwaukee* should be permitted to impinge upon the rights of third parties not party to such an agreement.

\(^{49}\) 48 F.2d at 844. The court was satisfied that:

[U]pon the proofs and the application of the test hereinbefore noted, the petitioner has brought itself within the range of the statute and the rules; that is to say, the petitioner has shown a relationship to the vessel and its operation which, on its own showing, furnished ground for asserting either a qualified ownership, or some sub-
interest sufficient to enable the Car Ferry Company to limit liability could be something less than even a qualified ownership, at least so long as that "something less" amounts to "some substantial legal interest." Moreover, the court seemed also to indicate that the vendee railroad too had a sufficient interest to bring it within the scope of the Limitation Act, gratuitously noting that while it would be difficult for the Car Ferry Company to avoid a claim of ownership "a like claim might be made against the railway company." Thus, The Milwaukee can be read as indicating that both the vendor and vendee corporations there involved had a sufficient interest to qualify as "owners" for section 183 purposes.

It has generally been held that, in the absence of contrary federal legislation, state law will determine the question of when title to a vessel passes. See Stewart & Co. v. Rivara, 274 U.S. 614 (1927); St. Paul Fire and Marine Ins. Co. v. Vest Transp. Co., 666 F.2d 932, 938 (5th Cir. 1982). It could well be argued that the Limitation Act, by providing certain remedies to owners of vessels, pre-empts state law when a determination of ownership must be made for Limitation of Liability purposes and that, as a consequence, general federal maritime law should govern that question even where state law would otherwise be applicable. For analogous authority, see Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954). See also infra note 122.

50. 48 F.2d at 844.

51. It should be noted that while The Milwaukee can be read as indicating that both the Car Ferry Company and the Railroad Company would be entitled to limit liability, the Railroad Company did not petition to limit liability. While noting that the Railroad Company could also be deemed the owner of the involved vessels, that statement was not made in the context of the Limitation of Liability Act. The full quote of the court in that regard was as follows:

As indicated upon oral argument, if the case were not before the court under the limitation statute, but upon an ordinary proceeding charging [the Car Ferry Company] as owner of and liable for the loss, it would be difficult, upon the facts now before the court, to evade or avoid claim of ownership. True, a like claim might be made against the railway company.

48 F.2d at 844. While that language could be taken as a tacit assertion that either the Car Ferry Company or the Railway Company could be deemed owners for limitation of liability purposes, it is also consistent with earlier cases holding that while a mere bailee or someone whose interests fall short of section 183 ownership can be held fully responsible for tortious occurrences caused by them during their possession and control of the vessel—perhaps, as owners pro hac vice—they are incapable of limiting liability for such tortious occurrences. See the district court's opinion in Vang v. Jones & Laughlin Steel Corp., 7 F. Supp. 475 (W.D. Pa. 1934), where, after concluding that Jones & Laughlin was not an owner for limitation of liability purposes, the court said:

The respondent had custody of the boat solely to unload it, and its duty was to hold the boat safely at its landing place until that unloading was accomplished. The respondent, of course, would be liable for the damage resulting from the breaking away of this boat from this landing place.

Id. at 477-78 (emphasis added). It is significant, however, that the Railway Company in The Milwaukee case did not exercise such exclusive possession and control over the subject vessel at the time of the injuries. Thus, its liability would have been premised upon its status
The latter interpretation of *The Milwaukee* decision is most significant in that it indicates that section 183 ownership need not necessarily be tied to legal title at all, but can be premised upon ownership interests completely separate and distinct from title.\(^3\) And, it is exactly that thread that was picked up and expanded upon nearly two decades later by the court in *Petition of Colonial Trust Company*.\(^3\)

In *Colonial Trust Company*, full legal title to the vessel “Charlotte” reposed in the trustee-Trust Company which successfully premised its Petition to Limit Liability upon that ownership interest.\(^4\) However, the settlor’s wife also petitioned to limit liability, and it is clear that her life estate fell short of placing legal title to the vessel in her. In challenging this petition to limit, the injured repairman urged that, since the wife’s interest was only equitable, she was not an owner for section 183 limitation purposes. In disposing of that contention, the court said:

> [B]ut she had in addition [to her equitable interest] all of the outward attributes of ownership. She had full and exclusive possession and control of the vessel; she was responsible for its maintenance and operation. As far as third persons were concerned, she had complete dominion over it; it was her boat, and the claimant sued both her and the Trust Company in the State court as owners. The legal relations between Mrs. Elton and the “Charlotte” implicit in her life use, were of sufficient number, scope and dignity to come within the purview of the statute.\(^5\)

The court then noted that holders of fractional legal interests have been permitted to limit liability\(^6\) and reasoned that:

> If the legal relations which together comprise ownership of a vessel can be split perpendicularly so that several persons are owners, as with tenants in

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\(^5\) In that regard, the court would have picked up on a portion of the expanded definition of ownership articulated by the Court in *Hyde v. Shine*, 199 U.S. 62, 82 (1905). *See supra* text accompanying note 19. There, the Court noted that “under certain circumstances” the word owner could include “an equitable as well as a legal ownership...”. It is interesting that, although this facet of the *Hyde* Court’s expanded definition of “ownership” has found its way into section 183 limitation of liability decisions, that Court’s observation that ownership could even include “a right of present use and possession” has made a much less auspicious inroad in section 183 cases. *See infra* text accompanying note 69, commencing the discussion of *In Re Petition of United States* and *In Re Barracuda Tanker Corp.*

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common, and each is able to claim the protection of the statute, there seems little reason why the statute should not also apply where those same legal relations are split horizontally as in the present case provided each holder of an interest has sufficient legal relations to constitute what has been tradition-ally recognized in the law as "title" either legal or equitable with sub-
stantial rights and powers in dealing with the property; that is, something more than possession and control, for a mere bailee or lessee is not entitled to a limitation of his liability . . . and something more than bare legal title held for security of an obligation not in default, because such a holder cannot invoke the statute.57

Thus, Colonial Trust holds that any interest in a vessel which gives the holder thereof "substantial rights and powers in dealing with" the vessel will suffice for section 183 limitation of liability purposes. And, while the court does not explicitly define the nature of those "substantial rights" required, it does make clear that they need not depend upon legal title so long as they provide the holder with something more than a bare right to possess and control the vessel.58

At first blush, it appears that Colonial Trust has broadened the scope of those who can be deemed "owners" for section 183 pur-
poses. Upon closer scrutiny, however, it may well be that it repre-
sents a slight backing away from an expansive reading of the court’s decision in The Milwaukee,59 at least insofar as the owner

57. 124 F. Supp. at 76.
58. It is, of course, clear that "substantial rights and powers in dealing with" a vessel can be created by contract. However, 46 U.S.C. § 186 (1976) specifically embraces demise charterers—whose powers fall short of amounting to either legal or equitable ownership and which are contractually created—within the ambit of those types of "owners" entitled to limit liability. See infra text accompanying notes 123-72. What is not yet clear is whether any other contractually created rights that do not amount to a type of legal or equitable ownership, and which are not embraced within the scope of section 186, give rise to a claim of section 183 ownership for limitation of liability purposes. There is clearly a considerable distance between the limited right to possess and control the vessel of the bailee in Vang v. Jones & Laughlin Steel Corp., 7 F. Supp. 475 (W.D. Pa.), aff’d 73 F.2d 88 (3d Cir. 1934), and an undoubted demise charterer falling squarely within the scope of 46 U.S.C. § 186. Whether any persons or entities falling within that range are owners for limitation of liability purposes presents an important, and as yet not satisfactorily answered, question. It is not inconceivable, however, that one lacking facets of either legal or equitable ownership but who is possessed of more than transitory "substantial rights and powers in dealing with" a vessel could yet be deemed an "owner" for section 183 limitation of liability purposes.
59. 48 F.2d 842 (E.D. Wis. 1931). The Milwaukee can possibly be read as permitting the owner of an equitable interest in a vessel and who did not have possession and control of the vessel at the time of the occurrences giving rise to the claims sought to be limited to come within the scope of section 183, at least if sued as a result of that equitable interest. In that regard, it would treat the owner of the equitable interest far more generously than Colonial Trust, where it appears that it was necessary for the equitable owner to be in possession and control of the navigational functions of the involved vessel.
of an equitable interest is concerned. For, in Colonial Trust, the holder of the equitable interest had virtually complete power over the operation and maintenance of the vessel and, if anyone's right to limit might have been suspect, it was that of the possessor of legal title, in whom reposed neither the present nor future right to possess, control or otherwise navigate the "Charlotte."\(^{60}\) In The Milwaukee, on the other hand, possession and control of the fleet of vessels involved clearly reposed in the Car Ferry Company, and not in the Grand Trunk Western Railway Company. Thus if the Grand Trunk's interest was equitable in nature, as it appears to have been, the court's seeming indication that it too could have successfully petitioned to limit liability\(^{61}\) could go beyond the "substantial rights and powers in dealing with the vessel" test articulated in Colonial Trust.\(^{62}\) If, on the other hand, the interest of the Grand Trunk Western Railway Company was a defeasible legal title with the immediate right to possession and control remaining with the holder of the equitable interest, the only distinguishing factors between it and the unsuccessful petitioner in Brassert\(^{63}\)—which could indeed be significant—would be that its legal interest was not held solely for purposes of security, but for the

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60. It is significant that, upon completion of the equitable owner's life estate, the residuary estate of which the vessel was a part was to go to other persons. Thus, the Trust Company's legal interest was only for the purposes of acting as a conduit from the cestui que trust to the remaindermen or, possibly, to dispose of the vessel and distribute the funds derived from the sale to the remaindermen. While the Trust Company's legal title was perhaps more significant than the legal title of the American Car & Foundry Company, (see 61 F.2d 162 (7th Cir. 1932), aff'd, 289 U.S. 261 (1933)), in that it assured that the Trust Company would once again come into possession of the vessel in its capacity as a conduit or a vendor, it was at no time contemplated that the Trust Company would at some future time put the vessel to navigational pursuits. Thus, the potential control over the vessel reposing in the Trust Company does not seem markedly different than that of the American Car & Foundry Company.

61. That this is not the only rational interpretation of The Milwaukee decision, however, is made clear in the discussion in note 51, supra.

62. In that regard, it could be authority for the premise that the owner of the equitable interest could limit liability when suit is premised upon his status as an owner even in the absence of any possession or control of the vessel. It should be noted, however, that based on the facts, the Railway Company, if indeed the owner of an equitable interest, held that interest for the purposes of, and in anticipation of, coalescing the equitable and legal ownership so that it could engage in navigational pursuits. Thus, its equitable interest was quite obviously more than a bare equitable interest and is more in accord with the interest of the mortgagee in Admiral Towing Co. v. Woolen, 290 F.2d 641 (9th Cir. 1961), discussed infra at note 97, than with the interest of the holder of the legal title in American Car & Foundry Co. v. Brassert, 61 F.2d 162 (7th Cir. 1932), aff'd 289 U.S. 261 (1933), discussed supra at note 20.

63. 61 F.2d 162 (7th Cir. 1932), aff'd 289 U.S. 261 (1933).
eventual end of assuming operation and control of the vessels,\textsuperscript{64} and the fact that any action against it would have of necessity been premised upon its status as a legal owner and not, as was true in Brassert, only because it had manufactured the vessels out of which the claim arose. That this type of legal ownership has consistently been deemed as more significant than "bare legal title" is evidenced by, inter alia, the inclusion of the trustee within the ambit of section 183 ownership in Petition of Colonial Trust Company.\textsuperscript{65}

C. Non-Demise Owners Pro Hac Vice and Other Possessors of Vessels as Section 183 Owners

Thus, Colonial Trust and The Milwaukee lend credence to the contention that the omission of the holders of "bare legal title" from the lists of those who can limit for section 183 purposes has been narrowly construed and, perhaps, confined to those whose bare legal title is being held only for security purposes and who are not subjected to suit because of that title interest. Moreover, the emphasis placed by those courts on one's subjectability to liability "ordinarily assertible against one having . . . proprietorship or dominion over" the involved vessel opened up the possibility of extending the concept of ownership for section 183 limitation purposes to those who possess neither legal nor equitable title and who are not demise charterers within the scope of 46 U.S.C. § 186. That opening was made to appear more plausible by the Third Circuit's decision in In Re Petition of United States.\textsuperscript{66}

There, the Naval tanker USNS Mission San Francisco was operated by Mathiasen's Tanker Industries under a contract with the Military Sea Transportation Service, an agency of the United States Navy. Under the contract, Mathiasen had full control over the operation and manning of the vessel and was to assume all control normally incident to a demise charter.\textsuperscript{67} However, in contesting Mathiasen's Petition to Limit Liability filed pursuant to 46 U.S.C. § 186, injured crew members contended that the agreement with the Military Sea Transportation Service did not rise to the level of a demise charter because Mathiasen was to be reimbursed by the government for its operational expenses and, as a conse-

\textsuperscript{64} See supra note 62.
\textsuperscript{65} 124 F. Supp. 73 (D. Conn. 1954).
\textsuperscript{66} 259 F.2d 608 (3d Cir. 1958).
\textsuperscript{67} Id. at 611.
quence, did not “man, victual and navigate such vessel at his own expense” as required of section 186 owners.\(^6\) Initially, the court noted that section 186 also includes within its express scope those charterers who man and provision the subject vessel at their own expense “or by . . . [their] own procurement”\(^8\) and concluded that Mathiasen at the very least procured the men and materials required to navigate the USNS Mission San Francisco. However, the court did not rest on that point, but went on to note that the relationship of Mathiasen to the vessel made it both a charterer and an owner pro hac vice, and concluded that “[e]ither status justifies its petition for limitation.”\(^7\) Moreover, the court of appeals cited The Milwaukee court’s interpretation of Flink v. Paladini,\(^7\) a section 183 ownership case. The court also referred to Petition of Colonial Trust Co.\(^7\) as pertinent authority for its decision, and concluded by stating:

A prime purpose of the limitations acts has been to promote the employment of vessels in commerce and the encouragement of persons engaged in the business of navigation. . . . Mathiasen in this collision, as to third parties, had virtually the responsibility of the record owner. Under the theory and purpose of the statute Mathiasen should be afforded the same kind of protection against the possibility of the crushing loss which might arise as is given said owner.\(^7\)

\(^6\) Id. at 609 n.1. See 46 U.S.C. § 186 (1976). See also supra note 12 for the text of the statute.
\(^7\) 259 F.2d at 609 n.1.
\(^7\) Id. at 610.
\(^7\) 279 U.S. 59 (1929). See 259 F.2d at 610; supra note 41.
\(^7\) 259 F.2d 608. It is significant that all of the cited authorities dealt with ownership for purposes of 46 U.S.C. § 183 even though Mathiasen premised its right to limit upon 46 U.S.C. § 186.
\(^7\) 259 F.2d at 611. See also Complaint of B.F.T. No. Two Corp., 433 F. Supp. 854 (E.D. Pa. 1977). There, Boston Fuel owned all the stock of BFT, which was the titled owner of the Harbor Star. Pursuant to an oral agreement, Boston Fuel operated the vessel—i.e., it was responsible for supplying a crew, fuel, insurance and maintenance. All income and expenses generated and incurred from the operation of the Harbor Star were credited or charged directly to BFT and, at the end of each year, it paid to Boston Fuel an operating fee based upon a percentage of the gross income generated by the vessel. The claimants contended that Boston Fuel was neither an owner nor charterer within the scope of sections 183 and 186 of the Limitation Act and, as a consequence, could not limit its liability. The court nonetheless permitted Boston Fuel to limit its liability, stating: “While we are not certain that the terms embodied in the oral agreement between Boston Fuel and BFT would normally constitute a ‘charter party,’ the case of In Re Petition of United States . . . compels us to conclude that Boston Fuel may limit its liability in this case.” 433 F. Supp. at 872. In reaching that conclusion, the court also said:

Both Mathiasen and Boston Fuel are “engaged in the business of navigation” as operators of vessels owned by other concerns. It is because of their status as operators that they are potentially liable for the negligence of the vessels, and it is because of
Demise charterers have frequently been referred to as "owners pro hac vice" of vessels and it is arguable that the court was simply using the terms interchangeably and doing no more than concluding that Mathiasen was entitled to limit as provided in section 186. However, the repeated references to the section 183 authorities and the apparent distinguishing of charterers and owners pro hac vice for limitation purposes strongly indicates that the court was of the opinion that Mathiasen could premise its right to limit upon either section 186 or section 183, since it had complete and more than transitory operational control of the vessel and its liability arose out of the exercise of that control. And, in distinguishing Vang v. Jones & Laughlin Steel Corp. where one whose right to possession and control was more limited both in time and scope and, as a consequence, was deemed a mere bailee unable to limit, the court noted that there, the would-be limitor was "... a mere bailee who was nothing else. ..." For other maritime purposes, those whose right to temporarily possess and control the movements of vessels upon navigable waters have been deemed owners pro hac vice of those vessels. But, for limitation of liability pur-

their status as operators that they fall within the scope of the limitations statutes. 433 F. Supp. at 873. In a footnote, the court stressed that the degree of control exercised over the vessel by the operator, and not the nature of the corporate relationship, should be controlling. 433 F. Supp. at 873 n.20. Thus, in the Third Circuit one falling short of qualifying as a demise charterer seems to be capable of arguing that his control is sufficient to bring him within the scope of section 183 for limitation purposes.

74. See Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 611 (3d Cir. 1948), stating that the demise charterer "becomes owner pro hac vice" and the discussion in Moore & Pelaez, supra note 2, at ¶ 245[1]. See also infra text accompanying notes 123-72.

75. See supra text accompanying note 12.

76. 7 F. Supp. 475 (W.D. Pa.), aff'd, 73 F.2d 88 (3d Cir. 1934).

77. 259 F.2d at 609, (emphasis added).

78. See Blair v. United States Steel Corp., 444 F.2d 1390 (3d Cir. 1971), cert. denied, 404 U.S. 1018 (1972), where a bailee in exclusive possession of a barge was deemed the owner pro hac vice for Jones Act and unseaworthiness purposes; and Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), where a bailee-type owner pro hac vice was deemed an owner for purposes of the Longshoremens' and Harbor Workers Compensation Act. Neither of these owners pro hac vice would qualify as demise charterers under the commonly used criteria. See infra notes 123-72 and accompanying text.

It is significant that there is some indication of a judicial willingness to expand the definition of a demise charter to broaden the range of remedies available to injured seamen and to other maritime workers. See the discussion in Bishop v. United States, 334 F. Supp. 415, 418 (S.D. Tex. 1971), rev'd, 476 F.2d 977 (5th Cir. 1973), where, as dictum the court noted that the enlarged interpretation of demise charters in the personal injury area should not be construed as changing the general maritime law but as the "courts' attempt to construe the congressional intent in Jones Act cases," and concluded that the enlarged interpretation of demise charters in the personal injury cases should not be used for proving or disproving the existence of a demise charter in other situations. This contention was specifically rejected by
poses, such temporary and limited rights of possession and control have consistently been deemed inadequate, and there is nothing in *In Re Petition of United States* that indicates a backing away from that position. To the extent the decision carves out a category of owner *pro hac vice* who is separate and distinct from a demise charterer yet different also from a mere bailee, however, and provides such an owner *pro hac vice* with the ability to limit his liability, it is a most significant decision in that it could be construed as adding yet another group of non-titleholders to the ranks of section 183 owners.

The "owner *pro hac vice*" distinction apparently made in *In Re Petition of United States* was picked up and elaborated upon in *In Re Barracuda Tanker Corp.*, dealing with the total loss of the infamous "Torrey Canyon" and its burgeoning cargo of crude oil off the southwest coast of England. There, the Union Oil Company of California—which had entered into a twenty-year time charter of the Torrey Canyon from its registered owner—sought to limit its liability for the tens of millions of dollars of damage inflicted to the fifty-dollar after-the-occurrence value of the completely destroyed tanker. The court rejected the contention that the charter, even though for so lengthy a term, was tantamount to a demise, concluding that, "[i]t seems clear that, in couching section

the court of appeals, which thought that there is but a single standard for the finding of a demise charter and that the standard should be uniformly applied in all areas of the admiralty. Bishop v. United States, 476 F.2d 977 (5th Cir.), cert. denied, 414 U.S. 911 (1973). It is evident, however, that the courts have expressed a willingness to expand the definition of *pro hac vice* ownership in the personal injury area to embrace those who by no stretch of the concept could be deemed demise charterers. These cases lend analogous support to the separation of demise charterers and owners *pro hac vice* for limitation of liability purposes. What scant precedent there is, however, indicates that an owner *pro hac vice* who would even attempt to be brought within the scope of section 83 must prove a considerably more permanent and/or substantial relationship to the vessel than has been required of those designated as owners *pro hac vice* for maritime personal injury purposes. For an expanded discussion of this issue see *infra* notes 123-72 and accompanying text.

79. 259 F.2d 608 (3d Cir. 1958). See *supra* note 66 and accompanying text.
81. It is clear that the "time charter" arrangement was created for income tax purposes and that, to a considerable extent, Union's control over the use of the Torrey Canyon was identical to that of an owner. See *supra* note 10. Nevertheless, the charter clearly designated it as the time charterer and specifically provided that "nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer." 281 F. Supp. at 231.
82. The horrendous damage to beaches and wildlife caused by the Torrey Canyon's loss of 119,328 tons of crude oil—and the minimal amount of the after the occurrence value of the vessel—precipitated a renewed and vigorous attack on the limitation doctrine that has shown few signs of subsiding. The $50 limitation fund represented the stipulated value of a single lifeboat, the only property salvaged from the disaster.
186 in the terms chosen, Congress intended in the usual case to accord the right to limit liability to the bareboat charterer, while denying that right to the time charterer." Undaunted, Union Oil contended that it should be permitted to limit its liability as an owner pro hac vice of the Torrey Canyon, which squarely presented the issue of whether a charterer outside the scope of section 186 ownership might nevertheless be deemed an owner for section 183 purposes. The court first noted that, as the historical basis for the protection afforded by the Limitation Act waned, there has been a judicial tendency to view the Act restrictively. It noted, however, that "... this change in judicial attitudes has not affected the liberal approach which has always been manifest in determining who is entitled to maintain a limitation proceeding." And, after reviewing a broad array of section 183 cases, the court concluded, "[t]he rule that has emerged ... appears to be that, if the petitioner may be held liable because of his ownership or control of the vessel, he can maintain a petition to limit his liability." Thus, although noting that it was a difficult question as to whether that rule should be extended to the case before it, the court concluded that Union had to be given an opportunity to prove its section 183 ownership in a full limitation proceeding and enjoined the claimants from instituting separate suits against Union outside the limitation proceeding.

The claimants appealed that portion of the district court's order enjoining separate actions against Union, contending that the court erred in finding Union to be an owner within the ambit of section 183. The readily available use of the corporate form to insulate owners from catastrophic loss, and the availability of reasonably priced liability insurance, today fulfills many of the purposes intended to be achieved by the Limitation Act. Moreover, those purposes are achieved without visiting the full consequences of marine disasters upon the victims. Other authorities had provided that control of the vessel coupled with either legal or equitable ownership would suffice for section 183 purposes. Control of the vessel unrelated to any type of ownership, however, seems to have been pushing the concept of section 183 ownership into previously uncharted territory. Thus, the court's use of the disjunctive "or" is of considerable significance.

One of the advantages that inures to a vessel owner permitted to limit liability is that he may compel a concourse of all claims asserted against him. Such claims must be asserted in the forum he selects in filing his Petition to Limit and, since that forum must be within the admiralty jurisdiction of a federal district court, the claimants are thus prevented from having a jury pass on their claims. Moreover, all prior suits commenced against the vessel owner in state or federal courts are enjoined, and those claimants must assert their right to recover in the limitation of liability proceeding.

83. 281 F. Supp. at 231.
84. The readily available use of the corporate form to insulate owners from catastrophic loss, and the availability of reasonably priced liability insurance, today fulfills many of the purposes intended to be achieved by the Limitation Act. Moreover, those purposes are achieved without visiting the full consequences of marine disasters upon the victims.
85. 281 F. Supp. at 230.
86. Id.
87. Id. at 232 (emphasis added). Other authorities had provided that control of the vessel coupled with either legal or equitable ownership would suffice for section 183 purposes. Control of the vessel unrelated to any type of ownership, however, seems to have been pushing the concept of section 183 ownership into previously uncharted territory. Thus, the court's use of the disjunctive "or" is of considerable significance.
88. 281 F. Supp. at 232. One of the advantages that inures to a vessel owner permitted to limit liability is that he may compel a concourse of all claims asserted against him. Such claims must be asserted in the forum he selects in filing his Petition to Limit and, since that forum must be within the admiralty jurisdiction of a federal district court, the claimants are thus prevented from having a jury pass on their claims. Moreover, all prior suits commenced against the vessel owner in state or federal courts are enjoined, and those claimants must assert their right to recover in the limitation of liability proceeding.
The court of appeals interpreted the theories of liability asserted by the claimants against Union as being premised upon activities unrelated to the navigation of the Torrey Canyon and, consequently, analogized the situation to the claim of negligent manufacture asserted against American Car & Foundry Company in the Brassert case, where the undoubted legal owner of a vessel was not permitted to limit liability alleged to have resulted from that owner's negligent manufacturing of the vessel. Not content to stop there, the court of appeals went on to note that:

No good reason has been advanced as to why the Government claimants must await the trial of the limitation proceeding before asserting their claims against Union. No case has been cited to us which supports the contention of Union that, as a time-charterer, it may be an 'owner' within § 183, even though it is not a 'charterer' within § 186. 'It seems quite plain that time charterers . . . are not entitled, as such, to take any benefit of the limitation of liability statutes.'

But, the court then reverted to its earlier assertion that the claims against Union were not within the scope of the limitation statute and, as a consequence, that it would make no difference whether Union was or was not deemed a section 183 owner. It was in the context of this discussion that the court quoted Justice Black, dissenting in Maryland Casualty Co. v. Cushing:

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.

89. 409 F.2d at 1014 (2d Cir. 1969).
90. Id. at 1015. The court found that:

The theory upon which they [the Government claimants] apparently are proceeding is that the stranding and sinking of the TORREY CANYON and the damage to their shores were caused by activities of Union unrelated to the navigation of the vessel, and that Union had something to do with the original designing and manufacturing of the TORREY CANYON in 1958 and with its enlargement in 1965.

91. Supra note 20.
92. 409 F.2d at 1015. (emphasis added.)
93. 347 U.S. 409 (1954). Maryland Casualty held that direct action suits against marine insurers should not be permitted to impair the shipowner's and charterer's right to indemnification for sums paid to claimants in a limitation proceeding. To accomplish that end, insurers—who are "... not entitled to 'limitation of liability' as that phrase is used as a term in admiralty"—were in effect able to successfully base their opposition to direct actions commenced against them on the Limitation Act. 347 U.S. at 421-22.
94. 409 F.2d at 1015. That Justice Black's dissent was quoted in relation to the court's belief that the nature of the claims asserted against Union were not of a nature subject to
Thus, while the court of appeals quite obviously did not believe a time charterer could circumvent the section 186 barrier by emphasizing its status as an owner pro hac vice, it is not clear whether that belief is a part of the holding or merely very strong dictum. And, it is even less clear whether one who is not a charterer at all, and bases his owner pro hac vice status upon grounds entirely distinct from any form of written or oral charter agreement, is similarly precluded from being able to bring himself within the scope of 46 U.S.C. § 183 on the ground that his alleged liability stems from his activities as the person or entity lawfully in possession and control of the vessel and who is more than a mere bailee or someone having a most transient and temporary possession of the vessel. Similarly, it is equally unclear whether the current judicial unwillingness to liberally construe the Limitation Act is an “across the board” phenomenon or, as indicated by the lower court in In Re Barracuda Tanker Corp., it is inapplicable to the determination of who is entitled to maintain a limitation proceeding. The answers to those questions are inseparably entwined with any definitive conclusions as to the issues of section 183 ownership.

One additional case that must be closely scrutinized in attempting to determine who are owners for section 183 limitation of liability purposes is Admiral Towing Co. v. Woolen. There, Admiral Towing Company and Walter Martinson petitioned to limit their respective liabilities for damages arising out of the disappearance at sea of the tug boat “Companion.” In that proceeding, it was held that Martinson was the owner of the Companion and that, with privity and knowledge, he had negligently failed to provide the vessel with an adequate crew, a life boat, or a functioning ship limitation is evidenced by the first part of the paragraph in which the quotation is set forth. There, the court said: “Finally, it is hard to see how it would foster the purposes of the limitation of liability statute to allow Union, only incidentally in the shipping industry through Barracuda, to delay prosecution of claims not covered by the statutes.” 409 F.2d at 1015. (emphasis added.) Thus, while the quoted objection to extension of the Limitation Act might also apply to an extension of the Act’s definition of the concept of section 183 ownership, it is not clear that the court intended it to serve that function.

95. In short, it could conceivably be that a more than transitory owner pro hac vice unfettered by any written or oral charter agreement might be in a better position to claim section 183 ownership status than one relying upon a charter agreement that specifically provides he is not to be deemed a demise charterer. While that result might appear somewhat illogical, it is a possible interpretation of the court of appeals decision in In Re Barracuda Tanker Corp.

96. See supra note 80.

97. 290 F.2d 641 (9th Cir. 1961).
to-shore radio. On appeal, Martinson contended that the district court lacked jurisdiction to hear his petition to limit liability because he was neither the owner nor the charterer of the vessel. The court thought Martinson was estopped from making that argument because of his earlier actions in asserting the right to limit but, nonetheless, went on to rule against him on the substantive aspects of the ownership issue. Moreover, the court's disposal of Martinson's contention that he was not an owner for section 183 purposes was not mere dictum but, clearly, an alternative basis for its affirmance of the lower court's decision.

The facts disclose that Martinson sold the Companion and another tug to one Louis Horne and an associate. Horne gave Martinson promissory notes for the unpaid balance of the sales price, one of which was secured by a mortgage on the Companion. Subsequently, Horne transferred legal title of the Companion to Admiral Towing Company, of which he was president. After payment on the notes was in default, Horne individually and as president of Admiral Towing agreed to re-deliver the tugs to Martinson. Upon delivery, Martinson was to cancel the promissory notes. Horne attempted to comply with the agreement, but a series of mishaps prevented him from delivering the Companion. As a result, Martinson employed an agent to pick up the Companion in Portland and deliver it to him in San Francisco. Horne turned the Companion over to the Martinson's agent and, on the journey from Portland to San Francisco, it was lost. Thus, although Martinson, through his agent, exercised complete control of and dominion over the Companion, "... he held no life estate in the lost vessel nor was he operating her under a written contract which approximated a chartering agreement." Nevertheless, the court had little trouble in concluding that he was an owner within the scope of section 183 of the Limitation Act. The court first distinguished those cases holding a mortgagee not in possession to be beyond the scope of the Act and those decisions making clear that possession and control standing alone are insufficient to base a claim of ownership for limitation purposes. It then went on to state:

98. Id. at 643. Such factual determinations would be sufficient to prevent any owner from limiting his liability.
100. Id. at 646.
101. Id. at 645.
102. Id. But see the discussion of In Re Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968), modified, 409 F.2d 1013 (2d Cir. 1969), supra text accompanying notes 80-
When, however, a mortgagee . . . comes into possession and control of a vessel as the first step in a process which is to culminate uninterruptedly in his becoming the holder of legal title to her, we think he becomes an owner for purposes of limiting his liability. *This for the reason that his relationship to the vessel is such as might reasonably afford grounds upon which a claim of liability for damages might be asserted against him, a claim predicated on his status as the person perhaps ultimately responsible for the vessel's maintenance and operation and a claim against which the Limitation Act is designed to furnish protection.* 103

It is significant that the *Admiral Towing* court did not focus

88.

103. 290 F.2d at 645 (emphasis added). That the fact one may be a “likely target” for a lawsuit stemming from injuries involving a vessel will not, in the absence of possession and control, necessarily be sufficient to bring him within the ambit of section 183 ownership is illustrated by Calkins v. Graham, 667 F.2d 1292 (9th Cir. 1982). The vessel involved in Calkins, the Lucky One, was owned by Pearl Calkins who agreed to sell the vessel to her son, William F. Calkins, or to such third party as he might select. Ms. Calkins delivered the vessel to William and, thereafter, Alaska-Oregon Fisheries, Inc., a corporation of which William owned 75% of the stock, agreed to purchase the Lucky One. That corporation immediately entered into a separate oral agreement to sell the Lucky One to Ballo, and possession of the vessel was turned over to Ballo. Ballo then sailed the vessel to a boat repair facility and, while there, one Graham was injured and commenced a suit to recover for her injuries. Title to the vessel was obtained by Alaska-Oregon Fisheries, Inc. (AOF) after the accident and, also after the accident, that corporation retook possession of the Lucky One when Ballo failed to make the agreed installment payments for purchase of the vessel. 667 F.2d at 1293.

William Calkins, named in his individual capacity as a defendant, sought to limit liability contending, *inter alia*, that he was a section 183 owner “because he was 'unquestionably the person who operated and managed the vessel,' thereby making him a 'likely target' for any legal claims concerning the vessel.” *Id.* at 1294. Thus, relying on Admiral Towing Co. v. Woolen, 290 F.2d 641, 645 (9th Cir. 1961), he argued that the term “owner” “should encompass anyone whose 'relationship to the vessel' is such as might reasonably afford grounds upon which a claim of liability for damages might be asserted against him . . . .” 667 F.2d at 1294. In rejecting Calkins’ contention, the court determined:

*Although this contention may have had some merit while Calkins was in exclusive possession and control of the vessel for his mother, it does not apply to the situation as it existed at the time of the accident. When the accident occurred, Calkins no longer had possession or control of the vessel, nor was he responsible for its maintenance and operation; Ballo was in possession and control and responsible for the vessel’s maintenance and operation under her sales agreement with AOF. Id.* at 1294-95 (footnote omitted)(emphasis added). Thus, since Calkins had no ownership interest in the vessel at the time of the occurrence, and since he was not in possession and control of the vessel, and since at the time of the occurrence giving rise to the action for which limitation of liability was sought the ultimate conditional vendee was not yet in default, he was denied the right to limit liability. The case does, however, lend some credence to the contention that one whose possession makes him the target for a lawsuit premised upon that possession and control of the vessel might indeed successfully limit pursuant to section 183 notwithstanding the absence of any indicia of legal title. *See also* Dick v. United States, 671 F.2d 724 (2d Cir. 1982), where the court, in permitting the United States to limit liability although it was neither the owner or charterer of the vessel, said: “As a general rule, one who is subjected to a shipowner's liability because of his exercise of dominion over a vessel should be able to limit his liability to that of an owner.” *Id.* at 727.
alone upon the fact that Martinson’s efforts were aimed directly toward obtaining title to the Companion but, instead, attempted to reconcile the concept of ownership with a goal of the Limitation Act to protect those against whom suit can be commenced “. . . predicated on his status as the person . . . ultimately responsible for the vessel’s maintenance and operation. . . .”¹⁰⁴ Martinson’s status as the person “ultimately responsible for the vessel’s maintenance and operation” was undoubtedly augmented by the fact he fully intended to foreclose on the mortgage and, thereby, coalesce his right to operate and control with the situs of the legal title.¹⁰⁵ However, several of the decisions previously discussed herein seemingly make that coalescence unnecessary for the determination of section 183 ownership at least where the right to operate and control is to be of some substantial nature and duration and is therefore distinguishable from the possession and control effectuated by one who is a mere bailee and nothing more.¹⁰⁶ Moreover, the fact it was Martinson’s intention to subsequently regain legal title to the Companion should not be conclusive, since it is the would-be limitor’s relationship to the vessel at the time the damage claims arose, and not his status at some subsequent time, that is determinitive of the right to limit. This is made clear by numerous authorities permitting successful petitions to limit liability by former owners who, at the time limitation was sought, no longer had any interest, legal or otherwise, in the offending vessel. Thus, the court in Petition of Zebroid Trawling Corporation¹⁰⁷ quite accurately noted, “[L]imitation has been held available to former owners even when the ship has been lost or abandoned . . . or condemned and sold . . . or taken over by the underwriters. . . .”¹⁰⁸ And, it has even been held that a former owner could limit liability for injuries sustained after it had parted with ownership of the vessel but where its actions at a time when it was the unquestioned

¹⁰⁴. 290 F.2d at 645. As pointed out by the court, such a claim is precisely that type of claim “. . . against which the Limitation Act is designed to furnish protection.” Id.

¹⁰⁵. Id. at 645-46. That the court undoubtedly deemed that inevitable future consequence relevant is illustrated by its statement that: “For all intents and purposes, when the Companion was given over to Cone [the agent] . . . in San Francisco, ownership of the vessel passed to Martinson despite the fact that technical legal title had not yet passed. Consequently, even if he were not estopped on the issue, Martinson would be an ‘owner’ within the meaning of § 183.” Id.


¹⁰⁷. 428 F.2d 226 (1st Cir. 1970). In this case, and in the authorities therein cited, the damage for which limitation of liability was sought arose out of incidents occurring when the petitioner held legal title to the offending vessel.

¹⁰⁸. Id. at 228.
owner were a proximate cause of the subsequent injury-causing occurrence. Thus, it is arguable that Martinson would have been deemed an owner for section 183 purposes even if he had not possessed the immediate future intention to have legal title to the tug transferred to him, but was nevertheless at the time of the damage-causing incident the person "ultimately responsible for the vessel's maintenance and operation. . . ."

109. See In Re The Trojan, 167 F.Supp. 576 (N.D. Cal. 1958). There, the United States acquired title to the Trojan by decree of forfeiture. The vessel was then taken out of navigation, berthed in a Reserve Fleet, and ultimately sold to the Sheffield Tankers Corporation. In a separate sale, the United States sold oil stored in the Trojan's bunker tanks and warranted the oil as "Bunker C Fuel oil." In fact, the "oil" was an "admixture" of highly volatile, inflammable and explosive matters which exploded after title had changed hands causing extensive damage to the vessel and injuring and killing some 52 persons. The United States sought to limit its liability and the issue, as framed by the court, was whether "a person who at the time of the accident had neither legal nor equitable title [can] qualify as an owner if the accident was proximately caused by such person's conduct at a time when he unquestionably was the owner and unquestionably had the right of limitation." Id. at 578. In answering that question, the court said that:

[In] order to effectuate the purposes of the Act the motion to dismiss [the United States' Petition to Limit Liability] should be denied. To hold otherwise would subject a person to greater liability after a sale than existed before a sale. The weakness of such a holding appears when it is recalled that the alleged liability arose as the result of negligent conduct occurring before sale and during ownership, at which time limitation would have been available.

Id.

It should be noted that it is not all that clear that limitation would have been appropriate even if the United States had never sold The Trojan since it possessed the vessel only as a result of its owner's having run afoul of the law and its negligence was not in operating the vessel but in failing to disclose the nature of materials it sold. Thus, there was more than a passing resemblance to the United States' status and the status of the American Car & Foundry Company in Brassert, 61 F.2d 162 (7th Cir. 1932), aff'd, 289 U.S. 261 (1933). The court circumvented that potential barrier, however, by noting that while the only claim then asserted against the United States was that of its vendee, there was the distinct possibility that the personal injury claimants would also seek relief against the United States and that those claims—ostensibly because they would be premised upon the United States' status as owner of the vessel and not because of breach of warranties arising out of the sale—would be limitable.

It should be noted that contracts to sell vessels are not maritime. See Moore & Pelaez, supra note 2, at ¶ .245[2]. The contract to sell the bunker oil, however, would likely be maritime since it was to be used by a vessel that was to be again placed in navigation. See Moore & Pelaez, supra note 2, at ¶ .230.

The court did not deal with the troublesome fact that, at the time of the negligence, The Trojan was withdrawn from navigation. And, it is at least questionable whether a "vessel" withdrawn from navigation maintains its status as a vessel for maritime purposes and, as a consequence, whether the owner of such a structure can be embraced within the scope of the Limitation of Liability Act. In that regard, it is significant that such a structure is not a vessel for most other maritime purposes. See Moore & Pelaez, supra note 2, at ¶ .215[4].

110. 290 F.2d at 645. It is difficult to see how the position of Martinson for limitation purposes would have been significantly different had its possession of the Companion been for purposes of commencing a judicial sale to satisfy its mortgagee rather than as a step
D. Guidelines for Determining Section 183 Ownership

The foregoing discussion makes evident the fact that, for limitation of liability purposes, "ownership" is not entirely wedded to the situs of legal title to a vessel but, instead, may in a particular case encompass a broad range of legal, equitable and possessory rights held singularly or in combination by those seeking the right to limit. Thus, it is not possible to set forth a single rule that will apply to all limitation proceedings, and each case must be resolved on an ad hoc basis with close attention to its particular facts. There are, however, a few common threads that run through the decisions that provide considerable assistance to resolving the question of whether a particular person's or entity's relation to a vessel is sufficient to successfully invoke section 183 protections.

Initially, the precedents are virtually unanimous in requiring that the claim sought to be limited be one premised upon the would-be owner's status as the person having legal title, an equitable interest or the right to possess and control the vessel and not because of other, and unrelated, activities. It is, by way of illustration, unlikely the undoubted registered legal owner and operator of a vessel who was also the manufacturer thereof could limit his liability for claims based solely upon his malfeasance or misfeasance during the design or manufacturing of the vessel, even though he could most certainly seek limitation of liability for claims arising out of the operation and use of the vessel during his ownership. Thus, while it is not a prerequisite to the right to limit that the claims be maritime in nature, or that the person or entity seek-
ing to limit liability have been in control of or in any manner connected with the vessel's operation at the time the claims arose,\textsuperscript{113} it seems clear that the claims must be of a type to which owners, \textit{qua owners} and because of that ownership, can be subjected and not of a type to which those who by no stretch of the imagination ever ascended to the status of ownership could also be subjected. It is significant to note that such potential exposure to liability as one possessing an ownership interest does not require that one himself have been engaged in navigational pursuits, either directly or indirectly, but requires only that his subjection to the asserted liability arise only because of the fact that at the time of the claim-creating occurrence he possessed one or more of the traditional indicia of ownership—\textit{i.e.}, legal or equitable title or the right to possess and control. If this first hurdle is cleared by one possessing undoubted legal title, it seems probable that no more will be required and limitation as to claims asserted against him because of his status as a legal owner will, in the absence of privity or knowledge or some other defense, be subject to limitation. As to holders of other traditional facets of ownership, however, clearing this first hurdle will most probably mean only that he \textit{may} be able to limit, subject to his being able to hurdle one or more of the remaining barriers. If the person seeking to limit is unable to clear this initial hurdle, no degree of satisfaction of the subsequently enumerated criteria will likely be of any usefulness to him.

Secondly, where the person seeking to limit possesses no portion of legal ownership, as that term has been broadly construed to include those who possess interests in the entity in whom legal title in actuality reposes,\textsuperscript{114} but instead bases his averment of ownership on equitable or possessory and control rights, something more than transitory and incidental possession and control will in all probability be required.\textsuperscript{115} Thus, while a non-demise charterer\textsuperscript{116} who in practical fact has a much more than transitory and near complete possession and control of a vessel at the time of the oc-

\begin{enumerate}
\item[113.] See supra note 27 and accompanying text.
\item[114.] See Flink v. Paladini, 279 U.S. 59 (1929).
\item[115.] With the possible exception of a contrary indication in \textit{The Milwaukee}, 48 F.2d 842 (E.D. Wis. 1931), there is no authority to support the contention that the owner of an equitable interest in a vessel who lacks any operational or navigational control of that vessel can limit his liability.
\item[116.] A demise charterer, by definition, does not have either a legal or equitable interest in the vessel. He can, however, limit liability because he has been conferred ownership status by an Act of Congress. See 46 U.S.C. § 186 (1976 & Supp. V 1981) and \textit{infra} text accompanying notes 123-72.
\end{enumerate}
currency for which limitation is sought may have a shot at being able to limit, it is clear that the mere fact he had virtually complete control for a limited purpose will be insufficient to distinguish him from a "mere bailee and nothing more" and, as a consequence, prevent him from being categorized as an owner for section 183 purposes. Moreover, it seems probable that as the interests possessed go from equitable to merely possessory, a greater amount of actual and more than transitory or otherwise limited rights of possession and control will be required, and that the end goal intended as a result of that possession and control will likely be afforded more significance. Thus, while a rather limited possession and control by one having an equitable interest in the vessel may be sufficient to have him designated as an owner for section 183 purposes, and similar rights of possession and control may also be sufficient to enable one who has exercised it for the purposes of coalescing in the immediate future his right to possess with legal or equitable ownership, much more will undoubtedly be required of one whose right to possess and control is not based on legal or equitable title and who has not come into possession as the first step in an intended uninterrupted process of transferring legal ownership to himself.

Finally, one whose rights of possession and control are considerably greater than a "mere bailee" but who falls short of qualifying as a demise charterer may have a chance of basing section 183 ownership upon his being the person ultimately responsible for the vessel's maintenance and operation if he is not laboring under a contractual agreement specifically designating him as a time or voyage charterer, but will more than likely have no basis to make such a contention if he is by express terms of the agreement upon which his possession and control is based placed outside of section 186 ownership. Thus, the greater the scope of the possession and control and the less said in an agreement about its legal status, the stronger the argument for section 183 ownership that can likely be made. It cannot be overly emphasized, however, that one basing a

117. See supra note 43 and accompanying text.
118. Thus, one possessing neither legal nor equitable title but who premised his right to limit upon the fact that his possession was directed toward the immediate coalescing of legal title and possession, was deemed a section 183 owner in Admiral Towing Company v. Woolen, 290 F.2d 641 (9th Cir. 1961). It is unlikely that a similar possession by one with less "salty" aspirations would have sufficed for that purpose.
contention of section 183 ownership on his status as an owner pro hac vice has a tough row to hoe and had better be possessed of a considerable amount of persuasive legal dexterity!\textsuperscript{120}

It is not contended that these broad guidelines will enable courts to steer casually through the ownership reefs that are daily created by imaginative lawyers in structuring the present-day operation of

\textsuperscript{120} It is evident that limitation can not possibly be available to all owners pro hac vice who can conceivably be fit between the legal and equitable owners entitled to limit in section 183 and those undoubted demise charterers granted the right to limit in section 186. On the one extreme are those having temporary rights of possession and control for limited purposes, such as while loading or unloading cargo on or from barges at their wharf facilities. Limitation by such transient "owners pro hac vice" has been systematically and uniformly denied. At the other extreme are those who fall just short of demise charterer status, either because of the nature of their possession and rights to control or because of specific limitations set forth in their charter agreements. While such persons may have stronger claims to limit, permitting them to achieve ownership status would tend to undermine section 186. Whether there exists a middle ground, clearly beyond the scope of section 186 and to which section 183 could logically be extended without subverting the Congressional intent of providing a right of limitation only to demise charterers, and to no other types of charterers, is both unclear and somewhat questionable. It is toward that middle ground, however, that counsel for non-demise-charterer owners pro hac vice must aim.

That there may be a special category of owner pro hac vice unrelated to either legal or equitable ownership or to possession and which is available only to the United States is indicated in Dick v. United States, 671 F.2d 724 (2d Cir. 1982). In Dick, the owner of a private pleasure boat injured the plaintiff during the course of a negligent rescue operation. And, since the negligent rescuer was at that time functioning as a member of the Coast Guard Auxiliary, the victim sought to recover against the United States. The United States attempted to limit liability to the value of the rescuing vessel, and was denied that right by the district court. \textit{Id.} at 725. In reversing, the court of appeals noted that the Coast Guard Auxiliary Act provides in 14 U.S.C. § 827 that a vessel performing such saving duties shall be deemed to be a public vessel of the United States; and that the Public Vessels Act in 46 U.S.C. § 789 provides to the United States "... the benefits of ... all limitations of liability accorded by law to the owners, charters, operators or agents of vessels." \textit{Id.} at 726. The court, citing Flink v. Paladini, 279 U.S. 59 (1929), as authority that the term "owner" is to be liberally construed for limitation purposes, and believing it unlikely that Congress intended the United States to bear a greater responsibility for damage caused by auxiliary Coast Guard vessels than for damage directly caused by the Coast Guard, concluded that: "[v]iewing the language of the Coast Guard Auxiliary and Reserve Act in the light of this historical background, we conclude that, for liability purposes, Congress intended the United States to be treated as owner pro hac vice of Coast Guard Auxiliary boats, which become "public vessels" when assigned to Government service." \textit{Id.} at 728. In dissenting, Circuit Judge Mansfield noted that, "[t]he fact that the boat was deemed by statute to be a 'public vessel' did not, absent ownership, or chartering by the government, permit the United States to claim limitation of liability." \textit{Id.} at 728 (Mansfield, J., dissenting). The dissent notwithstanding, the case stands for the premise that the United States, in the narrow range of the facts of the case, can be deemed an owner pro hac vice of a vessel in which it has absolutely no ownership interest and over which it exercised no dominion, possession, or control. Thus, \textit{Dick} seems to sanction a judicial expansion of the right to limit inferred from another Act of Congress which in no way directly dealt with the limitation issue. It is highly unlikely another such expansion will be found where a private litigant, and not the government, is involved.
maritime enterprises to take advantage of, or to evade, the host of tax and regulatory considerations that have much to do with commercial shipping, and little to do with answering the question of who are owners for the purposes of the Limitation of Liability Act. They do, however, shed more light on the issue than can be found in any single authority, and if flexibly applied should ease the pain of the voyage.

It is indeed lamentable that in this, the probable twilight of the limitation era, courts and litigants must yet waste money and scarce judicial resources in determining this collateral, but most significant, legal issue. Perhaps, before the Limitation Act is itself confined to the shelves of maritime history, the issue of ownership will be more clearly and definitively developed. Until that happy day, however, in far too many instances both would be owners and claimants will be compelled to proceed without a clear indication of their potential rights and liabilities.

III. DEMISE CHARTERERS ENTITLED TO LIMIT LIABILITY

The statutes providing for limitation of liability have always provided that the charterer of any vessel, "in case he shall man, victual, and navigate such vessel at his own expense, or by his own

121. See infra note 166 for a discussion of piercing corporate veils to ascertain ownership for limitation purposes.

122. In addition to the uncertainty surrounding the nature of the ownership interest that will enable one to limit liability, it is unclear whether the existence of the appropriate ownership interest is to be determined by state law or by general federal maritime law. There is no dearth of non-limitation maritime authority that "The question of ownership of a vessel is ordinarily governed by state law." St. Paul Fire and Marine Ins. Co. v. Vest Transp. Co., 666 F.2d at 938. See also Puamier v. Barge BT 1793, 395 F. Supp. 1019, 1028 (E.D. Va. 1974).

However, since existence of the requisite ownership interest is inseparably entwined with the right to limit, and since only a federal court exercising its admiralty jurisdiction can determine if the right to limit exists, a strong argument can be made that the question of ownership must be determined by federal law. See generally, Moore & Pelaez, supra note 2, at ¶ F.03. See also Calkins v. Graham, 667 F.2d 1292 (9th Cir. 1982) where, in a limitation of liability case, the court stated in a footnote: "[i]n any event, this court is not bound in any way by the state court verdict on the issue of liability in determining the federal question of whether Calkins was the 'owner' of the Lucky One under federal law." Id. at 1295 n.1.

In all probability, the absence of clear maritime precedents on the question of what constitutes a particular legal or equitable ownership interest will lead the courts to conclude that federal and state law on the issue is the same or, in the alternative, that the absence of federal law warrants application of state law on the basis that there is no compelling need for a uniform federal precedent. It is believed, however, that uniform rules should determine who is entitled to limit liability pursuant to a federal statute and that the result should not differ depending upon the vagaries of which state's law is applicable. See also supra note 49.
procurement . . ." is entitled to the Acts' benefits. This has been judicially construed as providing the right to limit liability to demise charterers while denying that right to both voyage and time charterers.

While the rule can be simply stated, its application is shrouded in confusion. The confusion results both from the fact it is not always easy to ascertain the true nature of a charter, and from the recent expansion of the “owner pro hac vice” concept in areas of maritime law unrelated to limitation of liability and the uncertainty as to whether that expansion has any applicability to limitation cases.

Some of the confusion inherent in determining the nature of a charter arises because the parties do not always frame their agreements with either great formality or care. Indeed, precision is not necessary because charters, including demises, need contain no magic words such as are sometimes necessary to effectuate terrestrial conveyances, and need not even be in writing. As a consequence, it seems axiomatic that the actual relationship of the parties to the vessel should control, and not the terminology chosen. This generally is the judicially accepted criterion. Thus, in Austenberry v. United States the court found a demise charter to


124. See In Re Barracuda Tanker Corp, 281 F. Supp. 228 (1968), modified, 409 F.2d 1013 (2d Cir. 1969); and Gilmore & Black, supra note 9, at 840. For a discussion of the various types of charters, see Moore & Pelcz, supra note 2, at 7.248[2]. The clear distinguishing feature of a demise charter from other types of charters is the near complete transfer of possession, command, and navigational control of the vessel to the charterer. It is the obtaining of such control and possession that causes the charterer to be treated as the “owner pro hac vice” of the vessel for many maritime purposes, including that of limitation of liability.

125. See supra text accompanying note 133.

126. For authority that oral charter parties are enforceable in the admiralty, see Texaco Export Inc. v. Overseas Tankship Corp., 573 F.2d 717 (2d Cir. 1978); and Gaspard v. Diamond M. Drilling Co., 593 F.2d 605 (5th Cir. 1979). That charter parties can be implied from circumstances concerning the possession and use of a vessel is illustrated by St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., 500 F. Supp. 1365 (N.D. Miss. 1980), aff'd, 666 F.2d 932 (5th Cir. 1982). That no technical words are required to create a demise is illustrated by Complaint of Cook Transp. Sys. Inc., 431 F. Supp. 437, 443 (W.D. Tenn. 1976); and United States v. Shea, 152 U.S. 178 (1894): “No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control.”

127. 169 F.2d 583 (6th Cir. 1948). It is significant that the finding of a demise in this case was for the purposes of permitting the government to limit liability. That the court ultimately determined the government was precluded from limiting because of negligence attributed to it does not detract from the finding that one called a licensee was deemed a demise charterer for section 186 limitation of liability purposes.
exist even though the document transferring possession was referred to as a "license" and the word charter was nowhere mentioned. Reliance upon the substance of the agreement rather than the words used seems even more appropriate in the area of limitation of liability, where the rights of those not party to such agreements can be drastically affected by the finding of a demise. Thus, although there is some authority that one who is described as a voyage or time charterer in the document transferring possession of a vessel cannot thereafter aver that he is in fact a demise charterer, the converse should never be true and evidence of a less complete dominion and control over the transferred vessel should be admitted.

In beginning a discussion of what will constitute a demise charter for limitation of liability purposes it should be noted that there is an abundance of authority that the courts will not find a demise where the facts are compatible with the existence of a less complete transfer of a vessel. As stated more than a century ago by the Supreme Court, "courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer." That ancient and persistent reluctance, when carried into the area of limitation of liability, is somewhat at odds with the frequently articulated judicial liberality in construing the term "owner" for limitation of liability purposes and may evidence a

128. 169 F.2d at 593. As stated by the court:
The mere fact that the government was not referred to as charterer, in the document in which the boat was offered and accepted by the Coast Guard for the duration of the war, is not of controlling importance, for the government took over its absolute control, subjected it to use as a government vessel, and caused it to be manned, provisioned, navigated, and supplied with all necessaries.

Id.

129. Unless form is to prevail over substance, such judicial utterances must be deemed based on an estoppel theory. Thus, it is at least conceivable that one who knowingly or at his own insistence is described as a voyage or time charterer may be estopped from subsequently insisting he is in fact a demise charterer. In the absence of facts sufficient to support an estoppel, however, such as some detrimental reliance upon those assertions, the better view would appear to be that the substance of the agreement and not the terminology selected should control.


131. See supra note 10. See also In Re Barracuda Tanker Corp. 281 F. Supp. 228 (S.D.N.Y. 1968), modified on other grounds, 409 F.2d 1013 (2d Cir. 1969), where the court noted that the current restrictive application of the limitation provisions visible in the decisions "... has not affected the liberal approach which has always been manifest in determining who is entitled to maintain a limitation proceeding." 281 F. Supp. at 230.
perceived legislative goal of offering greater protection from catastrophic maritime losses to those who own vessels than to those who operate vessels owned by others. Moreover, the stated judicial reluctance to find a demise is also at odds with numerous non-limitation cases in which demises have been found to exist on facts judicially admitted as being "not free from doubt,"\(^{132}\) and with the recent expansion of the concept of ownership \textit{pro hac vice} in cases dealing with the rights of seamen and longshoring personnel seeking recovery for personal injuries.\(^ {133}\) Since the precedents seem to equate a demisee and an owner \textit{pro hac vice},\(^ {134}\) it must be ascertained whether this recent expansion of the \textit{pro hac vice} concept has similarly expanded the scope of those entitled to limit liability as provided in 46 U.S.C. § 186.

It is difficult to reconcile the non-limitation personal injury cases dealing with the demise issue. Indeed, the only consistent thread in determining whether a demise exists in those cases is that, in the majority of instances, the finding served ultimately to benefit an injured employee or to preserve his chosen cause of action. Thus, there began to emerge a belief that a demise charter could mean one thing for personal injury purposes and quite another thing for other maritime purposes or, at least, for purposes of limiting one’s liability. Judicial recognition of that seeming phenomenon can be seen in \textit{Bishop v. United States},\(^ {135}\) where owners of shrimping vessels that had been turned over to captains who fished on lay shares

\(^{132}\) See e.g., United States v. Shea, 152 U.S. 178, 191 (1894).

\(^{133}\) See, for purposes of illustration, Blair v. United States Steel Corp. 444 F.2d 1390 (3d Cir. 1971), cert. denied, 404 U.S. 1018 (1972); and Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116, 127-28 (3d Cir. 1979). See also the discussion in the text commencing at note 135, \textit{infra}.

\(^{134}\) Repeatedly, the cases—whether dealing with a charterer’s right to limit liability or the obligations of the charterer to members of the crew or to third persons—refer to the demise charterer as the owner \textit{pro hac vice} of the subject vessel. The interchangeable use of those terms leads inescapably to the conclusion that for most if not all maritime purposes they are synonomous.

It should be emphasized that the finding of a demise charter arrangement has legal ramifications beyond permitting the charterer to limit liability. The demisee is treated as the vessel owner for virtually all other maritime purposes also and, as a consequence, the interchangeable use of the terms demisee and owner \textit{pro hac vice} are even more frequently encountered in personal injury cases brought against the charterer/owner \textit{pro hac vice} by members of the crews of vessels and by longshoremen proceeding pursuant to section 905(b) of the Longshoremen's Act than in limitation of liability cases. It remains to be definitively determined, however, whether the finding of a demisee/owner \textit{pro hac vice} in the non-limitation cases is valid precedent for the same determination in a limitation proceeding. See in this regard the discussion in the text commencing at note 135, \textit{infra}.

Ownership at Sea: Limited Liability

contended they were not the employers of the crew engaged by the captain and were thus immune from having to pay FICA and FUTA taxes on crew wages. The United States, seeking to recover those taxes from the vessel owners cited, as analogous authority, personal injury cases in which the captains of vessels sailed under lay shares were deemed not to be the owners *pro hac vice* of those vessels and, as a consequence, the crew members were permitted to proceed against the vessel owner.\(^{136}\) In concluding that the owners of the vessels were not employers compelled to pay taxes on the crew wages, it was necessary for the district court to distinguish those authorities. The court did so by observing that the restrictive definition of demise charters in those cases was reflective of a judicial attempt to coalesce the humanitarian policies of the Jones Act with the general maritime law of demise, and that, consequently, such cases should not be used as precedent outside that narrow sphere.\(^{137}\) Such reasoning would also serve to rationalize those cases where essentially shore-bound personnel injured while "navigating" barges the short distance required for their being loaded or unloaded have been entitled to bring Jones Act and unseaworthiness actions against their employers whose most temporary possession and control of such vessels was deemed sufficient to make them the owners *pro hac vice* thereof;\(^{138}\) and those cases where employees within the scope of the Longshoremen's and Harbor Workers Compensation Act have been permitted to bring 905(b) negli-

\(^{136}\) *Id.* at 418.

\(^{137}\) *Id.* As stated by the court:
The courts have deviated from the general maritime law in personal injury and wrongful death cases by requiring, for humanitarian reasons, that fishermen, being wards of the sea, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. The court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law. . . . The deviation as to personal injury and wrongful death cases has come about by virtue of the courts' attempt to construe the congressional intent in Jones Act cases. . . . In conclusion . . . the cases cited by the Defendant for the proposition that a demise should not be implied on the facts of this case are not persuasive because they belong to that group of cases in which the Courts, in order to follow an humanitarian policy set by Congress to provide injured seamen with the possibility of recovery from the vessel owner, rather than the sometimes less solvent charterer, deviated from the general maritime law. *Id.* at 418, 420.

*See also* Harris v. Waikane Corp., 484 F. Supp. 372, 375 n.1 (D. Hawaii 1980): "Usually courts strain to find that charters are not demise charters . . . though the rule is somewhat different if a personal injury action is brought against the alleged demise charterer as owner *pro hac vice*.'

gence actions against such ephemeral "owners."139 In both instances, a finding that the person or entity so temporarily in possession and control of the vessel was the owner pro hac vice thereof facilitated the injured employee's ability to seek full compensation for his injury, even though the requisite finding of a "de-mise" seemed clearly at odds with the ancient admonition that such complete transfers of possession and control will not be found to exist if the transaction is compatible with some lesser form of transfer.140

Thus, as observed by the district court in Bishop, the seemingly conflicting decisions as to the finding of a demise might well be reconciled by reading the decisions as an attempt to coalesce the general maritime law of demise with the policies inherent in the Jones Act and, more recently, with those of the Longshoremen's Act.141 And, as not stated in Bishop but readily flowing therefrom, there seemed no basis for extending those decisions into the area of limitation law where the finding of a demise would create entirely different results and, in many instances, harm those very persons who benefited from an expansive interpretation of demise charters in the personal injury cases.

That beguilingly plausible basis of reconciling the welter of seemingly inconsistent decisions dealing with demise charters was dealt a severe blow by the fifth circuit's decision reversing Bishop.142 There, it was cryptically stated that:

[T]here is no basis for thinking, as the District Judge characterized it, that courts have "deviated from the general maritime law in personal injury cases" in determining the existence of a demise charter. There is but a single, not as urged a double, standard: Has the shipowner surrendered virtually complete possession, control and navigation to the non-owner (charterer)? If so, it is, if not, it's not, a demise.143

Thus, at least in a non-limitation setting, the fifth circuit has de-

139. See, inter alia, Griffith v. Wheeling-Pittsburgh Steel Corporation, 610 F.2d 116 (3d Cir. 1979).

140. See note 130, supra. Such decisions also seem clearly at odds with the limitation of liability decisions treating those temporarily in complete possession and control of vessels for loading and unloading purposes as "mere bailees" of the vessels not entitled to limitation of liability. See The Severance, 152 F.2d 916 (4th Cir. 1945); and Vang v. Jones & Laughlin Steel Corp., 7 F. Supp. 745 (W.D. Pa.), aff'd, 73 F.2d 88 (3d Cir. 1934). That even "mere bailees" may be demisees for maritime personal injury purposes, however, is illustrated by Marstaller v. Albina Dock Co., 191 Or. 145, 229 P.2d 269, 273 (1951).


142. 476 F.2d 977.

143. Id. at 979.
determined that a demise's existence will be governed by the same standards regardless of the consequences the finding will have on the involved parties. However, the court did, in a footnote, leave open the possibility that a separate standard may be statutorily required in limitation cases. This may be construed as a judicial recognition that a demisee for limitation of liability purposes has to have more than complete possession, control and navigational power over the vessel and that, additionally and unlike a demisee in other settings, he must "man and victual" the vessel if he is to be entitled to the benefits of the Limitation Act. If this reasoning is followed to its logical conclusion, then, there would indeed be a "double standard" for determining the existence of a demise; first, one standard, turning upon complete surrender of possession, control and navigation for all general maritime law purposes whether involving commercial matters or maritime personal injury suits; and, second, a separate standard for limitation of liability purposes, requiring, in addition, that the would-be demisee "victual" and "man" the vessel entrusted to him at his own expense, or by his own procurement.

Support for this construction is found in many non-limitation cases where a demise has been found to exist even though the charterer did not supply any fuel or other supplies and even though the vessel owner supplied the crew. Illustrative of these cases is United States v. Shea, where the Court had to determine whether an agreement fo furnish vessels to the United States constituted a demise, thereby obligating the government to pay rental while the vessels were laid up for repairs, or a lesser charter which would have exonerated the government from such responsibility. The agreement specifically provided that the owner was to turn the vessels over complete with an engineer and fireman and, when requested, would supply the remainder of the crew. It also provided that the government was to supply the required fuel. In concluding that the contract was a demise, the Court focused on possession and control and dismissed the fact the charterer did not "man" the vessel.

144. Id. at 980 n.9. The court observed, "Shipowners stress some early cases which have held in their situations that to be a demise the charterer did not have to provide fuel, stores, victuals, etc. Significantly, Congress requires this to qualify as a vessel owner for limitation of liability, 46 U.S.C. § 186." Id.

145. 152 U.S. 178 (1894).

146. Id. at 178, 179.

147. Id. 152 U.S. at 190-91. The Court stated:
Other non-limitation cases have also found a demise where, had the court focused upon the obligation to man and victual the vessel, such a contention may well have foundered. A recent illustration is *O'Donnell v. Latham*, where the vessel owner's insurer argued successfully that the existence of a demise relieved it of any duty to compensate an injured member of a fishing party which had rented a small boat. The boat in question was left by its owner "... tied up to the dock, fueled and ready for an early morning pickup by the fishing party." The fishing party was to use the vessel for a single day and was charged a rental of eighty-five dollars plus the value of the fuel consumed.

The court recognized that determining the nature of a charter "cannot be performed with bright-line precision" since it involved the application of principles "... formulated in the context of seagoing commerce onto the relatively recent phenomenon of private pleasure boat leasing." The court, however, had little difficulty in deciding a demise charter existed. In reaching that conclusion, it brushed quickly over the fact that the fishing party had provided no fuel, and focused instead on the fact the agreement without question displayed "... the dominant feature of such a [demise] charter: 'possession and control of the vessel' was vested in the fishing

We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail, affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the government to furnish fuel was unnecessary in case there was a demise, it may also, in like manner, be said that the further clause as to the petitioners' furnishing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer, nor outweighs that of the action of the parties in the execution of the contract.

*Id.*

148. 525 F.2d 650 (5th Cir. 1976). See also Marstaller v. Albina Dock Co., 191 Or. 145, 229 P.2d 269 (1951); and Willamette-Western Corp. v. Columbia Pac. Towing Co. 466 F.2d 1390 (9th Cir. 1972).

149. 525 F.2d at 651.

150. *Id.*

151. *Id.* at 652. It is significant that the court recognized that some of the difficulty in determining whether a demise existed resulted from attempting to impose principles "formulated in the context of seagoing commerce onto the relatively recent phenomenon of private pleasure boat leasing." 525 F.2d at 652. As a result, the court thought, "[s]ome of the normal standards for determining whether a demise charter exists are inconclusive here." *Id.* This need to apply maritime principles to changed conditions is endemic and compels each case to be viewed both with an eye toward precedent and with consideration of the underlying policy of the law sought to be freshly applied.

152. Indeed, in the bulk of such "charters" it is unlikely that a refueling is even remotely contemplated by the parties.
Thus, there is no dearth of authority that a demise charter can indeed be found where the owner of the vessel turns over complete possession and control of the vessel to a charteree who thereafter is free to control the vessel's navigation for the duration of the term, no matter how short that term may be and no matter that it can be terminated at the will of the vessel owner. There is, however, precious little authority indicating that such a demise will be sufficient to take the charterer within the scope of 46 U.S.C. § 186 enabling him to be treated as a vessel owner for limitation of liability purposes, and the plain wording of that statute seems to require, in addition, that the would-be demisee be obliged to provide a crew and all requisite supplies. Consequently, there is a strong urge to categorically state that one who charters a vessel cannot be a section 186 owner thereof unless he is vested with sufficient possession and control to satisfy the general maritime law requirements of a demisee and, additionally, mans, victuals and navigates the vessel at his own expense or by his own procurement. Such a broad rule would, however, take outside the scope of section 186 limitation, the charterers of vessels which require no manning or victualing—such as the barges lacking motive power and, for all practical purposes, crews, but which are responsible for transporting the bulk of cargoes on the nation's great inland rivers and a substantial portion of our ocean commerce. And, that result at least potentially collides with section 188, which makes clear that the Limitation Act—including section 186 thereof—applies "... also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." Moreover, there is no indication in the few reported decisions dealing with the issue that the demisee of a barge will be permitted to limit liability only if he furnishes a crew or supplies to such a vessel which, in most

153. 525 F.2d at 653.
154. The fact one bears the ultimate financial responsibility for manning, victualing and navigating a vessel does not make him the demise charterer thereof. See In Re Barra-cuda Tanker Corporation, 281 F. Supp. 228, 231 (S.D.N.Y. 1968) modified on other grounds, 409 F.2d 1013 (2d Cir. 1969), and the authorities therein cited, stating: "The courts have rejected the argument that ultimate responsibility for payment was the measuring rod. Rather, they look to the contract to determine who, in the first instance, is required to discharge the responsibility." That the charterer is reimbursed for such expenses, however, does not necessarily prevent him from qualifying as a demisee. See In Re Petition of United States, 259 F.2d 608, 609-10 (3d Cir. 1958); and Complaint of B.F.T. No. Two Corp. 433 F. Supp. 854, 872 (E.D. Pa. 1977).
instances, will be in need of neither during the existence of any charter.\textsuperscript{166} Thus, unless the specific inclusion of barges within the scope of section 186 is to be rendered largely meaningless, the latter section must be construed as requiring the demisee to "man and victual" the chartered vessels \textit{only when the vessels are such as would under normal usage require manning and victualing}, and permit the finding of a section 186 demise of vessels requiring no such services provided all other requirements of a demise (\textit{i.e.}, the requisite possession, control and direction over navigational functions) are found to exist. In short, the nature of the craft chartered and the nature of the function to which it is to be put, and not a blind observance of whether manning and victualing were in fact provided or required, should determine whether the requisites of section 186 have been fulfilled.

There is judicial precedent in both limitation and other types of maritime cases that the nature of the vessel and its function must be considered in determining whether a demise exists and that a noncontextual review of the charter terms is insufficient in making that decision. Thus, in \textit{Willamette-Western Corp. v. Columbia Pacific Towing Co.},\textsuperscript{157} where the court had to ascertain the nature of a charter of a floating crane barge, the court found a demise charter to exist even though many of the features normally incident to such a charter were not present. In reaching that conclusion, the court said, "since the nature of a vessel must shape the critical terms of its charter, many of the obligations usually incurred in chartering a vessel cannot, logically, be said to constitute essential parts of crane barge charters."\textsuperscript{158} While the \textit{Willamette-Western} court was not attempting to define the nature of the charter for limitation of liability purposes, other courts have carried the same reasoning into the limitation area. Thus, the absence of provisions

\begin{itemize}
  \item \textsuperscript{156} \textit{See, inter alia, Pettus v. Jones & Laughlin Steel Corp., 322 F. Supp. 1078 (W.D. Pa. 1971).}
  \item \textsuperscript{157} 466 F.2d 1390 (9th Cir. 1972).
  \item \textsuperscript{158} \textit{Id. at 1392. In expanding upon that observation, the court said:}
  \textit{The Atlas was indeed a vessel of an unusual character. It was not intended to roam the oceans of the world; rather, it was docked, perhaps permanently, and required no navigation. It carried no cargo which needed to be stowed and cared for. The crew, such as it was, required no victualing . . . for it went home at night. The issue is thus distilled into a question of control over the Atlas, and in that context, that is, alone, the distinguishing characteristic of a demise charter.}
  \textit{Id. See also R.D. Wood Co. v. Phoenix Steel Corp., 211 F. Supp. 924, 927 (E.D. Pa. 1962), warning against "a vacuum-like application" of the precedents, and making clear that "Whether a particular charter is or is not a demise must still depend upon the facts of the case."}
\end{itemize}
pertaining to the manning and the victualing of the chartered vessel in Complaint of Cook Transportation System, Inc.,\textsuperscript{159} which did involve the charterer's attempt to limit its liability, was apparently deemed inconsequential, the court noting only that since a barge without motive power was involved not much thought would be given to such matters.\textsuperscript{160}

It thus appears that, in addition to exercising the appropriate possession and control over the chartered vessel, a would-be demisee must also man and victual the vessel \textit{to the extent manning and victualing is required}. And, conversely, the absence of any duty to man and victual a vessel that requires no manning and victualing will not be sufficient to defeat the finding of a demise for limitation purposes if the other facets of a demise are present.\textsuperscript{161}

While it is difficult to generalize in this corner of the maritime law, it is probable that a demise for section 186 limitation of liability purpose remains largely unaffected by the recent expansion of the owner \textit{pro hac vice} concept and, except in those cases where the nature of the vessel dictates otherwise, must include those statutorily mandated obligations which, while often a part of demises in other maritime areas, are not there required. Consequently, while non-limitation authorities are persuasive in determining whether a section 186 demise exists, they are not necessarily controlling.

While it is clear that virtually complete possession and control of a vessel by the charterer are required for all demises, including those within the scope of section 186, it is the sounder view that the control must be real and not merely apparent. Thus, while it has been held that the fact the vessel owner can terminate the agreement at will is not necessarily sufficient to warrant a conclusion that insufficient control has been relinquished to prevent the finding of a demise, that may not be the case where the power to

\textsuperscript{159}. 431 F. Supp. 437 (W.D. Tenn. 1976).

\textsuperscript{160}. \textit{Id.} at 444.

\textsuperscript{161}. It will, however, be necessary to determine whether one whose complete possession and navigational control was so limited in scope and duration as to lead the court to deny the right to limit on the ground that he was a "mere bailee." \textit{See} The Severence, 152 F.2d 916 (4th Cir. 1945); and Vang v. Jones & Laughlin Steel Corporation, 7 F. Supp. 745 (W.D. Pa.), \textit{aff'd}, 73 F.2d 88 (3d Cir. 1934). \textit{See also supra} note 42. In all probability, courts will likely continue to use a somewhat pragmatic test in distinguishing between demise charterers and bailees of barges, requiring that for limitation purposes some greater range of navigation be anticipated then merely winching or floating the vessel into position for loading or unloading, and then a few hundred yards downstream to the point where it will again be turned over to the tow boat.
terminate is coupled with other factors, such as great economic disparity between the parties, which as a practical matter make the owner's "surrender" of control a fiction. In short, even where the terminology indicates a demise, the courts should not blind themselves to the realities of the situation in determining whether a demise exists. Illustrative of this in a non-limitation setting is the decision of the court of appeals in Bishop v. United States.\textsuperscript{162} There, in finding that captains who sailed vessels under lay share arrangements and were given complete navigational control and full possession of the vessels, subject to the owner's right to terminate, lacked sufficient control to constitute demisees, the court focused on the economic realities of the arrangement. And, in concluding that the captains in fact lacked control of the mission, the court said:

> Considering the relative economic disparity between the owner of an expensive ocean-going vessel with high costs for operation, bunkering, maintenance and insurance, and a prospective master whose only investment in the enterprise is his time and energy, this right to terminate is a powerful force. The notion that such a master really has the full command, possession and control of the ship to do as he pleases in that fishing trade is simply not realistic.\textsuperscript{163}

Another factor leading to the court's decision, which was deemed "significant," was that the captain was obliged to deliver the catch for sale or receipt at a specified place in the absence of extraordinary circumstances. Thus, "lacking any real economic independence,"\textsuperscript{164} the court concluded that the master and his crew were in reality an integral part of the owner's enterprise and that the real significance of the arrangement was to establish a means of calculating compensation. The Bishop court was also unimpressed with the failure of the owners to give the master detailed orders as to how the fishing should be performed, noting that such discretion is inherent in the nature of the task and, moreover, that its elimination would preclude the owner from being able to limit its liability.\textsuperscript{165}

\textsuperscript{162} 476 F.2d 977 (5th Cir. 1973).
\textsuperscript{163} Id. at 979. The court deemed the right to terminate under such circumstances a critical factor in concluding that a demise charter has not been created.
\textsuperscript{164} Id. at 980.
\textsuperscript{165} Id. An owner maintaining such control over a vessel's navigation would undoubtedly be deemed to have "privity or knowledge" of the cause of the loss, and thus be precluded from successfully limiting his liability. See 46 U.S.C. § 183(a) which permits the owner of a vessel to limit liability only for specified losses or damage "... done, occasioned, or incurred, without the privity or knowledge of such owner. . . ." See also Gilmore
IV. PIERCING CORPORATE VEILS TO IDENTIFY THOSE ENTITLED TO LIMIT LIABILITY

To the extent the actuality of a relinquishment of possession and control are to be determinative of whether a demise for limitation of liability purposes will be found to exist, it may also be necessary to sift through and closely examine corporate structures. For, if a corporate demisee is in reality not a separate entity but, instead, merely a tool of the demisor or some other person or entity, the "demisee" would not seem to fall within the scope of section 186. In short, piercing of the corporate veil most certainly seems to be an appropriate device to prevent limitation by a designated or would-be devisee; and, conversely, may even play a role in conferring that status upon someone not so designated. While there is a dearth of authority dealing with piercing of corporate veils to determine rights under the Limitation Acts, it is clear that the concept is not alien to the admiralty and has been applied to other facets of maritime law dealing with demises. Thus, it would seem that a corporate demisee which is in actual fact so managed and controlled by the persons or entities owning its shares as to make a mockery of the corporate structure, or which was created only to defraud creditors or others, cannot claim the status of a demisee for limitation of liability purposes regardless of the careful wording of its charter documents since, in actual fact, it will lack the complete possession and navigational control which is the hallmark of a demise.


166. See, e.g., Kirno Hill Corp. v. Holt, 618 F.2d 982 (2d Cir. 1980). The Court observed:

The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: Holt must have used Waterside-Pennsylvania to perpetrate a fraud or have so dominated and disregarded Waterside-Pennsylvania's corporate form that Waterside-Pennsylvania primarily transacted Holt's personal business rather than its own corporate business.

Id. at 985. See also Talen's Landing, Inc. v. M/V Venture II, 656 F.2d 1157 (5th Cir. 1981); and Ross Industries, Inc. v. M/V Gretke Oldendorff, 483 F. Supp. 195 (E.D. Tex. 1980), where the court pierced the corporate veil to hold a parent corporation responsible for the obligations of its fraudulently formed corporate subsidiary and to conclude that, because of the control exercised by the parent, no true demise charter between them was created.

167. Similarly, it would appear that a corporate "owner" would not qualify as an owner for purposes of 46 U.S.C. § 183 if it was so dominated or controlled by another corporation or by an individual as to justify the piercing of its corporate veil.

However, it is probable that it is the lack of true corporate independence and not merely the existence of a close corporate relationship that will be necessary to pierce the corporate veil for limitation of liability purposes. Thus, in B.F.T. No. Two Corp., 433 F. Supp. 854, 873 (E.D. Pa. 1977), the court, in permitting the charterer who owned all the stock of the
The more difficult question, however, is whether one who is neither a section 183 owner nor a section 186 demisee can ascend to either status by himself piercing a corporate veil to show that he, and not a corporation he controls, in reality is the vessel owner or exercises the possession and control required of a demise charterer. Initially, it should be emphasized that one who might conceivably be placed in the somewhat unusual position of attempting to pierce his own corporation's veil need not have so structured his enterprises as to defraud or otherwise seek unfair advantages, but may have done so for a host of legitimate, or at least acceptable, reasons. Thus, by way of illustration, one desiring to make use of a vessel may form a corporation to hold title to the vessel and have that corporation lease it back to him so there are increased tax benefits. Moreover, those same tax considerations and other considerations, including an ability to procure governmental subsidies, more favorable rates, or to man the vessel with seamen outside the scope of a particular restrictive or expensive labor agreement, may dictate that the lease-back be in some form other than a demise. It may thus be incumbent upon the lessee to attempt to bring himself within the scope of a section 183 owner by showing that he in fact totally dominates and controls the corporation which is the titled owner of the vessel. Conversely, one who has wrongfully sought to defraud can also make use of such corporate structures and, conceivably, be held accountable for the corporate wrongs if third parties seek to pierce the corporate veil. The question in both instances, however, is whether the architect of such schemes should ever be able to himself pierce the corporate structures he has fashioned so that he can gain the advantages of the Limitation Act.

corporate owner to limit liability, concluded that the terms of the operating agreement and the degree of control exercised over the vessel by the owner were more significant than the corporate relationship. For indication of a contrary view, however, see Trexler v. Tug Raven, 290 F. Supp. 429, 443 (E.D. Va. 1968), rev'd on other grounds, 419 F.2d 536 (4th Cir. 1970).

168. It is evident that either an individual or a corporate entity can seek to pierce a corporate veil in an attempt to prove that he or it, and not the subject corporation, is in reality the owner or demisee of a vessel. The success of such a venture should not depend upon whether it is being made by an individual, by another corporation, or by some other legally valid entity. In short, if any person or entity is entitled to obtain the benefits of the Limitation Act by piercing the veil of the corporation he or it has created, all other similarly situated persons or entities should also be entitled to the same relief. And, conversely, if any person or entity is deemed to be estopped from piercing the veil of a corporate entity he has created, all other similarly situated persons or entities should also be estopped. There is, quite simply, no legitimate basis for treating would-be corporate piercers differently because of their personal or corporate form.
The most sympathetic case could be made for the "real" owner who places title in a corporation it too totally dominates and whose ownership, as a consequence, is deemed insufficient for limitation of liability purposes. If the corporation's veil is pierced so that the corporate "owner" cannot limit and the person or entity who in effect has full control is similarly precluded from limiting liability, there would exist no owner for limitation of liability purposes. And, if the corporate structuring was not effectuated for purposes of defrauding anyone, that might seem an extreme penalty to pay for a failed attempt to take advantage of tax or other laws. Conversely, even if the failed attempt at corporate structuring was done for the purposes of seeking some wrongful advantage, refusing to permit limitation by that person or entity who is in fact the owner amounts to the imposition of a penalty for the failed attempt. And generally our civil law—and that would include the non-criminal general maritime law—is designed only to award damages for wrongful activity and not to impose penal sanctions. However, it is also true that limitation of liability is not looked to with the same favor as was once the case, and that the right to limit is today narrowly construed and not likely to be extended.\textsuperscript{169} Thus, one who attempts to structure his activities in an advantageous way but who carelessly or wrongfully fails in that pursuit, may be in no better position to claim the benefits of the Limitation Acts than an owner or demisee who fails to timely commence a limitation proceeding.\textsuperscript{170} In short, his failure to achieve the right to limit might be deemed to have resulted from his inattention to statutory detail and not be deemed a penalty imposed for his negligent or wrongful actions.

While this author leans toward the view that this most certainly is not the time to expand the limitation of liability concept and, as a consequence, would be most reluctant to permit the piercing of the corporate veil to be used as a device to expand the opportunities to limit liability, it must be emphasized that no court has yet resolved the issue. It should suffice to say that one who so structures his shipping activities as to ultimately raise the spectre of having to pierce his own corporate veil to take advantage of the Limitation Act does so at his own considerable peril.\textsuperscript{171}

\textsuperscript{169} See \textit{supra} note 9 and accompanying text.

\textsuperscript{170} See \textit{Moore & Pelaez}, \textit{supra} note 2, ¶ F.02, for an extensive discussion of the time within which a Complaint to Limit Liability must be filed.

\textsuperscript{171} For authority in a non-maritime setting limiting one's ability to pierce the corporate veil he has himself created, see Sams v. Redevelopment Authority, 431 Pa. 240, 245, 244
Thus, just as it is difficult to ascertain ownership for section 183 purposes, it is often far from clear who are to be deemed demise charterers entitled to limit liability as provided in section 186 of the Limitation of Liability Act. If nothing else, the confusion spawned by the ownership issue should make modern-day lawyers sensitive to the problem and include the possible desire to at some future time limit liability as one of the myriad of considerations involved in structuring their client's maritime activities. Only through the exercise of such prior vigilance are the entanglements and confusion evident in the precedents likely to be avoided.

V. CONCLUSION

It is evident that tying the right to limit liability to the elusive concept of ownership causes a great deal of difficulty in identifying those within the Act's scope. Yet, it is significant that this difficulty is of comparatively recent origin, and coincides with the emergence of complex business structures and transactions spawned by tax laws and other factors unrelated to fulfillment of the Limitation Act's intended purposes. Thus, it is possible that our continued reliance on the concept of ownership may be mis-

A.2d 779, 781 (1968):

[N]o sound reason exists for piercing the veil for the benefit of the individual shareholders, who created the veil in order to procure other business advantages. In our view, one cannot choose to accept the benefits incident to a corporate enterprise and at the same time brush aside the corporate form when it works to their (shareholders') detriment. The advantages and disadvantages of the corporate structure should be seriously considered and evaluated at the time such organization is contemplated and after incorporation has been selected, the shareholders cannot be heard to argue that the courts should not treat them as a corporation for some purposes and as a corporation for other purposes, whichever suits their present economic interest.

For similar authority in a maritime setting, see St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., Inc., 500 F. Supp. 1365, 1372 n.9 (N.D. Miss. 1980): "It is, of course, impermissible for corporate stockholders to have availed themselves of corporate structures of separate corporations when their interests were served but to discard them when it becomes no longer advantageous."

But see 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (1982 Cum. Supp. to Perm. Ed.) where, it is stated that:

Some courts recognize that the corporate veil may be pierced in 'reverse.' While the usual situation is for a creditor to attempt to pierce the corporate veil in order to impose personal liability on the corporate members, a 'reverse pierce' case involves a corporate insider, or someone claiming through him, attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same. The procedure has been justified on the basis of the equitable nature of the concept of piercing the corporate veil, and it has been applied in probate proceedings, and in cases involving insurance contracts.

Id. at 25.

172. See supra notes 1-122 and accompanying text.
placed, and the right to limit should be applied in a manner consistent with the Act’s underlying goal even if, occasionally, that might result in a seeming subversion of its language.

The purpose of limitation was to encourage participation in maritime commerce which was, and remains, vital to this nation’s economy and security. To accomplish that end, the Limitation Act encourages the investment of venture capital in the vessels required to effectuate maritime commerce. Because maritime ventures are both costly and risky, and because the risk must be entrusted to captains and crews beyond the investor’s immediate control, the ability to limit any losses that might occur to the value of the investment provided a powerful inducement to engage in ventures of importance to the national interest. It was those who made it possible to engage in maritime ventures, and not merely those who by some quirk can be labeled “owners,” the Limitation Act sought to protect. Originally, tying the right to limit to ownership was a fairly safe and certain way of accomplishing that goal. Today, in many instances, that practice does not lead to the same intended result. And, to adhere to such procedures when they are no longer compatible with the Act’s clearly intended purposes is to permit form to prevail over substance. In short, it is the status of the person or entity seeking to limit liability, and not the term by which he is labeled, that should control the right to limit.

The ability to form separate corporations for single vessels and the advent of affordable and readily available liability insurance have caused us to question the need for the Limitation of Liability Act. Until that Act is consigned to the ranks of maritime history, however, it should be applied in a manner consistent with its intended purpose. To do otherwise compounds the harm that application of this anachronistic doctrine too frequently causes. Unless we assume more of a willingness to look beyond mere form, there is little likelihood that what is yet left of the Act’s policy will be effectuated, and significant rights will continue to turn on subtleties and technicalities having much to do with current business practices and little to do with the enhancement of maritime commerce.