The Puerto Rico Ports Authority v. Umpierre-Solares: Can the "Dead Ship" Doctrine Ever Remove a Suit Brought *in Personam* on a Maritime Contract from Federal Admiralty Jurisdiction?

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I. Introduction

In 1989, the violent seas created by Hurricane Hugo caused a ship to sink in Puerto Rico's San Juan Harbor.[1] The owners contracted to have the ship disposed of by raising and removing the vessel from the path of heavy maritime navigation.[2] The owners transported the ship to a nearby harbor, where she remained moored at a dock.[3] Over a decade later, when the ship had not been removed, the ship owners sued to compel specific performance of the contract to dispose of the vessel.[4] The plaintiff, attempting to avoid the time-barring effects of laches, argued that the vessel was a "dead ship" – one that had so lost its navigation function that it no longer qualified as a "vessel" under federal admiralty jurisdiction.[5]

Does the so-called "dead ship" doctrine play any role in such a case given that the defendants were sued *in personam* on a service contract that a federal court determined to be maritime in nature? The United States Court of Appeals for the First Circuit addressed this question in the case of *The Puerto Rico Ports Authority v. Umpierre-Solares (The Isla Nena).*[6]

II. Background: Whether Admiralty Jurisdiction Reaches the Contract, and Thus Allows the Plaintiffs in *The Isla Nena* to Maintain an Action for Specific Performance

A. The "Dead Ship" Doctrine

Article 3, § 2 of the United States Constitution states that the judicial power of the United States "shall extend . . . to all Cases of admiralty and

1. P.R. Ports Auth. v. Umpierre-Solares (*The Isla Nena*), 456 F.3d 220, 222 (1st Cir. 2006).
2. *See id.* at 222-23.
3. *See id.* at 223.
4. *See id.*
5. Goodman v. 1973 26 Foot Trojan Vessel, Ark. Registration No. AR1439SN, 859 F.2d 71, 73 (8th Cir. 1988).
6. 456 F.3d 220.

maritime Jurisdiction."[7] A dispute over a contract may be cognizable under the admiralty law if the contract relates to a ship in its use as a ship.[8] Under the doctrine, a ship no longer falls within the purview of admiralty jurisdiction when its function has changed so much that it no longer has a navigation function.[9] The doctrine has its origins in the maxim that "a ship is made to plough the seas, and not to lie at the walls."[10] It follows from this that a contract involving a "dead ship" is not maritime, and therefore does not invoke admiralty jurisdiction.

A classic example of a "dead ship" is found in the case of *Mammoet Shipping Co. v. Mark Twain.*[11] In that case, the United States District Court for the Southern District of New York concluded that a nineteenth-century riverboat, docked at a Manhattan pier for use as a restaurant and showboat, was not a vessel for the purposes of admiralty jurisdiction.[12] The contract to ship the *Mark Twain* from Toronto, Canada to New York City did not relate to ships or maritime commerce, the court said, because the vessel was used as a restaurant, and not as a "ship *per se*."[13]

Courts tend to apply the "dead ship" doctrine when the change from a vessel's former navigation function is considerable. For example, a vessel does not become a "dead ship" merely because her registration has expired or is in need of repair,[14] or because she has been stored in dry dock.[15] However, the "dead ship" doctrine may apply when more substantial changes are needed to return the ship to navigation, such as in *Hanna v. The Meteor.*[16] In that case, the court applied the "dead ship" doctrine to a member of a reserve fleet made up of out-of-service vessels that would have required extensive repairs and documentation in order to return to service.[17]

One commentator observed, at least with respect to the law regarding maritime liens, that "[the dead ship doctrine] would appear to be a dying doctrine, and the maxim of maritime law on which it and related rules were based appears to have been generally discarded."[18] However, the doctrine's effectiveness in cases not involving maritime liens shows it

7. U.S. CONST. art. III, § 2, cl. 1.

8. Pierside Terminal Operators, Inc. v. M/V Floridian, 423 F. Supp. 962, 967 (E.D. Va. 1976).

9. *See Goodman,* 859 F.2d at 73.

10. The Poznan, 9 F.2d 838, 843 (2nd Cir. 1925), *rev'd,* 274 U.S. 117 (1927).

11. Mammoet Shipping Co. v. Mark Twain, 610 F. Supp. 863 (S.D.N.Y. 1985).

12. *Id.* at 866-67.

13. *Id.* at 866.

14. *See* Hercules Co. v. Brigadier Gen. Absolom Baird, 214 F.2d 66, 69 (3rd Cir. 1954).

15. *See* Am. E. Dev. Corp. v. Everglades Marina, Inc., 608 F.2d 123, 125 (5th Cir. 1979).

16. *See* Hanna v. The Meteor, 92 F. Supp. 530, 532 (E.D.N.Y. 1950).

17. *See id.*

18. J.F. Rydstrom, Annotation, *What Is a "Vessel" Subject to a Maritime Lien Under 46 U.S.C.A. § 971,* 3 A.L.R. FED. 882 (2005).

is still used to determine whether a federal court may exercise its admiralty jurisdiction.[19]

B. *Exxon Corp. v. Central Gulf Lines, Inc.*

In this case, the Supreme Court decided whether it should follow a *per se* rule holding that agency contracts do not fall under admiralty jurisdiction.[20] The Court overruled the holding of *Minturn v. Maynard*[21] excluding all agency contracts from admiralty jurisdiction.[22] It held that admiralty jurisdiction applied to the agency contract under which Exxon agreed to obtain fuel from other suppliers for ships in ports where Exxon could not supply the fuel itself.[23] The relevant inquiry, according to *Exxon*, is an examination of "the subject matter of the agency contract" to determine "whether the services actually performed under the contract are maritime in nature."[24] The Court reiterated its statement that "the fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'"[25]

C. Maritime Contracts

The Supreme Court's emphasis on the protection of maritime commerce in determining admiralty jurisdiction has been applied to contracts in subsequent cases with similar results.[26] In 2004, the First Circuit, the same court that decided *The Isla Nena*, emphasized the protection of maritime commerce in *Cunningham v. Director, Office of Workers' Compensation Programs*.[27] Although that case involved a dispute under the Longshore and Harbor Workers' Compensation Act,[28] the court noted that courts deciding admiralty jurisdiction cases regarding contracts, as opposed to torts, have traditionally had wide berth on whether transactions "relate to the navigation, business or commerce of the sea."[29]

Later in 2004, in *Norfolk Southern Railway Co. v. Kirby*,[30] the Su-

19. *See* Mullane v. Chambers, 333 F.3d 322, 327 (1st Cir. 2003); *See* Robert E. Blake, Inc. v. Excel Envtl., 104 F.3d 1158, 1160 (9th Cir. 1997); *See* Goodman v. 1973 26 Foot Trojan Vessel, Ark. Registration No. AR1439SN, 859 F.2d 71, 73 (8th Cir. 1988).

20. *See* Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 604 (1991).

21. Minturn v. Maynard, 58 U.S. 477 (1855).

22. *See Exxon Corp.*, 500 U.S. at 612.

23. *Id.*

24. *Id.*

25. *Id.* at 608 (quoting Sisson v. Ruby, 497 U.S. 358, 367 (1990)).

26. *See* Cunningham v. Dir., Office of Workers' Comp. Programs, 377 F.3d 98 (1st Cir. 2004); *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).

27. *See* 377 F.3d at 109 n.12.

28. 33 U.S.C. § 901 (2007).

29. *Cunningham,* 377 F.3d at 109 n.11 (quoting Nacirema Operating Co. v. Johnson, 396 U.S. 212, 216 n.7 (1969)).

30. 543 U.S. at 14.

preme Court held that a bill of lading for a contract that included transportation of goods by sea, as well as by land, was maritime in nature.[31] The "protection of maritime commerce" of *Exxon*,[32] the court stated, is achieved in contract cases by focusing on "whether the principal objective of a contract is maritime commerce."[33]

III. THE *PUERTO RICO PORTS AUTHORITY V. UMPIERRE-SOLARES* DECISION

A. FACTS

The Puerto Rico Ports Authority stemmed from a dispute over performance of a contract to remove and dispose of the *Isla Nena*, a ship moored at a shipyard in Puerto Rico.[34] The vessel's slow demise began when she sunk in 35 feet of water[35] in San Juan Harbor during Hurricane Hugo in 1989. The U.S. Army Corps of Engineers ordered The Puerto Rico Ports Authority, owner of the vessel, to have it raised and removed.[36] The order was issued pursuant to Section 15 of the Rivers and Harbors Act of 1899, providing that in order to maintain safety in navigation, obstructions in navigable waters must be removed.[37]

The Authority hired defendants, two men and their diving crane companies, to complete the task.[38] The Puerto Rico Ports Authority paid $85,000 and the defendants raised the ship and moored her at a dock at a shipyard in the municipality of Catano.[39] Defendants had contractually agreed to re-sink the vessel in the sea after raising her, but were unable to do so because of the permitting process involved.[40] The individual defendants, Jose Umpierre-Solares and Milton Andrews-Figueroa, also wanted to acquire the ship's "remains" and offered to pay the Ports Authority $1,000.[41] The parties then modified the contract so that for $84,000, instead of $85,000, the defendants would remove the vessel "in the most convenient and speedy way possible."[42] Plaintiff paid the de-

31. *See id.* at 27.

32. Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 608 (1991).

33. *Kirby*, 543 U.S. at 25.

34. P.R. Ports Auth. v. Umpierre-Solares (*The Isla Nena*), 456 F.3d 220, 222-23 (1st Cir. 2006).

35. Appellant's Brief at 10, P.R. Ports Auth. v. Umpierre-Solares, 456 F.3d 220 (1st Cir. 2006) (No. 05-1637).

36. *P.R. Ports Auth.*, 456 F.3d at 222.

37. 33 U.S.C.A. § 409 (2004) (requiring ship owners to remove their vessels if they constitute obstructions to navigation).

38. *See P.R. Ports Auth.*, 456 F.3d at 222-23.

39. *Id.* at 223.

40. *See id.*

41. Appellant's Brief, *supra* note 35, at 14.

42. *P.R. Ports Auth.*, 456 F.3d at 223.

fendants, who then failed to perform.[43] In July 2006, when the First Circuit wrote its opinion, the vessel was still at the shipyard in Catano,[44] partially sunk because of another storm that occurred in the area of the Army Terminal channel.[45]

In 2003, the Puerto Rico Ports Authority and its executive director filed a complaint in Puerto Rico Superior Court seeking specific performance.[46] The defendants removed the case to the United States District Court for the District of Puerto Rico based on the court's admiralty jurisdiction, contending that the contract for re-float and disposal of the ship was a maritime service contract.[47] The defendants also filed a summary judgment motion claiming that the action was barred by laches.[48] In the alternative, the defendants argued that the agreement constituted a salvage contract, and as such, was governed by a two-year statute of limitations.[49]

The Puerto Rico Ports Authority contended that the contract was for professional services and that their complaint was filed within the relevant 15-year statute of limitations.[50] The Ports Authority argued that the doctrine of laches did not apply.[51] The federal court agreed with the defendants' laches argument, and granted the defendants' summary judgment motion.[52] The complaint was dismissed with prejudice.[53]

The "dead ship" doctrine only entered the picture when the Puerto Rico Ports Authority filed a motion with the district court to alter, amend, or vacate the judgment.[54] The *Isla Nena* was a "dead ship", the Ports Authority argued, and therefore the contract for its removal and disposal could not be reached by admiralty jurisdiction.[55] The motion was denied; the Ports Authority appealed the denial of that motion, as well as the district court's grant of the summary judgment motion, to the First Circuit.[56]

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43. *See id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *See id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.* (noting PRPA did not bring its action until at least eleven years after it first knew that the ship had not been re-sunk and had been moved to Catano. The court found this delay was unreasonable and economically prejudiced the defendants in the case).
54. *Id.*
55. *Id.* at 224.
56. *See id.* at 223.

B. The First Circuit's Opinion

The Ports Authority was equally unsuccessful on appeal. The First Circuit, in *The Isla Nena*, held that the contract claim was cognizable under admiralty jurisdiction, and therefore was barred by laches.[57] In making its ruling, the First Circuit began with a general jurisdictional analysis to determine the *Isla Nena*'s status as a vessel under the "dead ship" doctrine.[58] Guided by the Supreme Court's reiteration in *Exxon Corp. v. Central Gulf Lines*,[59] namely, that the interest in the granting of admiralty jurisdiction is "the protection of maritime commerce,"[60] the court looked to the nature of the transaction. Specifically, the court examined the original contract to remove and dispose of the *Isla Nena* when she sank in San Juan Harbor.[61] The court held that because the contract involved the removal of an object that was obstructing the "navigation, business or commerce of the sea," the contract was maritime in nature.[62]

Next, the court considered the Ports Authority's "dead ship" argument. The Ports Authority contended that admiralty jurisdiction did not govern the contract dispute because the *Isla Nena* was a "dead ship," a vessel whose function has changed so much that it no longer has a navigation function.[63] Whether the *Isla Nena* was alive or dead was irrelevant, the court held, because the nature of the contract was maritime and because the contract related to an object that obstructed navigation in San Juan Harbor.[64] Unlike the "dead ship" cases cited by the plaintiff, the present case involved a "contract for removal of a ship obstructing navigable waters."[65] Therefore, the *Isla Nena*, whether dead or alive for the purposes of the "dead ship" doctrine, fell within the reach of federal admiralty jurisdiction simply because of where she lay – a place where she obstructed navigation.[66]

The court's reasoning is in accord with cases finding admiralty jurisdiction over contracts for the salvage of objects that were not vessels and were not involved in maritime commerce. For example, in the 1879 case of *Maltby v. Steam Derrick Boat*,[67] the United States District Court for the Eastern District of Virginia sustained a finding of admiralty jurisdic-

57. *See id.* at 224, 227.
58. *See id.* at 224.
59. 500 U.S. at 603.
60. *P.R. Ports Auth.*, 456 F.2d at 224 (quoting *Exxon Corp.*, 500 U.S. at 608).
61. *Id.* at 224.
62. *P.R. Ports Auth.*, 456 F.2d at 225 (quoting Cunningham v. Dir., Office of Workers' Comp. Programs, 377 F.3d 98, 109 (1st Cir. 2004).
63. *See id.* at 225.
64. *Id.*
65. *Id.*
66. *Id.*
67. Maltby v. Steam Derrick Boat, 16 F.Cas. 564 (E.D. Va. 1879) (No. 9000).

tion over a contract to salvage a sunken boat that had no means of propulsion or sails.[68] The test, according to *Maltby*, was not whether the object to be saved was maritime in nature, but whether the particular contract involved the salvage of some movable thing "possessing the attributes of property" on navigable waters.[69]

Furthermore, the First Circuit distinguished *Luvi Trucking, Inc. v. Sea-Land Service, Inc*,[70] another case cited by the Ports Authority in support of its "dead ship" theory. In *Luvi Trucking*, the court held that it did not have admiralty jurisdiction over a contract to transport cargo on land from one pier to another.[71] However, the court in *Luvi Trucking* noted that simply because a contract involves a ship does not mean it is governed by maritime law; there must be a "link between the contract and the operation of the ship, its navigation or its management afloat."[72] The Ports Authority argued that the contract governing the removal and disposal of the *Isla Nena* was not maritime in nature because it involved a dead ship, as opposed to the operation, navigation, or management of a ship that was afloat.[73] The First Circuit refuted that distinction. It pointed out that the holding in *Luvi Trucking* did not rely on the "dead ship" doctrine.[74] It relied on the fact that the contract involved a trucking company that never came in contact with a vessel.[75] The court observed that in contrast, the defendants in the present case had substantial contact with the *Isla Nena*; in particular, they raised her from the bottom of the harbor and transported her to the shipyard.[76] Therefore, the court held that the Ports Authority's contract was maritime in nature.[77]

Finally, the First Circuit held that the district court did not err in holding that the Ports Authority's action was barred by laches.[78] Overall,

68. *See id.* at 566.

69. *Id.* (noting that in cases "in which the courts have denied salvage where property other than vessels of navigation or their furniture or cargoes has been saved . . . these will nearly all be found to have turned on questions of place, or questions not affecting the character of the thing saved.") However, as will be explored later in this note, other cases take an opposing view, those cases have since been distinguished on the facts. *See, e.g.*, Cope v. Vallette Dry-Dock Co., 119 U.S. 625, 627 (1887).

70. *P.R. Ports Auth.*, 456 F.2d at 226 (rejecting plaintiff's reliance upon Luvi Trucking, Inc. v. Sea-Land Service, Inc., 650 F.2d 371 (1st Cir. 1981)).

71. *See Luvi Trucking, Inc.*, 650 F.2d at 373-74.

72. *Id.* at 373 (citing E. E. Jhirad & A. Sann, 1 Benedict on Admiralty § 183, at 11-7-8 (6th ed. 1974)).

73. *P.R. Ports Auth.*, 456 F.2d at 226.

74. *Id.*

75. *Id.* (quoting *Luvi Trucking, Inc.*, 650 F.2d at 373-74).

76. *Id.*

77. *Id.*

78. *See id.* at 227-28 (noting district court's holding Ports Authority waiting eleven years to bring its suit to be unreasonable and that the defendants would be economically prejudiced if they had to dispose of the *Isla Nena* at no cost to the plaintiffs).

the First Circuit affirmed the district court's orders granting the defendants' summary judgment motion and denying plaintiff's motion to alter/amend, with costs.[79]

IV. ANALYSIS

While the court in *The Isla Nena* may have followed the direction of *Exxon*, and the cases before it, in stressing the protection of maritime commerce as the "fundamental interest giving rise to maritime jurisdiction,"[80] a close look at the court's application of this law to the facts brings its analysis into troublesome waters. First, the court focused on the original contract in April 1992 to remove the ship from San Juan Harbor, but the parties modified the contract in September, five months after the original contract was executed.[81] Subtracting $1,000 from the contract price, the defendants agreed to remove the ship from her mooring at the shipyard in Catano and dispose of her in the easiest possible way.[82] Under the original contract, the defendants had agreed to remove her from San Juan Harbor and dispose of her at sea.[83] It is the modified version of the contract under which the plaintiffs sought performance some 11 years later, not the original version.

It now appears that the First Circuit applied the correct jurisdictional analysis to the wrong version of the contract. Parties to a contract are free to modify their agreement in whole or in part.[84] When they modify their contract, the new version supersedes the old version.[85] The new version of the contract, in this case, required the defendants to dispose of a ship that was moored at a shipyard.[86] It is at this situs that the court should have applied its admiralty jurisdiction analysis. The contract was still for removal and disposal of a vessel, but the removal and disposal of the vessel were to take place in new locations. So what would have happened if the court had applied its analysis to the amended contract? The admiralty law governing wharfage is illustrative on this point.

Wharfage is the fee that vessel owners pay to use a dock to load and unload cargo, receive and let off passengers, or to conduct repairs.[87] As

79. *Id.* at 228.

80. Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 608 (1991) (quoting Sisson v. Ruby, 497 U.S. 358, 367 (1990)).

81. *P.R. Ports Auth.*, 456 F.2d at 222-23.

82. *Id.* at 223.

83. *Id.* at 222-23.

84. *See* Savage Arms Corp. v. U.S., 266 U.S. 217, 220 (1924).

85. *See* Decca Records, Inc. v. Republic Recording Co., 235 F.2d 360, 363 (6th Cir. 1956); *See also* Housekeeper Pub. Co. v. Swift, 97 F. 290, 294 (8th Cir. 1899).

86. *P.R. Ports Auth.*, 456 F.2d at 223.

87. *See Ex Parte Easton*, 95 U.S. 68, 73 (1877).

the court noted in *Howmet Corp. v. Tokyo Shipping Co.*,[88] "[a]ll of the services embraced in wharfage are intimately related to and are essential incidents to a ship in the ordinary course of navigation."[89] Without piers or wharves, ships engaged in commerce and navigation would be "subjected to great. . .delay."[90]

The factual record does not indicate whether the Ports Authority paid a wharfage fee to the owner of the dock to which the *Isla Nena* was moored. Regardless, the law on wharves is relevant because of the importance of wharves to commerce and navigation. The *Isla Nena*, half-sunk and moored to a dock, prevented other ships from using that mooring during their trips to Catano. Indeed, the defendants argued that the partially-sunk ship affected commerce because of its location in the heavily-trafficked Army Terminal channel.[91] As such, the ailing vessel constituted an obstruction to navigation, an "essential" maritime interest served by wharves.[92] The contract for its removal, therefore, was maritime in nature because it "relate[d] to the navigation, business or commerce of the sea."[93] In light of the importance of wharves in serving the maritime interests of navigation and commerce, the First Circuit most likely would have reached the same holding had it analyzed the amended the contract instead of the original version.

However, one difference in fact might have led the court to find against admiralty jurisdiction. Specifically, the First Circuit's conclusion that the presence of the *Isla Nena* at the bottom of the sea in San Juan Harbor constituted an obstruction to navigation was based in part on the U.S. Army Corps of Engineers' order to remove the ship pursuant to the Rivers and Harbors Act of 1899.[94] Section 15 of that statute provides that to maintain safety in navigation, obstructions in navigable waters must be removed.[95] Had the Corps not ordered the ship's removal, the absence of that fact might have resulted in a different holding.[96]

However, the possibility that the contract to remove the *Isla Nena* from its mooring could be construed as one for ship breaking is not likely.

88. Howmet Corp. v. Tokyo Shipping Co., 320 F. Supp. 975 (D. Del. 1971).

89. *Id.* at 978.

90. *Ex Parte Easton,* 95 U.S. 68 at 73.

91. Appellee Response Brief at 11, P.R. Ports Auth. v. Umpierre-Solares, 456 F.3d 220 (1st Cir. 2006) (No. 05-1637).

92. *See Howmet Corp.*, 320 F. Supp. at 978.

93. Cunningham v. Dir., Office of Workers' Comp. Programs, 377 F.3d 98, 109 n. 11 (1st Cir. 2004) (quoting Nacirema Operating Co. v. Johnson, 396 U.S. 212, 216 n.7 (1969)).

94. P.R. Ports Auth. v. Umpierre-Solares (*The Isla Nena*), 456 F.3d 220, 225 (1st Cir. 2006).

95. *Id.*

96. *See generally* REA v. Eclipse, 135 U.S. 599, 608 (1890) (holding that admiralty does not have jurisdiction over a contract for the sale of a vessel). If a court holds that a ship-breaking contract is a contract for the sale of a vessel, the case could be removed from admiralty jurisdiction.

There appears to be no case addressing whether contracts for ship-breaking, under which a ship's parts are sold for scrap, are within the purview of admiralty law.[97] Ship breakers are considered to be workers in maritime employment covered by the Longshore and Harbor Workers' Compensation Act,[98] but a contract for sale of a ship is not considered maritime in nature.[99] Here, the parties had agreed to dispose of the ship. As part of the same agreement, the two individual defendants paid $1,000 to acquire her remains. However, there is no indication that the ship's parts were to be sold for scrap. If construed as a contract for the sale of a ship, it appears the transaction would not be reached by admiralty law.[100] But even if it was construed as a sale, the sale was to occur only after the considerable task of removing her from her location obstructing maritime navigation.[101] That service, as the court in *The Isla Nena* concluded, is cognizable under admiralty law because of its relation to maritime navigation and commerce.[102]

V. Future Effect

A. The Court's Application of the Law to the Facts Indicates a Possible Presumption That the Contract is Maritime in Nature

In light of the court's decision to use the terms of the original unmodified contract as its jurisdictional point of origin, the future effect of this case is unclear. In other words, the court's reliance on the original contract to remove and dispose of the *Isla Nena* at San Juan Harbor, as opposed to the amended contract to remove and dispose of it when it was moored at Catano, could be construed as a willingness to look to the part of the contract or stage in the evolution of the contract that is *most* maritime in nature.[103] Based on these considerations, the First Circuit appears to take a broad view of the contract for the purposes of jurisdiction, thus opening a door for future courts to find contracts maritime in nature by relying on a provision or stage in the evolution of the contract that is

97. The author was unable to find any cases or secondary authority deciding whether a contract for ship-breaking is cognizable under admiralty law.

98. 33 U.S.C. § 902(3) (1984).

99. S. C. Loveland, Inc. v. E. W. Towing, Inc., 608 F.2d 160, 164 (5th Cir. 1979) (citing Atl. Lines, Ltd. v. Narwhal, Ltd., 514 F.2d 726, 731 (5th Cir. 1975)).

100. *REA*, 135 U.S. at 698.

101. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 24 (2004) (holding that a bill of lading is still a maritime contract even though it provides for some transportation by land, so long as the bill requires substantial carriage of goods by sea).

102. P.R. Ports Auth. v. Umpierre-Solares (*The Isla Nena*), 456 F.3d 220, 225 (1st Cir. 2006).

103. *See* Posting of S. COTUS to Appellate Law & Practice Blog, http://appellate.typepad.com/appellate/2006/07/index.html (July 27, 2006, 19:52 EDT).

most maritime in nature.[104]

B. The Future of the "Dead Ship" Doctrine as Applied to Maritime Contracts

The First Circuit in *The Isla Nena* noted that whether the *Isla Nena* was "live" or "dead" for the purposes of the "dead ship" doctrine was irrelevant.[105] What brought the contract for its removal under admiralty jurisdiction, with its attendant use of the equitable doctrine of laches instead of local statutes of limitation, was the fact that the nature of the contract was maritime.[106] The outcome of this case begs the question: has the "dead ship" doctrine become powerless to remove a contract from the reach of admiralty law? Or, more specifically, if a contract falls under admiralty jurisdiction because it is deemed "maritime in nature," is there any way, after *The Isla Nena*, that the "dead ship" doctrine can extinguish a specific performance action brought *in personam* under a maritime service contract? No, as long as the contract in question is for the removal of an obstruction to navigation.[107]

In a line of cases during the late nineteenth century,[108] courts disagreed over whether it matters that the ship to be salvaged is "live" or "dead." In *Maltby v. Steam Derrick Boat*,[109] the court found admiralty jurisdiction over a sunken derrick boat that lacked sails and means for propulsion, but had a mast for hoisting objects from the river that were obstructing navigation.[110] The court declared that it did not matter whether the object to be salvaged was maritime in nature, so long as the object to be saved was a piece of property found in navigable waters.[111] The opposing view is illustrated by *Cope v. Vallette Dry-Dock Co.*,[112] decided seven years later in 1887. In *Cope*, the Supreme Court declined admiralty jurisdiction over a claim for salvage of a piece of dry dock, having been saved just before it would have sunk as a result of a collision with a vessel.[113] The Court held that a dry dock is not used for navigation, and is not a ship or a vessel.[114]

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104. *Id.*
105. *P.R. Ports Auth.*, 456 F.3d at 225-26.
106. *Id.* at 226.
107. *See id.* at 225.
108. *See, e.g.*, Cope v. Vallette Dry-Dock Co., 119 U.S. 625 (1887); Woodruff v. One Covered Scow, 30 F. 269 (E.D.N.Y. 1887); Maltby v. Steam Derrick Boat, 16 F. Cas. 564 (E.D. Va. 1879) (No. 9000); Hezekiah Baldwin, 12 F. Cas. 93 (E.D.N.Y. 1876) (No. 6449).
109. 16 F. Cas. 564.
110. *Id.* at 566.
111. *See id.*
112. 119 U.S. 625.
113. *Id.* at 627.
114. *Id.*

Ten years later in 1897, the Circuit Court of Appeals for the Seventh Circuit decided *In re Hydraulic Steam Dredge No. 1.*[115] This case involved a dispute over a contract to furnish coal to a dredge that sucked mud from the bottom of a lake and transported it in pipes to areas that needed the material as a fill for railroad purposes.[116] Although not a salvage case like many of the aforementioned cases, this case looked to the nature of the contract to determine whether it was maritime, just as the court did in *The Isla Nena.* The court determined that although the dredge dug up materials from the bottom of a lake, its purpose was to effectuate construction on land.[117] "It is not suggested that vessels engaged in navigation frequented the place," the court noted.[118] While this last statement is dicta, it is important because it foreshadowed what later became a focus on whether a particular location is heavily navigated.

This same reasoning led a court to find that a dredge, whose work is to remove obstructions to the navigation of rivers, harbors, and channels, may be subject to a maritime lien in order to satisfy a dredging contract debt.[119] Additionally, the Supreme Court recently held in *Stewart v. Dutra Construction Co.*[120] that a giant dredge that removed silt from the ocean floor and dumped it into adjacent scows was a "vessel" within the meaning of the Longshore and Harbor Workers' Compensation Act.[121]

The courts eventually sided with *Maltby* in their admiralty analysis, concluding that the salvaged objects need not be ships or distinctly maritime, but must simply be a piece of property found in navigable waters cognizable under admiralty jurisdiction.[122] This was not necessarily a repudiation of *Cope*; many courts simply distinguished that case on the facts.[123] Additionally, a good explanation for why courts once restricted salvage claims to ships and their cargo exists in *Cheeseman v. Two Ferry Boats.*[124] In that case, the court explained that the distinction originates in the outdated rule that maritime jurisdiction only extended to the "ebb and flow of the tide."[125] At the time, ships were one of the only things that existed in the seas.

115. *In re* Hydraulic Steam Dredge No. 1, 80 F. 545 (7th Cir. 1897). This case contains an excellent summary of the evolution of salvage law with respect to objects not inherently maritime in nature. *Id.* at 550-54.

116. *Id.* at 546-547.

117. *See id.* at 557.

118. *Id.*

119. McRae v. Bowers Dredging Co., 86 F. 344, 348 (C.C.W.D. Wash. 1898).

120. Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005).

121. *Id.* at 484, 497.

122. *See, e.g.,* Colby v. Todd Packing Co., 77 F. Supp. 956, 958-59 (D. Alaska 1948).

123. *Id.* at 958.

124. Cheeseman v. Two Ferryboats, 5 F. Cas. 528 (S.D. Ohio 1870) (No. 2633).

125. *Id.* at 532.

The importance that admiralty law places on removing obstructions to navigation might also be traced to cases involving derelict vessels and floating objects that constitute a marine peril. Derelict vessels, or vessels floating along without anyone controlling them, are considered by courts to be obstructions to navigation and a danger to commerce.[126] Even floating objects such as logs can be considered a danger to navigation, and their salvage thus considered maritime in nature.[127]

It is clear then that the "dead ship" doctrine has no role in maritime contract cases when the contract involves the removal of an obstruction from navigable waters. This reasoning is in line with the holdings in the aforementioned decisions relating to salvage, derelict vessels, and objects constituting marine peril. It reflects the continued importance that admiralty law places on the free flow of vessels in navigable waters and the "protection of maritime commerce."[128]

C. The "Dead Ship" Doctrine Can Still Remove a Case From Admiralty Jurisdiction When Obstruction to Navigation Is Not at Issue

Despite the emphasis admiralty courts place on the nature of maritime contracts and the furtherance of navigation (versus the maritime status of the object obstructing navigation), *The Isla Nena* shows that the "dead ship" doctrine is not dead. The doctrine can still remove a case from the reach of federal admiralty jurisdiction, so long as obstructions to navigation are not involved.[129]

The plaintiff's argument in *The Isla Nena* was that the ship was no longer engaged in navigation, and that because it was to be given a deep water burial, the ship was no longer *intended* to be used in navigation.[130] The argument seemed to acknowledge the weakness in the plaintiff's case: the fact that the ship was obstructing navigation at the time of the suit for specific performance of the contract. The plaintiff's strategy, and the First Circuit's emphasis on the fact that the *Isla Nena* was obstructing navigation, indicates the "dead ship" doctrine's vitality in cases *not* involving such obstructions.

The cases cited by the plaintiffs in *The Isla Nena* are evidence of the

126. *See* Tracor Marine Inc. v. M/V Margoth, 403 F. Supp. 392, 394 (D.C.Z. 1975); Henry R. Tilton, 214 F. 165, 167 (D. Mass. 1913); Flora Rodgers, 152 F. 286, 288-89 (D.S.C. 1907); Anna, 1 F. Cas. 931, 932 (C.C.E.D.N.Y. 1873) (No. 401).

127. *See* Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633 F.2d 1304, 1306 (9th Cir. 1980).

128. Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 608 (1991) (quoting Sisson v. Ruby, 497 U.S. 358, 367 (1990)).

129. P.R. Ports Auth. v. Umpierre-Solares (*The Isla Nena*), 456 F.3d 220, 225-26 (1st Cir. 2006).

130. Appellant's Brief, *supra* note 35, at 22.

doctrine's continued use. The First Circuit decided a case only three years earlier that provided the concise definition of the "dead ship" doctrine relied on by the plaintiffs.[131] Other cases cited by the plaintiffs indicate the doctrine is still alive, when the facts so allow.[132] Many of these "dead ship" cases involve ships not touching water. For example, in *Hanna v. The Meteor*,[133] the District Court for the Eastern District of New York held that a ship that is part of an out-of-service fleet is a "dead ship" to which a party cannot attach a lien for repairs.[134] In *Robert E. Blake Inc. v. Excel Environmental*,[135] the Ninth Circuit held that admiralty law did not reach a contract to reactivate a ship that had been mothballed and unused for years, because the ship was "dead."[136]

The "dead ship" doctrine after *The Isla Nena* does not appear to be effete. It influences decisions on cases in which a finding of admiralty jurisdiction turns on the status of the vessel. After this case, though the doctrine appears to be powerless to remove from admiralty jurisdiction a maritime services contract to raise and dispose of a vessel posing an obstruction to navigation. The courts have reiterated the interest of admiralty jurisdiction in the protection of navigation and maritime commerce.[137] It does not matter whether the object obstructing navigation is a ship or its cargo or otherwise. Thus, when it comes to contracts for removal of such objects, the "dead ship" doctrine cannot place the contract beyond the reach of admiralty jurisdiction.

131. Mullane v. Chambers, 333 F.3d 322, 328 (1st Cir. 2003) ("[A] ship loses its status as a vessel when its 'function is so changed that it has no further navigation function.'" (quoting Goodman v. 1973 26 Foot Trojan Vessel, Ark. Registration No. AR1439SN, 859 F.2d 71, 73 (8th Cir. 1988))).

132. *See, e.g.*, Robert E. Blake Inc. v. Excel Envtl., 104 F.3d 1158, 1160-61 (9th Cir. 1997) (citing *Goodman*, 859 F.2d at 73) (holding that a contract to reactivate a "laid up" ship which had been mothballed and inactive for several years was not cognizable under the admiralty jurisdiction); AMOCO Oil v. M/V Montclair, 766 F.2d 473, 477 (11th Cir. 1985) (holding that dead ships are ships that have been completely removed from commerce and navigation); Marina Entm't Complex, Inc. v. Hammond Port Auth., 842 F. Supp. 367, 370-71 (N.D. Ind. 1994) (holding that a contract to lease a barge did not fall under admiralty jurisdiction because the *res* was a dead ship).

133. 92 F. Supp. 530 (E.D.N.Y. 1950).

134. *See id.* at 532.

135. 104 F.3d 1158 (9th Cir. 1997).

136. *Id.* at 1160-61.

137. Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 608 (1991) (quoting Sisson v. Ruby, 497 U.S. 358, 367 (1990)).