Collision at Sea and in Court: The Saga of USS Chicago and MS Silverpalm, 1933-38

> "They were the only moving objects in the whole long, moonlit road, and yet they crashed into each other with that malignant accuracy which brings two ocean liners together in the broad waste of the Atlantic."
>
> —*"The Story of the Sealed Room," by Arthur Conan Doyle*

By Thomas C. Hone
With William J. Hone

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To: Richard H. Webber, Esq., Navy veteran, fine lawyer and wonderful gentleman

A NOTE ON TERMS

Actually, it's a note on one term—the name of the British-flag merchant ship that collided with U.S.S. *Chicago*. In court documents, official correspondence, the Silver Line company history, and court testimony, the name can be *Silverpalm* or *Silver Palm*. The text of this book uses *Silverpalm* except where, in a quotation, the name *Silver Palm* is used.

Acknowledgements

This manuscript could not have been written without the significant contribution of my late brother, William J. Hone, Esq. Bill was an excellent lawyer and a skilled teacher. Once, while we were engaged in a somewhat heated argument, he reminded me—with a twinkle in his eye—that I was getting a law school's first year of education from him for free. Not only that, but Bill's wonderful wife Marge fed me when I showed up at their home with a big box or two of papers, notes, and first draft chapters.

I wrote almost all of this lengthy case study and did most of the research, but I knew from experience how to do the research and write it up. What I really needed was help with understanding the law. Like any profession, law is its own world, and the best legal practitioners are masters of it. In the case of this study, I was able to proceed with the benefit of the lawyer I most respected. However, if there are any legal errors in the text, the fault for that is mine alone.

A number of people aided me in my research. The staff of the Navy Department Library in Washington, D.C., was most helpful, as was the staff of the Bancroft Library at the University of California. Without the records in the National Archives in Washington and in the National Archives Branch in San Bruno, California, the book could not have been written. The staffs of those two organizations were very cooperative and found most of the documents that I have cited. Also quite essential to the study were the photographs in the National Archives and in the Navy's History and Heritage Command.

Haley Maynard, Chris Killillay, and Holly Reed of the National Archives in Washington, and Charles Miller of the National Archives in San Bruno, were especially helpful. I could not have completed my research without the assistance of Marisa Louie Lee of San Francisco. Again, I am responsible for any factual errors that might exist in the study.

Christopher Wright provided copies of the plans for *Chicago* and provided information about the ship's structure and performance. Norman Friedman confirmed my suspicions regarding *Chicago*'s 8-inch guns.

Several individuals read the manuscript and offered suggestions: Captain Gerard D. Roncolato, USN (Ret.); LT Peter N. Bishop, RN; Captain Jeffrey B. Subko, USNR (Ret.); and Ms. Mary Adams.

Lauren Hillman deserves thanks for turning the typescript into a book format.

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Chapter 1: Introduction

The night of October 23, 1933, started out mostly clear. The Silver Line motorship *Silverpalm*, a diesel- powered cargo ship displacing 9,766 tons when loaded, finished taking on her cargo in San Francisco just before midnight and headed out of San Francisco Bay, bound south to the Panama Canal and then New Orleans. Earlier that day, four United States Navy cruisers—*Chicago* (CA-29) and her sisters *Northampton* (CA-26), *Chester* (CA-27), and *Louisville* (CA-28)—left San Pedro, California, for a run north in order to participate in a Navy Day celebration in San Francisco. *Chicago* was the flagship of Vice Admiral Harris Laning, commanding the cruisers of the U.S. Fleet's Scouting Force.

The captain of *Silverpalm* was Bernard T. Cox, an experienced British mariner and World War I Royal Navy veteran. He had assumed his position in May. After leaving San Francisco Bay, he increased *Silverpalm*'s speed to 13.5 knots. Approaching him from the south was the line of the four U.S. Navy cruisers, steaming toward him in a line-ahead formation at 12 knots. At about 2:40 am, Captain Cox took direct control of his ship as fog and mist reduced visibility. At about 4:20 am, Cox slowed *Silverpalm* for about 20 minutes because the fog around his ship grew worse. He increased her speed when visibility improved.

The four warships kept station on their course north. *Chicago* and the two cruisers following her towed special spars that kicked up spray visible to the ship that was next in line. The distance between ships was 600 yards. In charge of *Chicago* was Captain Herbert E. Kays, a 1905 graduate of the Naval Academy and recently the commander of Mine Division Two based at Pearl Harbor, Hawaii. Kays had taken command of *Chicago* in April. He and his navigating officer, Lieutenant Commander Lloyd R. Gray, spent the evening and early morning hours moving back and forth between *Chicago*'s pilot house and the adjacent chart house.

Even in the darkest hours after midnight, there was nothing to indicate that *Chicago* would collide with *Silverpalm* a little after 8:00 am, but collide they did. The actual collision, with *Silverpalm* ramming *Chicago*'s port side, cost three members of the cruiser's crew their lives and resulted in a Navy board of inquiry and then a series of court hearings that ran on for four years.

How did I—neither lawyer nor seaman—get involved in a pre-World War II accident at sea? Blame it on negligence—the apparent negligence like that which caused two tragic accidents involving Navy warships in 2017. On the night of 17 June 2017, guided missile destroyer U.S.S. *Fitzgerald* (DDG-62) collided with containership *ACX Crystal* approximately 80 nautical miles southwest of Tokyo. Seven American sailors were killed. In the dark of 21 August of that year, another guided missile destroyer, U.S.S. *John S. McCain* (DDG-56) turned into the path of tanker *Alnic MC* while both ships were passing through the Singapore Strait. The tanker struck *McCain*, ending the lives of ten American sailors and injuring 48 others. As I read newspaper reports of these deadly incidents, I wondered if similar accidents had occurred in the 1920s and 30s—a time before radar and Global Positioning Satellite (GPS) positioning.

As it happened, I had just found and purchased a book entitled *Civil and Merchant Vessel Encounters with United States Navy Ships, 1800-2000*, by Greg H. Williams, and the book had an entry for the collision of *Silverpalm* with U.S.S. *Chicago*.[1] I decided to follow up. According to Williams, the U.S. government sued Silver Line, Ltd., for the lives of the three sailors and a serious injury to a fourth; the government also sued

Silver Line for the cost of repairing *Chicago*. On its part, Silver Line sued the U.S. government for the damage to *Silverpalm* and its cargo. That was enough information to persuade me to dig deeper.

This book is the result. The story it tells is of a dispute among seagoing professionals and a clash between the lawyers for the U.S. government and those representing the Silver Line. As is sometimes the case in legal disputes, there were significant disagreements about the facts. Just where were *Silverpalm* and *Chicago* as they approached one another? What were their positions when they sighted one another? How did the two ships' captains try to avoid a collision? How fast were the two ships going before they collided? Different witnesses told different stories. Whose testimony was correct? Given the disagreement about the facts, it was up to the lawyers to persuade a judge of negligence or the lack of it. The stakes were high. The owners of *Silverpalm* could lose their ship.

I would need help with both the naval and legal aspects of the contest. One Navy officer I consulted said it was a matter of which ship was "burdened"—that is, which ship had to maneuver to avoid the other. However, the rules governing what ships should do when they encounter one another at sea are not the same now as they were in 1933, and I needed to discover just what guidance applied to ship captains in 1933. Fortunately, the guidance governing the actions of Navy officers existed in the form of a thick volume entitled *Knight's Modern Seamanship*, the 7th edition of which—published in 1918—covered both what the law and good seamanship required of ships' captains.[2] For help with the legal maneuvering, I turned to my older brother, William (Bill) Hone, a retired attorney.

I'm an experienced researcher with publications to prove it. But I didn't realize how both the nautical and legal stories connected with the collision of *Silverpalm* and *Chicago* would consume my time, tax my understanding, and drain my wallet. Hopefully, readers will find my account of events interesting and enlightening. That would be enough to justify all that I've invested in this book.

Chapter 2: Collision

On the morning of 24 October, there were three ships that mattered. In addition to *Chicago* and *Silverpalm*, there was the cargo liner *Albion Star*, which was heading north to San Francisco just ahead of *Chicago*. The three were about to interact in fog off Point Sur and become entangled in what every veteran sailor feared in the days before radar—a major collision.

On that morning, Geoffrey Newhouse, the junior third engineer of *Silverpalm*, went "down below about ten minutes" before his normal engine room watch began at eight in the morning. Newhouse stood his watch with two other engineer officers—Donovan Pitt and John Tough—and an "oiler," a sailor responsible for making sure that *Silverpalm*'s two powerful, two-stroke diesel engines were properly lubricated. Newhouse had served on *Silverpalm* for 13 months, and in that time the ship had called at ports in the Far East (Rangoon, for example, and Singapore, Surabaya, and Manila) and in North America, including San Francisco, Seattle, Vancouver, and Portland.[3] Now her diesels were taking her away from San Francisco and toward the Panama Canal.

Silverpalm's master, Captain Bernard T. Cox, was still on her bridge, and when engineer Newhouse was heading to his station the ship was sounding her foghorn once a minute. But *Silverpalm* was back up to what for her was high speed—about 13-and-a-half knots—because the fog seemed to be clearing. Aboard heavy cruiser USS *Chicago*, Vice Admiral Laning was eating his breakfast. At 7:45 a.m., he had released *Chicago* to move ahead of the other cruisers and increase speed to 18 knots so that a special new coating on the inside of her boilers could be properly annealed. As he ate his breakfast, Laning scanned press reports that had been sent to *Chicago* by radio.

On the navigating bridge of *Chicago*, Captain Kays and Lieutenant Commander Gray were looking out of one of the open forward bridge windows. They had a fairly clear view down a lane between fog banks to port and starboard. Behind and off to the side of Kays and Gray stood Lieutenant Robert O. Minter, the Officer of the Deck, responsible for making sure that the men on watch promptly responded to any orders that Captain Kays might give them. The ship's helmsman, Seaman 2nd class Julius Deming, had the wheel. Near the binnacle that housed the magnetic compass was Quartermaster 3rd class William Ladd, who was keeping a "rough note log." Others on or passing through the bridge that morning were *Chicago*'s chief signalman, Captain Kays' orderly, a corporal of the ship's Marine guard, a bosun's (boatswain's) mate, the ship's bugler, a sailor manning the telephone link to the forecastle lookout, and a sailor detailed to sound continuous, regular fog signals. *Chicago* then had four lookouts: one on each wing of the navigation bridge, one at the top of the ship's tripod mast, and one at the bow, the latter accompanied by an enlisted man on a telephone that allowed him to speak directly to Captain Kays.

Hidden in a fog bank to starboard was a third ship, the *Albion Star*. Her captain, Selwyn Capon, had been on his bridge from 4:30 p.m. of the previous day—a long watch caused by the fog's effect on visibility. From about six o'clock on the morning of the 24th, he began hearing, "at first faintly, and then gradually becoming louder, the fog signals of two vessels" on his ship's starboard quarter. At about 7:45 a.m., the signals began coming from the port quarter, which meant to Capon that the two ships were overtaking *Albion Star*.[4] Erik Irvine, the ship's fourth officer, heard the whistles astern when he came on watch at eight o'clock. He soon saw a warship off the port

quarter converging on *Albion Star*'s course. He "reported a destroyer to the captain."[5] James Harding, *Albion Star*'s first mate, also heard multiple fog signals, and he left his cabin to see what was happening. He quickly noticed two ships—one off the port bow of his own vessel and a second—a warship—off the port quarter.

On board *Chicago*, Ensign John Leeds relieved the bow lookout just before eight o'clock. He was told that there was a ship off the starboard bow. It was the *Albion Star*, though Leeds had no idea of its identity. With Leeds was Seaman Fred Connarn, the telephone "talker." The two men were shielded from wind and spray by a canvass windbreak that reached up to about three-and-a-half feet above the deck. Without any apparent warning, a ghostly image emerged from a fog bank to port. It was *Silverpalm*, and Leeds immediately reported her presence—through Connarn—to the bridge of *Chicago*, and then he pointed his arm to port to emphasize their sighting.

Captain Kays was already alert, though not to *Silverpalm*. His attention was focused on *Albion Star*. He took a good look at her when she came out of the fog bank to starboard, decided that *Chicago* could pass safely to her left, and ordered, "Ahead, standard, come left, 20 degrees."[6] Earlier, at about eight o'clock, Vice Admiral Laning had heard *Chicago* sounding two blasts on her whistle, which meant that she was stopping; he had also felt her slowing. He had quickly picked up his uniform cap and had climbed up a ladder one level to the flag bridge. He moved to the starboard wing and listened. The lookout there told him there was a ship to starboard. It was hidden in the fog and sounded its fog whistle. *Chicago* sounded hers. The still invisible steamer sounded its whistle again and then emerged from the fog forward and to starboard of *Chicago*. Laning recalled later that "It seemed to be about a mile away. I could see it very distinctly with a dark hull, white upper structure, two masts, and what seemed to me to be a blue mark near the top of the funnel."[7]

Laning also noted that *Chicago* "was gaining headway in the water and that it again sounded one blast on the whistle and seemed to be turning slowly to port and paralleling the course of the steamer in sight which, while standing in the same general direction as the *Chicago*, was on a converging course. The situation at that time looked very good to me."[8] His confidence that the two ships he could see were safely avoiding one another would be replaced in seconds when *Silverpalm* appeared to port on a collision course with his flagship.

As *Chicago* eased into her new course, Kays suddenly saw *Silverpalm* coming at him from a fog bank to port and simultaneously heard the report from bow lookout Ensign Leeds. Kays had seconds in which to find a way to prevent a collision. As Kays told the Navy Board of Inquiry, "these events took place really faster than I can tell them." His first impulse "was to continue my swing to the left" so that the oncoming *Silverpalm* could pass *Chicago* "port to port." However, "Almost immediately I realized that this could not be done; she was coming on fast."[9]

As Kays glanced at the approaching merchantman, he "immediately realized that a collision was inevitable, and that the safest thing to do was to get the ship stopped and backing off, if possible, swinging away from the oncoming ship, and take the contact, if there was to be one, as far forward as possible."[10] He therefore ordered, "Full right rudder," and, "Back, emergency, full," and then he "sounded collision quarters."[11] The cruiser's engineers immediately redirected the flow of steam from her forward turbines to the one that gave her thrust astern. It was that shift that was slowing down the cruiser.

On the bridge of *Silverpalm*, Captain Cox had first seen a blurred image of a ship that seemed to be crossing ahead of him. According to Donovan Pitt in *Silverpalm*'s engine room, Cox ordered "Stand By" on the engine room telegraph at just after 8:00 a.m. to warn the engine room officers that a new order was coming. Once visibility improved and he could see clearly, Cox realized that his ship was rapidly closing on the approaching warship, and he rang for full speed astern on both engines, repeating the order soon afterward.

Engineer Newhouse knew that repeating the "full speed astern" order meant an immediate emergency, and he and fellow assistant engineer Tough answered the bridge with "Stop" and at almost the same instant turned the two main engine control wheels to stop. However, as Donovan Pitt admitted in a deposition, cutting off the fuel to the big diesel motors did not stop the propellers, and so *Silverpalm* kept on, bare seconds away from colliding with *Chicago.*[12]

Silverpalm's engineers, unfortunately, could only shut off the fuel to her diesels and then wait while her engines gradually slowed and then stopped. As Donovan Pitt told the Navy Board of Inquiry, he and the other engineers on board had never measured the time it took to stop and then reverse the ship's diesels.[13] What mattered to Captain Cox was that his ship could neither slow down appreciably nor maneuver quickly. When he saw that his ship would collide with *Chicago*, he ordered the bow lookout, Osman Bin Puteh, to retreat from his post and take shelter amidships.

With *Silverpalm* aimed right at her, *Chicago* suddenly came extraordinarily alive. To navigator Gray, it was evident "that nothing whatsoever could be done by the *Chicago* to prevent a collision," and he stepped out on the port wing of the navigating bridge and, with Captain Kays, "watched the *Silverpalm* plow into the *Chicago*."[14] Like Gray, Vice Admiral Laning had quickly grasped what was coming. When the lookout standing with him on the flag bridge called out "Steamer dead ahead," Laning echoed his call and moved quickly to the port side of the flag bridge.[15] Captain Simons, who, as the admiral's aide, was not a regular member of the crew but had been standing on the upper bridge, felt the engines vibrating when they had been thrown in reverse, and he quickly descended from the upper bridge to the port side of the flag bridge out of a concern for Vice Admiral Laning's safety.[16] He arrived at Laning's elbow just as *Silverpalm* struck *Chicago*. Quartermaster 3rd class Ladd noted the time on the ship's clock. It was 8:07 a.m.

Lieutenant William E. Pennewill was about to leave his stateroom when he heard the collision alarm. As he later recalled, "As I reached for the door I looked over my shoulder out the porthole and saw the *Silverpalm* bearing down on us. I pulled open the door and then she struck. I knew if I started to run through the door I would be crushed against the opposite bulkhead so I just stood fast. The bow of the *Silverpalm* pushed closer and closer, her anchor on a level with my head. It seemed like hours but it could have been only seconds that that anchor kept crushing nearer and nearer. At last, just as I had given up hope, it came to a halt not more than three or four feet from my head. I took a deep breath and then I ran."[17] Ensign Leeds and Seaman Connarn had already retreated from their post at *Chicago*'s bow. As Leeds told the Navy Board of Inquiry, "When the collision occurred the jar knocked me down, and I went over to the side of No. 1 turret [the turret closest to the bow] and held on to the steps leading into the [turret] trainer's booth."[18]

By that time, *Chicago*'s crew was already responding to the collision alarm. Machinist Joseph Oehlers headed through the warrant officers' mess toward his battle station in Number 1 fire room. He didn't make it. A pile of wreckage

being pushed ahead of *Silverpalm*'s bow nearly crushed him. Fortunately for Oehlers, the warrant officers' Filipino steward and two of his messmen grabbed him and dragged him into the warrant officers' pantry, which was located on the second deck amidships, just in front of the base of the forward 8-inch turret. Oehlers had been briefly knocked unconscious—stunned by the shock of the mass of metal that severely injured him. He quickly revived and wrapped a "dirty dish rag" around his mangled right arm to stop its bleeding. The steward and his two assistants helped Oehlers through an adjacent passageway and then aft, to the operating room. The ship's doctor found that Oehlers had five broken ribs, a fractured skull, and multiple minor injuries in addition to his crushed right arm.[19]

Warren MacKay, *Chicago*'s chief radio electrician, was in the warrant officers' mess room, forward of turret 1, just before 8:00 a.m., when he heard *Chicago*'s whistle sound twice, signaling that the ship was stopping. He left the mess room, crossed behind turret 1, and climbed the ladder to the pay office on the main deck. He was exchanging words with the ship's chief storekeeper when he thought he heard the collision alarm. He then made his way to the starboard side of the well deck, sighted the ship later identified as the *Albion Star*, and looked over the side, noticing that *Chicago* was not moving. Within about a minute, *Silverpalm* struck *Chicago*, and "There were men running all around me." MacKay had never seen *Silverpalm* to port.[20]

When *Silverpalm* slipped out of the fogbank covering her, the ship's bow lookout rang a bell once, which meant that he had sighted a ship off the port bow. Captain Cox had waited about four minutes until he could see the other ship better, and then he ordered "Full astern, both engines," and then "Hard to starboard." He was maneuvering to avoid *Albion Star*, whose fog whistle had been heard by 3rd Officer George Stanley. Stanley left the bridge of *Silverpalm* and moved to the port wing of the pilot house, where he could hear and see better. In the meantime, *Silverpalm* sounded her fog whistle to indicate that she was stopping.[21] But she still had headway, and she was about to strike *Chicago*.

When the ships came together, Assistant Engineer Pitt in the engine room of *Silverpalm* felt a bump. It was not strong enough to throw him off his feet.[22] Vice Admiral Laning remembered *Chicago* being shoved bodily sideways, with her bow swinging approximately 50 degrees.[23] Captain Simons "was greatly surprised to feel no jar" as *Silverpalm*'s bow pierced *Chicago*'s port side, and he was further surprised to see "a sheet of flame" flare up "ten or fifteen feet into the air" as *Silverpalm* ground to a halt at the base of *Chicago*'s forward turret. The cruiser "heeled over to starboard," but when she rolled back upright, *Silverpalm*'s bow "then came in again and hit on the turret, and a similar sheet of flame went in the air a second time."[24]

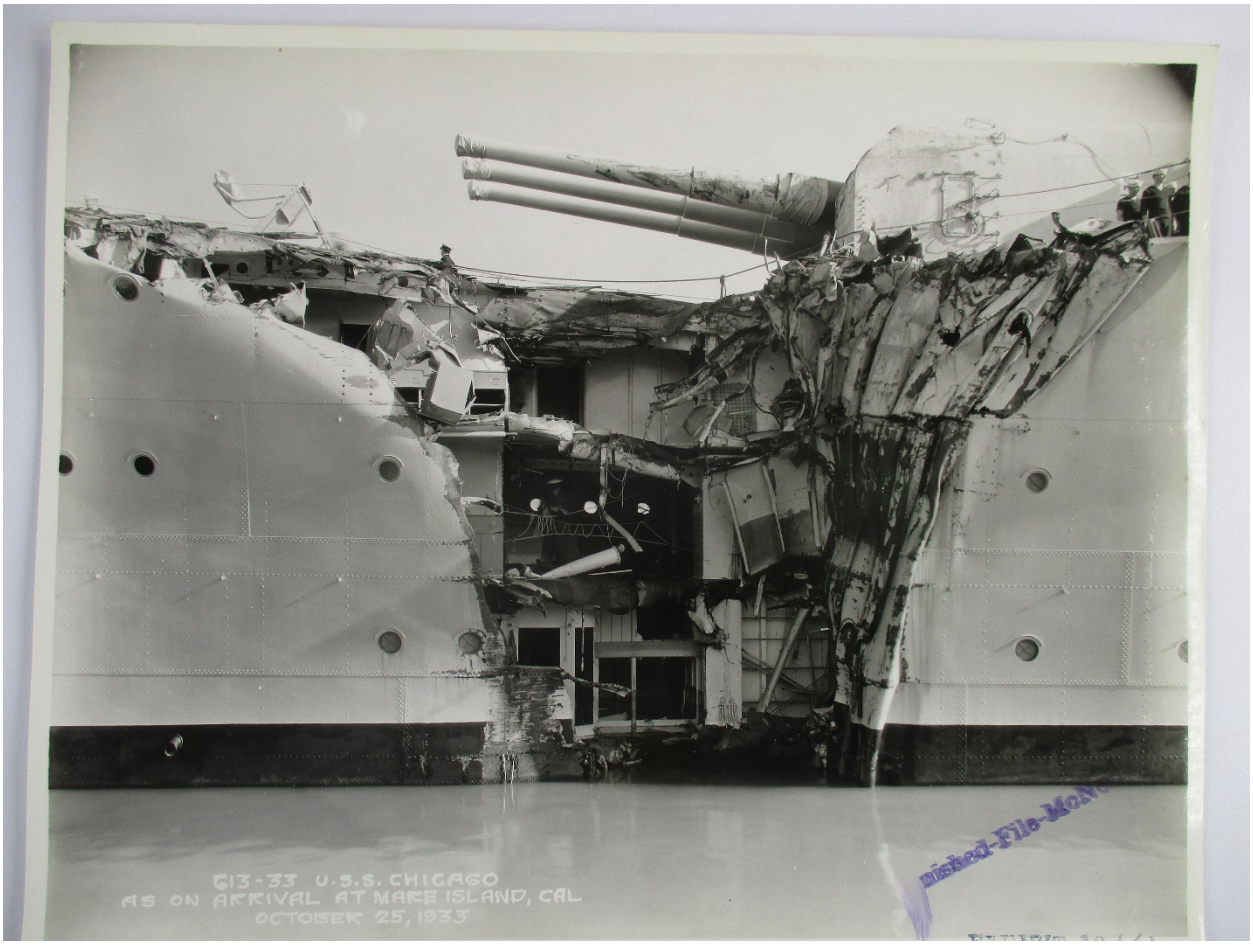
The two ships, both now stopped, separated, as Captain Kays "backed the engine [of *Chicago*] one-third to draw away" from *Silverpalm*. Captain Capon of *Albion Star* and first mate James Harding heard the sound of the collision. Harding described it as "a faint rumble."[25] Capon heard "the usual tearing of metal… it has a sound of its own," and he maintained his ship's course as *Chicago* and *Silverpalm* disappeared into the fog.[26] Captain Kays on *Chicago* testified later in court that immediately after the collision, *Chicago* sent a radio message to *Silverpalm*, asking if she needed any assistance, but Captain Cox did not recall receiving it until after 8:30 a.m.[27]

Both ships remained stopped for a time as their crews surveyed the damage to each, and *Chicago*'s crew placed a specially designed collision mat over the gash in her hull. As Captain

Kays recalled, "some few minutes later, we started ahead slow." When the other three cruisers reached *Chicago*, a "medical officer" from USS *Chester* (CA-27) went on board *Chicago* to assist treating the injured, and all four cruisers "squared away on our course to San Francisco."[28] Before they left, *Chester* asked *Silverpalm* if she needed "mechanical assistance," and Captain Cox said he did not.[29]

Chicago sailed to San Francisco with three dead members of her crew: Lieutenant (junior grade) Harold Macfarlane, USN, First Lieutenant Frederick Chapelle, USMC, and Chief Pay Clerk John Troy, USN. Machinist Joseph Oehlers, USN, survived his injuries but lost his right arm below the elbow after he was taken to the naval hospital at Mare Island when *Chicago* reached the shipyard there.[30] *Silverpalm* also returned to San Francisco—to Pier 46.

Chapter 3: Aftermath



Source: National Archives and Records Service

TAKING STOCK: THE SHIPS

When *Chicago* reached the Mare Island yard, she appeared to be very heavily damaged. One of the first photos taken of her before she was drydocked showed crumpled superstructure both above and below her waterline. Though six compartments were flooded, *Chicago* had not taken a significant list.

Once *Chicago* docked in San Francisco, *Chicago*'s electricians replaced the cable to the ship's anchor windlass. They also wired a number of temporary circuits to provide electric power to many of the compartments that had been damaged or cut off from electricity in the forward part of the ship. The next day, 25 October 1933, *Chicago* moved under her own power from San Francisco Bay to drydock number 2 at the Mare Island Naval Shipyard. Getting underway to Mare Island involved testing the main engines, lighting off four boilers, and making sure that the ship's auxiliary machinery—water and oil pumps, forced air blowers, and electrical generators—worked satisfactorily.[31]

Chicago was designed and built under the constraints the Washington Naval Treaty of 1922. Without fuel and reserve feed water for her boilers, she had to weigh less than 10,000 tons—despite being 600 feet in length and mounting nine 8-inch, long-range guns in three turrets. To

keep her overall weight under the 10,000-ton ceiling, the naval architects in the Navy's Bureau of Construction and Repair used the lightest possible steel and limited the amount of armor placed around and over her turrets, shell and powder magazines, and engine rooms. When *Silverpalm*'s bow encountered *Chicago*'s armor, it was brought up short, despite having already crushed a number of unarmored compartments in the cruiser.

The next photograph shows the damage to *Chicago* after the ship was drydocked. The gash in her side below her normal waterline is very clear. The design of *Chicago* and each of her five sisters was a compromise. Speed, cruising range, and a powerful armament were the characteristics that their designers stressed. At the same time, many steps were taken to enable the ships to survive serious damage. One such step was extensive compartmentation, both below and above the waterline.[32]

Source: National Archives and Records Service

Once in the drydock, *Chicago*'s engines were shut down, and all power—electrical and steam—was provided by cables and lines from the shipyard. Hoses at the drydock provided the ship with fresh and salt water. However, the ship was not a hulk. She had heat, water, and lights. It was important, for example, to not let the engines and other machinery "go cold" to the point where starting everything up again would be too difficult and expensive. The same was true for the ship's plumbing, and to make sure that the salt water lines necessary for fire-fighting would not leak once *Chicago* was repaired, the Navy's Bureau of Construction and Repair decided to remove and replace all of them in the ship. Lieutenant Commander Colton testified that this task "was one of the biggest jobs during our overhaul."[33]

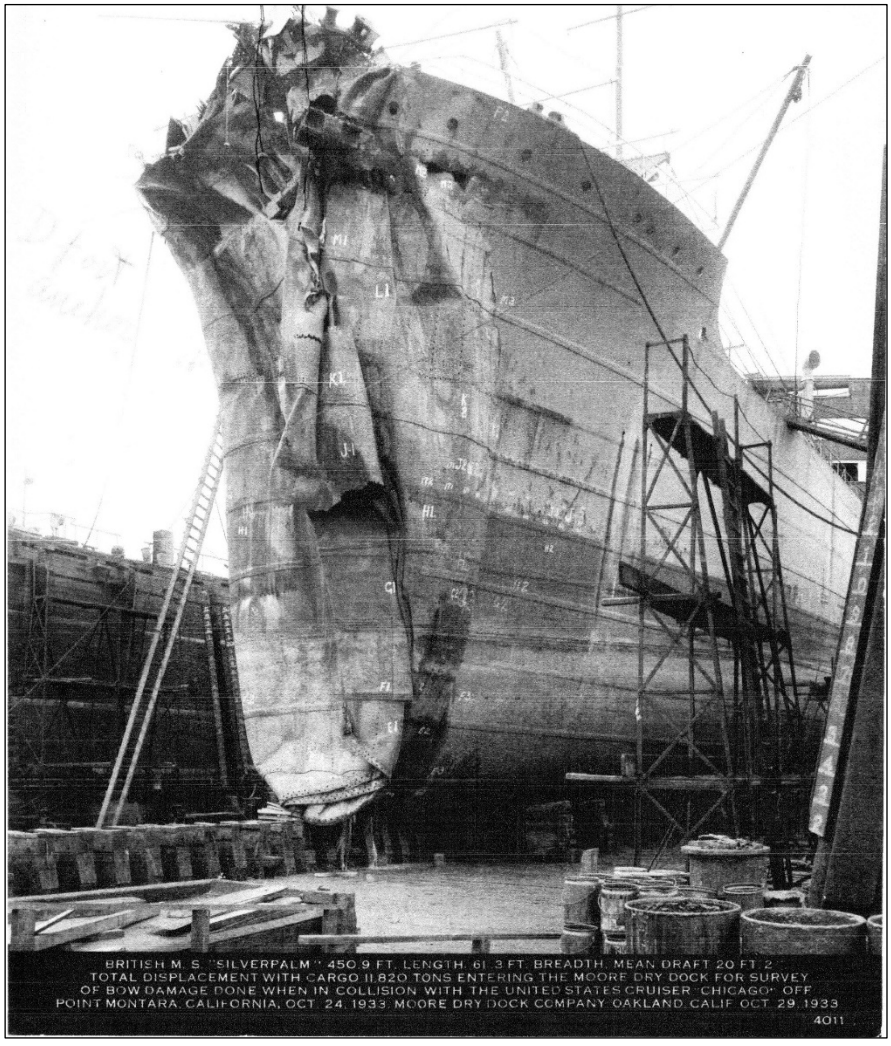
The ship's crew, aided by the shipyard's workers, finished the job of removing debris from the damaged part of the ship and cut out all the damaged hull plates and interior bulkheads and partitions. As that was being done, the engine room personnel opened up machinery to detect any damage to joints and couplings that might have resulted from the collision. One of the ship's cruising turbines had a steam leak, and the nozzles that projected high pressure steam into that turbine were removed and repaired by the personnel of the navy yard.[34] Members of *Chicago*'s crew also scraped clean the ship's bottom and repainted the hull—except for the black paint that marked the ship's waterline. An expert in the yard, experienced in painting what

had to be a straight line along both sides of the hull, did that.[35]

Silverpalm's design was obviously very different than the cruiser's. The cargo ship was essentially a mobile strongbox, intended to safely and economically transport items long distances according to a set schedule. Where *Chicago*'s design stressed mobility and fighting power, *Silverpalm*'s stressed cargo capacity, economical and reliable operation, and sturdiness. Her sturdiness had kept her afloat after she rammed *Chicago*; her reinforced bow had caved in *Chicago*'s light plating with relative ease.

Nevertheless, *Silverpalm* had suffered, as the photograph below, taken on 29 October, shows. Commander Thomas B. Richey, a member of the Navy's corps of naval constructors, examined *Silverpalm* while she was drydocked at Moore's Shipyard in Oakland. He saw that her bow had been "damaged for a distance of about 40 feet from the stem on both sides. For about 30 feet the stem was pushed bodily aft," and a number of hull and deck plates had been broken. He estimated it would take about 45 days for Moore's workforce to restore her.[36]

On 23 November 1933, *Chicago*'s crew began preparing the ship to leave the drydock. The next day, the drydock was filled, the power cables and hoses connecting the ship to the drydock were disconnected, and *Chicago* was towed to Berth E in the navy yard. As the ship's log noted, "Connected steam, electricity, salt and fresh water, and compressed air leads."[37] At one time, to build a house you first constructed the frame and the skeleton of the roof beams, and then you filled in the interior walls and floors, all the while rigging the plumbing, electric wiring, and air ducts. It was roughly the same for *Chicago*. When she tied up to her berth, her hull, decks, and interior bulkheads had been substantially repaired, but there was a lot to do to make the ship fit for operations. In addition, the members of the crew who stayed with the ship, such as the 32 enlisted men responsible for repairing and maintaining *Chicago*'s guns and the 90 needed to maintain the engine rooms, had to



Silverpalm in drydock. Source: NARA.

be housed and fed, and other sailors were detailed to clean up after them.[38]

Gradually, the ship and all her systems came to life. On 23 January 1934, for example, cruising turbines 1 and 4 were run in order to test the steam lines. Later that day, 200 lbs. of steam pressure was introduced into "all sections of auxiliary steam lines" in an effort to locate any leaks. On 8 February, boiler number 8 was used to test two of the ship's generators. The day after, all the ship's auxiliary machinery was temporarily powered by steam generated by the ship's own boilers.[39] On 22 February, *Chicago* was moved to berth L-1, where gradually her own engines and electrical generators provided the ship with light and power.[40] At just after ten on the morning of 24 March, *Chicago* got under way on her own, leaving two tugs behind at 20 minutes after. At 1041, the ship was steaming at 12 knots. She successfully completed her "repair trial" that day.[41]

TAKING STOCK: THE NEWSPAPERS

Area newspapers had already gotten on to the story. The *Oakland Tribune* was the first to publish an account. Under the headline "Drydock Holds Crippled Cruiser After Sea Collisions," the paper's October 25th edition carried two large photographs of *Chicago*'s damage and two stories, one with the apparent facts of the incident and a second based on an interview with Navy reserve Lieutenant Clarence Martin, who was allegedly on *Pensacola* (CA-24).

Martin, who said he was in *Pensacola*'s wardroom when the SOS signal was received from *Chicago*, noted that the captain of his ship immediately "issued orders to all the boat crews to dash to their stations, and all signal men were sent to the bridge." Later, when *Pensacola* reached the scene of the collision, he noted that *Chicago*'s crew was "proceeding with machine-like precision. There was no excitement."[42] However, there was no "Lieutenant Clarence Martin" listed in the Navy's official *Directory* for 1 October 1933. His name does not appear in the list of active officers or in the list of "inactive" officers, and he's not listed as a member of *Pensacola*'s crew. Someone was already making things up.

Other newspapers ran stories on the 26th. The *Santa Cruz Sentinel* quoted comments made by Bernard T. Cox, *Silverpalm*'s captain, to attorney Joseph J. Geary of the law firm of Lillick, Olson, and Graham. According to the *Sentinel*, Cox ordered his ship's engines to go "full speed astern" as soon as he observed *Chicago*. Cox was also quoted as saying, "Everything was done to avoid the collision. No whistle was heard from the *Chicago* until after she appeared from out of the fog."[43] The *Examiner* of San Francisco also quoted Captain Cox, though only by drawing on a written statement that Cox made to the attorneys acting for the Kerr Line, an American firm that handled business negotiations for the British-based Silver Line. In his statement, Cox wrote that he "saw the *Chicago* a mile away and came on cautiously, sounding my whistle. There appeared to be plenty of clearance room." When "the *Chicago* veered across my bows," Cox said that he immediately ordered his engines reversed.[44]

Both the *Examiner* and the *Los Angeles Times* reported that a "mysterious brown freighter" (the *Examiner*) or "a reddish-brown merchant ship" (the *Los Angeles Times*) had contributed to the collision by forcing *Chicago* to stop and change course.[45] However, according to the *Examiner*, *Chicago*'s officers said they had not heard *Silverpalm*'s siren, and Captain Cox had not heard *Chicago*'s fog signals. The *Times* observed

that "Laymen who saw the [*Chicago*'s] gaping hole today marveled that any vessel so cut could remain afloat." According to the *Examiner*, "Naval officers who saw the cut [in *Chicago*'s side] said that the vessel would certainly have been cut in two had not the freighter's prow been stopped by the heavy armor of the *Chicago*'s forward turret." The newspaper accounts, though necessarily brief, had told the basic story and set out some of the major issues that flowed from it. It would be up to the official Board of Inquiry to separate fact from speculation.

TAKING STOCK: THE LAW AND THE LAWYERS

News of the collision reached San Francisco almost immediately after it occurred, and the news triggered two different but related legal proceedings. One was a Naval Board of Inquiry. It was standard Navy practice to convene such a board almost immediately to investigate an accident involving one of the Navy's ships. The other proceeding was a libel hearing in federal district court, in this case the court in the southern division of the northern district of the state of California. This was in accordance with accepted admiralty law, which provided for cases where aggrieved parties—ship owners, cargo owners, and individuals—sought to recover money damages from the party or parties responsible for the collision.[46] There would actually be two libel hearings: one to determine which ship or ships were responsible for the collision, and a second to decide what damages the responsible party or parties would pay.

But First: The Peculiarities of Admiralty Law

This is where matters got complicated. Under then-accepted admiralty law, there were two types of liability in ship collision cases. The first was liability *in rem*, that is, in the thing itself—in this case the ships. The ships were considered to have legal standing—the right to sue. Hence *Chicago* could sue *Silverpalm* and vice versa in a federal district court. At the same time, the owner or owners of a ship could sue and be sued. These were cases *in personam*. The government of the United States could sue Silver Line, Ltd., the owner of *Silverpalm*, and Silver Line, Ltd., could sue the United States government, the owner of *Chicago*. The Public Vessels Act of 1925 made possible *in personam* suits "against the United States for damages caused by public vessels."[47] This meant that the Silver Line, Ltd., could bring suit in federal district court for the damages to *Silverpalm*. At the same time, the 1925 law did not permit a private party suing for damages in a federal district court to seize or arrest a "public" (in this case a Navy) ship. The U.S. government could and did post a notice of seizure on *Silverpalm* (on 1 November 1933), but the Silver Line, Ltd., could not do the same to *Chicago*.

Admiralty law also differed from the common law of negligence in several other ways. First, litigants in liability cases had no general right to a jury trial. The cases stemming from the collision between *Silverpalm* and *Chicago* would therefore be heard by a federal district judge. Second, admiralty law did not follow the "common law doctrine of contributory negligence."[48] On land, in a collision between two vehicles, a court would rule on how much damage was caused by each side's negligence (assuming that negligence was in some sense shared). That meant one side in a dispute could legally collect significantly more in damages than the other side. However, the rule governing U. S. courts in admiralty cases was that even slight negligence on the part of one ship involved in a collision required the "equal division of damages."[49] In the case of *Chicago* vs. *Silverpalm*, the court hearing the case might decide that most of the fault lay with *Silverpalm*, but if *Chicago* was even minimally at fault, the cost of damages would be shared equally. Third, there was no concept of "no-fault" liability in

admiralty collision law. If there was a collision, someone or something was at fault—period. Fourth, under an 1851 law, the United States had the right to petition a district court hearing a collision case for the limitation of liability. That is, the government could try to limit its damage payment by citing certain mitigating and legally recognized circumstances.

The Peculiarities of This Case

While it might have seemed logical for the parties involved in the collision to await the outcome of the Navy's Board of Inquiry before filing lawsuits, that was not the case in this instance because the Silver Line wanted to put *Silverpalm* back in service as soon as possible while in the meantime sending her crew to other ships operated by the Line. This meant that *Silverpalm*'s witnesses would likely leave the United States and not be available when the liability case was tried in a U.S. court. The owners of *Silverpalm* wanted their ship to be repaired and released; the United States government wanted the ship's crew—if not the ship itself—to stay under its jurisdiction while the federal attorney's office prepared its case.

Henry H. McPike, the federal district attorney, understood this very well indeed, as did his deputies, and they acted to begin libel proceedings as soon as possible, suing *Silverpalm* on 1 November 1933; Silver Line's lawyers filed their own suit against *Chicago* and the U.S. government the same day. The suit *in rem* (*Silverpalm* vs. *Chicago*) was numbered 21667. The suit *in personam* (Silver Line vs. United States) was numbered 21665. Because the actual trial would not begin for several months, the lawyers for both sides quickly began taking depositions under oath of the officers and members of the crew of *Silverpalm*. Such depositions, referred to by lawyers as depositions *de bene esse*, are intended to be introduced at a subsequent trial in lieu of live testimony on the part of absent witnesses.

In addition, the federal attorneys took depositions of certain officers and crewmembers of the steamship *Albion Star* before that British-flagged ship left Seattle. These depositions were taken before the Navy Board of Inquiry completed its investigation. Counsel for both the government and for the Silver Line jointly proposed that the Navy Board accept these depositions, and they became part of the evidence considered by the Board.

The libel actions were consolidated into one case so that they could be tried together. The consolidated action was then divided into two parts: liability (fault), to be tried before a federal district judge, and then awards for damages, which the same judge assigned to a Commissioner to sort out after a formal hearing in court. In other words, finding fault came first, and determining the cost of fault came second.

To help the reader follow and understand the legal issues, I'll begin the narrative where I began my research—by describing the Navy Board of Inquiry and noting how the attorneys for the parties in the libel case were involved. Once I've covered the Navy Board of Inquiry and listed its decisions and recommendations, I'll describe preparations for the district court hearing and then go over the hearing itself in detail.

As the Navy Board began its inquiry, counsel representing both the government (and *Chicago*) and Silver Line (and *Silverpalm*) were involved, but the district court cases on fault and damages *followed after* the Navy Board's hearings. Chronologically, the cases begin with the Navy Board's formal inquiry and then proceed to the district court hearing to determine fault, and then move on to the court's commissioner's work to assign money damages. However, counsel for the district court hearings were involved in the taking of depositions from personnel from *Silverpalm* and *Albion Star* and in the Navy Board of Inquiry hearings from the beginning of the Navy Board's

official inquiry. The text will follow the cases chronologically while at the same time describing and explaining (where possible) the actions of the attorneys for both the Silver Line and the government of the United States.

THE ROLE OF THE UNITED STATES ATTORNEY

While the Navy's Board of Inquiry was taking testimony, the office of the United States Attorney in San Francisco was advising the Navy Board's members and gathering evidence to be used in a court case against *Silverpalm* and the Silver Line, the owners of *Silverpalm*. As Federal District Attorney McPike informed U.S. Attorney General Homer S. Cummings on 2 November 1933, "The 12th [Naval District] Headquarters notified me almost at once" about the collision "and expressed their wish that this Office should cooperate." McPike went on to say that he was "glad that the request was made and that in the early stages of the case, we would be given opportunity to find out the facts, see the witnesses, etc. for ourselves while the facts were still fresh in their minds."[50]

Accordingly, he assigned Assistant Federal District Attorney Esther B. Phillips to attend the hearings of the Navy Board, and she did so starting on the first day—Thursday, 26 October 1933—that the Board met on board the damaged *Chicago*. By Sunday, 29 October, Phillips had heard enough testimony to realize that *Albion Star* had played an important role in the collision, and she quickly requested by radio telegram that the Attorney General in Washington, D.C., direct the U.S. Attorney in Seattle, Washington, to submit questions to select members of *Albion Star*'s crew before that ship left for her next destination.[51] That was done.

On 1 November McPike filed a libel claim against *Silverpalm*, and that same day the U.S. Marshal for the Northern District of California delivered a "notice of seizure" to *Silverpalm* notifying the captain and owners that their ship was, in effect, under arrest and could not be moved.[52] The notice of seizure informed the owners and the captain that they would have to appear before the District Court on 14 November to argue that their ship should not be taken by the U.S. government and sold to pay for damages to *Chicago* and injuries to *Chicago*'s crew.[53]

In his letter to Cummings, McPike also noted that the Naval Board of Inquiry had several times phoned his office: "For example, the Judge Advocate of the Court asked whether or not he could, or should subpoena witnesses from the 'SILVERPALM', and if so, how they should be handled." McPike recommended that the Judge Advocate issue subpoenas, and also that any testimony taken from *Silverpalm*'s crew should be collected before any members of the crew of *Chicago* had testified.[54] Indeed, after talking with McPike's staff, the Navy Board of Inquiry asked that a member of his staff attend the Board's hearings, and McPike "directed that this be done, *thus delaying filing the libel until the major part of the testimony was taken.*" (italics added)

As McPike continued in his letter, "It turned out that this was fortunate. We know now, not only the strength of our own case, but what weak points it has." Just as important was his statement that "Some lines of inquiry were started even during the trial for use in the civil suit."[55] McPike noted the inability of *Silverpalm* to reverse her engines until she was actually or nearly stopped, and that she was "proceeding at almost maximum speed in foggy weather."[56] He was describing the "line of inquiry" that the government would pursue in court. In comparison with *Silverpalm*'s actions, McPike viewed *Chicago*'s "maneuvers… to be without reproach during the few moments prior to the collision, save in one respect only: the question of her speed in the fog is, to some extent, in doubt."[57] McPike then

confided to the Attorney General, "You know, as well as I, what the courts hold in regard to speed of vessels in a fog."[58] Remember this point. It will determine the final outcome of the dispute about liability.

If speed in a fog was a prime source of liability, then was *Chicago* at fault for the same reason? McPike didn't think so. He told the Attorney General that "a full discussion of her speed by my representative, and the officers, in the recesses of the Naval Court, and before and after court, shows that the CHICAGO had at the time an unusual amount of power for backing…"[59] In short, when witnesses such as Vice Admiral Laning testified that *Chicago*'s engines were "backing very hard" at the time of the collision, *Chicago* was doing her very best to avoid a collision—and her engines had sufficient power to stop her and force her into reverse.

Unfortunately for the government's case, "no complete tactical [i.e., maneuvering] data for the CHICAGO" had been compiled. There was no official documentary evidence that her engines could stop her in the time available on the day of the collision, or that she could not maneuver out of *Silverpalm*'s path.[60] For that reason, McPike argued that tactical data compiled by the crew of *Louisville* (CA-28), a sister to *Chicago*, might be used in lieu of similar data for *Chicago*. If that information wasn't available, or if members of the crew of *Louisville* could not testify at any trial concerning the collision, then the crew of *Chicago* needed to collect the required data once she was repaired. As McPike put it to Attorney General Cummings, "I hope you agree with me on this. If you do, then I leave it to you to take up with the Secretary of the Navy" the need to test *Chicago*'s maneuverability.[61]

In his letter to the Attorney General, McPike enclosed a copy of the libel filed on 1 November by the lawyers representing the owners of *Silverpalm*. Their argument was that *Chicago*—and only *Chicago*—was responsible for the collision. However, if the district court ruled against *Silverpalm*, her advocates' likely strategy was to then settle for a ruling that both parties to the legal dispute were equally responsible for the accident. If the government would agree to that, then the case could be settled quickly. He also enclosed what he called "a skeleton libel" that his staff had prepared. It only covered the cost of repairs to *Chicago*. Claims from *Chicago*'s crew, especially claims filed by the survivors of the three members of the crew killed in the collision, were still being collected. McPike planned to fold all the damage claims into an amended libel.

Finally, McPike admitted in his letter that for psychological reasons he "had preferred to have the libel of the United States on file first." However, after hearing witnesses from both *Silverpalm* and *Chicago* testify, McPike came to believe that "The contrast between their witnesses and ours is overwhelming." Accordingly, he considered "it an advantage, …, that their libel should have the lower number, and should be considered the original libel, placing upon the 'SILVERPALM' the burden of proceeding first."[62] In saying this, McPike revealed the government's intended strategy for the trial: prove negligence on the part of the captain and crew of *Silverpalm* and demonstrate that the captain and crew of *Chicago* were not negligent. In addition, emphasize the equities of the case as affected by the deaths of three of the members of *Chicago*'s crew and the impact those deaths had on their surviving relatives.

The Justice Department forwarded a copy of McPike's 2 November letter to Attorney General Cummings to Rear Admiral Orin G. Murfin, the Navy's Judge Advocate General, on 10 November. Murfin was an experienced captain, having commanded light cruiser *Concord* (CL-10), 1923 through 1925, and battleship *West Virginia* (BB-48) in 1928-29. In his cover letter to Murfin, Angus MacLean, the Assistant

Solicitor General, commented that "the libel filed by the *Silverpalm* does not base it upon a fog situation whatever but apparently classes it as the usual situation where the vessels were on crossing courses with the CHICAGO the burdened vessel charged with the duty of keeping out of the way which she failed to do."[63] By contrast, the government's libel did "plead the fog condition and the failure of the SILVERPALM to proceed at moderate speed."[64] On 13 November, Admiral Murfin sent a copy of McPike's letter that had been sent earlier to the Attorney General, along with copies of the libels that had been filed, to the Chief of Naval Operations. Murfin needed to know, first, if the maneuvering and operating data collected for *Louisville* could be "relied on for the CHICAGO." Murfin also needed to know if that data, assuming it had been compiled, could be sent to his office. Finally, Murfin asked whether the officers and crew of *Lousiville* who had gathered that information could be available at the upcoming trial.[65]

WHAT THE NAVY DIDN'T WANT REVEALED

As I read through the file of the Judge Advocate General (Navy) in the National Archives, I came across important information that did not figure in either the Navy Board of Inquiry hearings or in the later proceedings of the federal district court. This was information about the 8-inch guns of *Chicago* and her sisters. At maximum elevation, each gun could throw an armor-piercing shell weighing 260 lbs. almost 32,000 yards—over 18 miles. But tests with the guns as they were mounted in the cruisers had revealed there was a serious problem: the spread of the shells at maximum range was too large. That significantly reduced the probability that a cluster of shells fired at a maneuvering enemy ship at long range would hit the target.

In an effort to identify what was causing the problem, the staff of the Naval Proving Ground at Dahlgren, Virginia, had set up the only spare 17-ton "slide" on which the guns were mounted in order to test fire the guns. In October 1933, Lieutenant Commander James K. Davis, an ordnance specialist, was responsible for inspecting new guns and turrets produced at the Naval Gun Factory in Washington, D.C. When he learned that *Silverpalm* had rammed *Chicago*, he suspected that the slide in *Chicago*'s forward three-gun turret might have been damaged, and he had the spare slide sent from Dahlgren to the Mare Island shipyard.

As he noted, the slide cradling the guns was "the most important item in the turret next to the guns themselves."[66] Therefore the best thing to do was to ship the spare slide west and have Mare Island ship the damaged slide east. That way, *Chicago*'s fore turret could be restored and the technical staff at the Washington Navy Yard could inspect and—if necessary—repair the damaged slide. There was just a chance, however, that the slide coming east could not be repaired, and so the chief of the Bureau of Ordnance authorized Davis to manufacture a new slide to be used at Dahlgren.

This put pressure on the Factory because work to produce a new slide "occurred during one of the heaviest periods of production and expansion that [had] ever been experienced in the history of the Naval Gun Factory" due to the construction of a number of new cruisers.[67] But the Office of the Chief of Naval Operations could not take the chance that replacing *Chicago*'s gun slide for turret 1 would leave the Proving Ground at Dahlgren without a slide to use in experiments. In a 1 November 1933 memo, Captain Edward Marquart, then serving as the senior ordnance officer in the Fleet Maintenance Division of the Office of the Chief of Naval Operations, feared

that "before the CHICAGO can be put in first class condition approximately one year may elapse."[68] This was not information that Marquart and his superiors wanted to see in the newspapers.

SUMMING UP: PREPARATION FOR TRIAL

In the immediate aftermath of the collision between *Chicago* and *Silverpalm*, the Navy and the Justice Department began moving along four parallel and often intersecting paths. The first path was the Navy's Board of Inquiry, the purpose of which was to determine if any Navy personnel were responsible for the collision. The second path, begun almost as quickly as the first and dependent upon it, was the work by the federal district attorney in San Francisco to build a libel case against the officers and owners of *Silverpalm*. Even before the Navy Board of Inquiry had reached its decision, Federal Attorney McPike was preparing his case. Indeed, his office was aiding the Navy Board of Inquiry. I'll describe the outcome of that collaboration in the chapters that follow. The third path was the case for damages filed by the United States government against *Silverpalm*'s owners. The fourth and final path was exclusively the Navy's. It was the effort to make sure that both *Chicago* and Dahlgren had intact gun slides, and it had to be done as quickly and as confidentially as possible.

Chapter 4: The Navy Board of Inquiry

> "The Court of Inquiry… has remained in its present form with only slight modification since the adoption of the Articles of War of 1786." *JAG Instruction 5830.1A* (2005)
> —Board Members and the Instructions Given Them

The day after *Silverpalm* rammed *Chicago*, Vice Admiral Laning began the process of establishing a Navy board of inquiry to investigate the cause or causes of the collision. He sent a letter to Captain Victor A. Kimberly, USN, a former battleship commander then serving as the chief of staff to the admiral commanding the 12th Naval District (San Francisco); the letter directed Kimberly to lead a board of inquiry. The other members of the board were Captains Harry K. Cage and Frank B. Freyer, USN, and Lieutenant Commander Paul R. Glutting, a submarine officer.

Captain Cage had commanded light cruiser *Marblehead* (CL-12) in 1929, and in 1932 he was the chief of staff to Vice Admiral Laning's predecessor, Vice Admiral William Standley, as Commander Cruisers, Scouting Force. Captain Freyer had served as assistant to the Navy's Judge Advocate General in Washington in 1929, and in the fall of 1933 he was head of the hydrographic office in the 12th Naval District. Earlier, he had also served temporarily as chief of staff of the navy of Peru, and he had commanded light cruiser *Trenton* (CL-11) in 1929. Lieutenant Commander Glutting had sailed on battleship *Florida* (BB-30) in 1929, and in 1932 he was a member of the faculty of the Reserve Officers Training Corps (ROTC) unit at Harvard University. In October 1933, he was on the staff of the Navy's Judge Advocate General in Washington.[69] Captain Kimberly lost no time in convening the Board, which met for the first time on 26 October.

Laning's instructions were that Kimberly and his colleagues were to "make a thorough investigation into all the circumstances connected with the… collision, the causes thereof, damages to property resulting therefrom, loss of life and injuries to personnel incident thereto, and the responsibility therefor.[70] The board was to "include in its findings a full statement of the facts," plus "its opinion as to whether the loss of life was due in any manner to the fault, negligence, or inefficiency of any person or persons; and if so, the names of such person or persons, and to what extent the fault, negligence, or inefficiency contributed to the accident. The court will further give its opinion as to whether any other offenses have been committed or serious blame incurred." Finally, the board of inquiry was to "specifically recommend what further proceedings should be had."[71]

I was surprised to discover that this structured inquiry, which began with ascertaining facts and then moved to "offering opinions and recommendations," is still the standard in the Navy.[72] Though the board of inquiry was not a court-martial—not a trial—it could recommend that charges be brought against anyone the court judged to have committed an offense. In addition, the rules governing the Board's proceedings structured its hearings. For instance, the President of the Board could close its hearings to the public, which Kimberly did. He could also appoint advisors to the Board, and the Board would have its own counsel—a member of the Judge Advocate General's Corps of the Navy. The advisors could be technical specialists, as indeed they were in this instance. The legal counsel, however, was provided to the Board because Board members did not have to be lawyers and hence could have questions about how to

examine witnesses and evaluate the available evidence.[73]

The voting members of the Board had to be senior in rank to anyone appearing before the Board as an "interested party."[74] That requirement meant that each of the three captains on the Board had had to be senior to Captain Kays. Each "interested party" had the right to be represented by counsel, and each counsel had the duty, as the current instruction says, "to protect and safeguard the interests of the party by all ethical and legal means."[75] The rules governing the Board also granted each witness the right to refuse to incriminate himself.

SILVERPALM'S WITNESSES

When Captain Cox of *Silverpalm* appeared before the Board on 26 October, the first day of its inquiry, Captain Kimberly, President of the Board, notified all the attendees that no one had as yet been "designated as defendant or complainant."[76] A far as Kimberly was concerned, that meant Captain Cox could speak freely. But Cox, along with Captain Kays and Lieutenant Robert Minter, were "interested parties," which meant that the Board would pay special and close attention to their actions on the day of the collision. It also meant that each man was allowed to have a counsel who could examine witnesses and "introduce new matter pertinent to the inquiry in the same manner as a defendant."[77]

Accordingly, Captain Cox introduced his counsel, Ira S. Lillick, along with Joseph J. Geary and Chalmers G. Graham. The three were members of the firm of Lillick, Olson and Graham of San Francisco. The Kerr Steamship Company also had representatives at the hearing, including Captain T. A. Ensor, the Marine Superintendent for the firm, and two representatives of the London-based Salvage Association. The latter two individuals represented the underwriters at Lloyd's of London. Captain Kays also was accompanied by counsel: Commander H. V. McKittrick, USN, Lieutenant Commander R. E. Dees, USN, and Lieutenant Commander W. C. Vose, USN. Lieutenant Minter, *Chicago*'s Officer-of-the-Deck at the time of the collision, requested the Board to accept McKittrick, Dees and Vose as his counsel, and the Board did so.[78]

On the second day of the hearing (27 October 1933), the Board hoped to call Captain Cox as its first witness. Cox's attorneys opposed this decision because they wanted the officers of *Silverpalm* to hear the testimony of the officers of *Chicago* before testifying themselves. As Attorney Ira Lillick pointed out to the Board, the United States Criminal Code made negligence on the part of any ship captain a criminal offense if that negligence led to loss of life, and therefore Captain Cox had a special stake in the proceedings. At the same time, the Code specified that "no witnesses shall be compelled to answer questions that might incriminate themselves."[79] Lillick then told the Board that he had instructed his side's witnesses "to refuse to answer any questions that may be propounded to them." At the same time, Lillick repeated "with a great deal of regret that we are compelled to take this position," and he wanted the Board "to understand that we will, in every other way in our power," assist it "in coming to a conclusion as to what" the Board's "finding shall be." He tempered this objection by adding that "if it be the desire of the [Board] that in view of this position so taken by us we should be excluded from the right to be present at the hearing, we shall comply with any request that the [Board] may make."[80]

Captain Kimberly then asked Lillick if the reason he was advising Captain Cox to refuse to answer questions was because Cox would be testifying before Captain Kays. Lillick answered, "No, not at all." He told the Board that he would have given the same advice to his clients even if Captain Kays had testified first. Lillick had his eye on "any litigation that might ensue" once the Board's hearings got underway. He didn't want his clients to be accused of sitting in the hearings just so they could gain information that would be useful later if they were parties in a libel case in the federal district court. Lillick finished by telling the Board, "We submit to the pleasure of the court as to our remaining or as to such other requests that may be made."[81] Captain Kimberly then cleared the hearing room

After a pause, Kimberly reopened the hearing and everyone filed back in. Kimberly informed all those in the room that "the privilege of declining to answer questions, on the ground that they might tend to incriminate the witness is personal and can be claimed only by the witness." The Board would summon the witnesses, and if any of them regarded a specific question as incriminating they could refuse to answer it. The members of the Board would then "decide whether or not the witness must answer the question."[82] That issue having been resolved, the Board began the examination of Captain Cox.

When questioned by Lieutenant Commander Glutting, Cox noted that he'd been *Silverpalm*'s master since May 1933, and that since that time his ship had not been involved in any emergency where she had had to reverse her engines. He therefore didn't know how long it would take to reverse them.[83] Glutting left that line of questioning and ascertained from Cox that *Silverpalm* had left San Francisco on October 23rd, bound for the Panama Canal, course "156 deg. true," speed on departure 13 and one-half knots.[84] When Glutting asked what speed *Silverpalm* was making at "8 a.m." on October 24th, Cox refused to answer, claiming that his answer might incriminate him.[85]

Cox faced a dilemma. If there were any libel proceedings in an American court, he could be compelled to testify. He'd already given statements to the press saying that his ship had been steadily blowing its whistle as required by international rules, and he had been quoted as saying that as soon as he had sighted *Chicago* a mile distant he had ordered his own ship to go full speed astern.[86] His statements obviously did not square with those given by Captain Kays and several others in *Chicago*. In a district court trial, Cox could expect to be asked about any discrepancies between his statements to the press and his answers to questions put to him during the Navy's inquiry. A clever attorney could point to any differences between Cox's statements to the press and his subsequent testimony as evidence that Cox's account of what had happened was mistaken.[87]

At this point, counsel Lillick intervened. After telling the Board that he and his colleagues appreciated the way that they had been treated by the Board, other Navy officers, and the officers of *Chicago*, Lillick said again that he and the *Silverpalm*'s witnesses wanted to help the Board reach a conclusion. However, he also stated that he or his fellow attorneys would object "to any questions… that seek to elicit facts having to do with what occurred upon the *Silverpalm* immediately prior to the collision and that might subsequently be used" in another court case.[88] He meant *any question*, so that the Board might have "to continue sitting and hearing objection after objection" from *Silverpalm*'s witnesses. He therefore wondered if there were a way to avoid continuing questions to which the witnesses would feel they had to refuse to answer. Captain Kimberly responded that the Board "fully appreciated the cooperation of the Kerr

Steamship Company's representatives," and understood that some witnesses might refuse to answer the Board's questions. But the questioning would continue, and witnesses would have to object to specific questions if they regarded them as incriminating.

Under oath, Captain Cox then told the Board that *Silverpalm* began sounding her foghorn at one-minute intervals once the weather thickened.[89] However, when asked whether the forecastle lookout had notified the bridge personnel at eight o'clock of a ship ahead in the fog, Cox declined to answer on the grounds that his answer might incriminate him, and Captain Kimberly informed him that he didn't need to answer.

The next *Silverpalm* witness was third officer George Stanley. He had joined Captain Cox on the bridge of the motor ship just after 7:45 a.m. on the 24th, and he confirmed Cox's testimony that the fog horn of *Silverpalm* was being sounded.[90] Stanley also testified that the ship's engine telegraph was set on "Stand By," though the engines were running "full ahead," and that he heard the foghorn of another ship off *Silverpalm*'s port bow.[91] At that point, his counsel, speaking on behalf of the Kerr Steamship Company, objected to this line of questioning and informed the Board that anyone helping to steer a ship involved in a collision that led to loss of life was as responsible for the collision—and the deaths—as would be a person who stood alongside a murderer and failed to act to prevent the murderer from killing his intended victim.[92]

Lieutenant Commander Glutting therefore tried a different line of questioning, gaining an admission from Stanley that the forecastle lookout did ring his bell once, which meant he had seen something off the port bow. But when Glutting asked Stanley whether Captain Cox had ordered a change of course or speed when he heard the bell rung, Stanley declined to answer on the ground that his answer might incriminate him. Captain Kimberly told Stanley to answer the question, and Stanley explained to the Board that, after about four or five minutes of sighting a ship ahead, Cox had ordered "Full astern, both engines," and then "Hard to starboard."[93] Stanley also told the Board that visibility ranged from a half-mile "up to two or three miles. At times, quite clear," though in the direction of *Chicago* visibility was only about a mile. To Stanley, the cruiser seemed "to be swerving to her starboard," and she seemed to be moving quite fast.[94]

A few moments later, Stanley admitted that *Chicago*'s "course appeared to be coming across our bow" from starboard to port at a speed of 15 or 16 knots. He also conceded that the cruiser therefore had the right-of-way according to the accepted international rules. Yet when Glutting asked him if *Silverpalm* was obliged to get out of the way, Stanley declined to answer on the grounds that what he said might incriminate him.[95] Stanley also said that he could not say, given his position on *Silverpalm*'s bridge, whether her engines were actually reversing when she struck *Chicago*. He admitted that he had never experienced an incident where the engines were suddenly reversed when they were driving *Silverpalm* forward at nearly top speed.[96] Glutting pressed the young officer: Was there a chance that the engines were not going full speed astern when *Silverpalm* struck *Chicago*? Stanley wanted to object to the question and refuse to answer it, but Captain Kimberly told him to answer because whatever he said would not incriminate him. So Stanley said yes—the engines might not have been full in reverse at the time of the collision.

The next witness to testify was Geoffrey Newhouse, junior third engineer of *Silverpalm*. What the members of the Board wanted from him

was an explanation of what it took—and how long it took—to stop the diesel engines of *Silverpalm*. His answer as to the time it took was "four to five minutes." Why? Because the first thing the officers in the engine room had to do was to shut off fuel to the engines. Once the engines stopped, they could be reversed. In this case, unfortunately, the engines kept turning over even after the fuel valve had been closed.[97] The motion of the ship's propellers as *Silverpalm* coasted through the water kept the engines turning over because the engines were coupled directly to the ship's screws. This meant that at the time of the collision *Silverpalm*'s engines were not going astern. Newhouse couldn't even say for sure that they were stopped.[98]

After Newhouse had been questioned, the Board adjourned for that day and for the following day (Sunday, 29 October). Assistant Federal District Attorney Phillips took time on the 29th to draft a letter to her immediate superior, McPike, and another missive to the federal district attorney in Seattle. She also sent a radio message to the Attorney General in Washington, requesting permission to ask the federal district attorney in Seattle to submit a questionnaire that she had drawn up to the officers of *Albion Star*. In her note to her secretary, Phillips did not describe the questionnaire, but it was apparent that she wanted to get information from some members of *Albion Star*'s crew before their ship got beyond her reach. Regrettably, her handwritten note did not have with it the draft letters that she had written to McPike or to the federal attorney in Seattle, so I don't know just what she said. However, the urgency of her request indicates that she regarded the officers of *Albion Star* as critical witnesses.[99]

The Board resumed its hearings on Monday, 30 October, with testimony from *Silverpalm*'s assistant engineer Donovan Pitt. He also was asked, "How long does it take to reverse the engines of the *Silver Palm* from 'Full ahead' to 'Full astern'?" He answered that he didn't know. "We have never timed it." Glutting tried to get an estimate out of him. Pitt said he couldn't say. Then there was this exchange between the two men: "Would it take twenty minutes?" "No." "Would it take ten minutes?" "No." "Would it take three minutes?" "It may take three minutes, it may take one minute." Glutting wasn't getting anywhere with this witness, though he did manage to get Pitt to admit that the propellers of both engines were going ahead when the ships collided.[100] Junior fourth engineer John Tough was more forthcoming. He'd had three years of experience with diesel engines and had served on *Silverpalm* for 16 months when the collision occurred. He was handling the throttle of the port engine on the morning of the accident.[101] He agreed with Geoffrey Newhouse that it would take about five minutes—or even six—to stop *Silverpalm*'s engines when they were turning at the rate they were that morning.[102] He also agreed that when the engine room acknowledged, "Full speed, astern," to the bridge the engines were still driving *Silverpalm* forward.[103]

CHICAGO'S WITNESSES

On Tuesday, 31 October, the Board convened at the Mare Island Navy Yard. The first witness was Vice Admiral Laning, whose account of the collision was covered in Chapter Two. His testimony was detailed and, given his experience, reliable. When he saw *Silverpalm* closing on *Chicago*, he thought that if *Chicago* "could be stopped quickly enough the oncoming steamer might pass ahead, especially if it used left rudder. If it had on right rudder, which I expected it to have on, I thought it would pass to the port of the *Chicago*."[104] As it happened, there wasn't time for *Silverpalm* to execute either maneuver.

After the collision, he remembered the cruiser swinging to starboard while the "steamer" (he did

not then know its name) fell off to port, so that "they gradually came parallel to each other" and separated.[105] Laning also testified that, after the collision, "a thick fog set in and [*Silverpalm*] was sounding fog signals for 'Stopped'."[106] Lieutenant Commander Glutting's point in asking Laning—a very experienced sailor—about *Silverpalm*'s fog signal was to show that *Silverpalm* did have a working fog signal and that, when it was properly used, it could be heard at a distance of a mile or more. When Laning said that he hadn't heard fog signals from *Silverpalm* before he sighted her, Glutting could leave it to the Board to infer that she wasn't sounding those signals properly.

Captain Simons testified after Laning. Simons brought two useful perspectives to the hearing. The first was based on the fact that he had been the previous captain of *Chicago*. In a sense, he knew what to look for as the events of the morning unfolded. For example, when he felt the ship vibrating, he knew immediately what that meant—"her engines were going astern."[107] On being asked how long it would take to stop *Chicago* when she had "two boilers on and a speed ahead of about eight knots in the water," Simons said that "ringing emergency back" would bring the ship to a halt in one minute and thirty seconds.[108] When the collision occurred, he looked over *Chicago*'s side and saw "from the movement in the water that the *Chicago* was ranging ahead at less than five knots."[109] Her engines had slowed the ship but had not yet stopped her.

The second perspective that was so useful was Simons' repeated checking of the times of events on his wristwatch. By his watch, for example, the collision took place at "0806 and 10 seconds." Because he confirmed for the Board that his wristwatch was "nearly one minute slower" than the bridge clock, it was possible to reconcile his observations with those made by members of the crew who were on the navigation bridge.[110]

After Simons finished testifying, the Board took a recess of nearly two hours. When the Board reconvened, Captain Kimberly announced that the legal status of Captain Kays and Lieutenant Minter had changed from "interested parties" to "defendants," and that consequently they possessed "additional rights and privileges" that they had not had when they were "interested parties." Both officers were told what testimony "seemed to implicate them," and they "were informed of their rights."[111] You can imagine how the two officers felt. Even if they were exonerated of any responsibility for the collision by the Board, they would still have that judgment—that they were defendants in an official Navy inquiry—on their records. Other officers would wonder whether one or both were qualified professionals.

The Board's decision to inform Captain Kays and Lieutenant Minter that they were possible defendants definitely changed the nature of the proceedings and likely the atmosphere in the hearing room, as well. Neither officer apparently left a written account of his feelings at that moment. However, Minter's feelings might have been similar to those of the fictional Lieutenant(jg) Willie Keith, as recounted in Herman Wouk's *The Caine Mutiny*: "[S]uddenly they were in the courtroom, and Willie felt the shooting tingles in his arms and legs… The room was a frightening blur of solemn faces; the American flag seemed gigantic, and its red, white, and blue terribly vivid, like a flag in a color movie."[112] In the novel, when Lieutenant Keith first speaks to the Navy court, "it was like punching his fist through a glass door."[113]

Lieutenant Steve Maryk, the imaginary *Caine*'s fictional executive officer, was also made uneasy by the formal beginnings of his court martial: "Seven officers stood on a dais in a semicircle

behind a polished red-brown bench, their right arms raised, staring with religious gravity" at the officer charged with prosecuting Maryk. "Outside, green-gray tops of eucalyptus trees stirred in the morning sunlight, and beyond them the blue bay danced with light. … The flag hangs between the eyes of the accused and the free sunlight and water, and its red and white bars are bars indeed."[114]

Chicago had been a prime catch for Kays. He'd been executive officer of the old battleship *Kansas* (BB-21) in 1920, and served on the staff of the commander, 12th Naval District in 1925. In April 1929, he was commander of Division 2 of Mine Squadron 2 in the fleet's Base Force. Six months later, he was a senior commander, serving on the staff of the rear admiral in charge of the 11th Naval District in San Diego. He hadn't hurt his career when he married the daughter of Rear Admiral Augustus F. Fechteler, but his rise was due to talent and not favoritism.[115] Captain Simons had had a similar career: command of a receiving ship in San Francisco in 1920, faculty member of the Naval War College in 1925, and, as Captain, assistant commandant of the 12th Naval District in 1929. In October1933, Simons was in line to become a rear admiral.

Lieutenant Minter was well into his Navy career but still very much a junior officer. In 1925, he was an Ensign serving on destroyer *Barker* (DD-213). In April 1929, he was a Lieutenant (junior grade, or "jg") in survey ship *Hannibal* (AG-1), working in the Caribbean. Six months later, he was on USS *Childs* (DD-241)—after her April 1929 collision with a large sailing ship (see Chapter 6). In July 1932, he was an "aerological officer" aboard *Augusta* (CA-31) and still a Lieutenant(jg). He would not rise to the rank of lieutenant commander until the spring of 1941. It would have been something of a minor miracle for him not to be concerned about the position he was in. As a retired rear admiral and World War II veteran once told me, the American people did not smile kindly on officers—no matter how intelligent and clever those officers were—who wrecked their ships or drove them aground.

The next witness in what was now a very different hearing for Captain Kays and Lieutenant Minter was Lieutenant Commander Gray, *Chicago*'s navigator. Gray had worked out the location of the collision: 36 degrees 2 minutes north and 122 degrees 9 minutes west, "about twenty miles off Point Sur," approximately 100 miles south of the lightship at San Francisco. Gray had also been in a good position to hear Captain Kays give orders to the helmsman and to the sailor manning the engine room telegraph: "Immediately prior to the maneuver leading up to the collision, I was in the pilot house looking out one of the open forward windows, *right next to the Captain*." (italics added) Gray saw the signal "Ahead, two-thirds" rung at "0800.1," and he remembered that "Stop" was rung on the engine room telegraph "at eight-tenths of a minute after 8 o'clock," when he and the Captain heard the fog signal from the steamer later identified as *Albion Star*. Once Kays saw the *Albion Star* and realized that she was gradually converging on his own ship, he ordered a course change that would take *Chicago* away from and eventually around the steamer—from 350 degrees to 330 degrees—and ordered the engines put ahead two-thirds.[116]

When Kays and Gray saw *Silverpalm* coming at *Chicago*, Kays "ordered full left rudder and immediately said, 'No, no, full right,' and ordered the engines backed full. This took place at six minutes after eight. Immediately followed the order, "Emergency, full astern," and the order to sound collision quarters…"[117] Navigator Gray was not in command, but he was right next to the officer who was, and his account of the sequence of events was not countered by any other member of the crew.

In addition, after the collision, and while both *Chicago* and *Silverpalm* were making their

respective ways to San Francisco, Gray consulted *Chicago*'s engine "bell book" and the ship's "rough logs" to calculate *Chicago*'s speed at the moment of the accident. The "bell book," which was compiled by the sailors manning the throttles at the engines, listed the times when engine orders were responded to, the identity of the engine, and the revolutions per minute (RPMs) of the turbines that the engine orders called for. The forms used by the throttle men were printed, but the information they entered was in pencil.

The quartermaster's rough log was in fact a rough diary, also written in pencil, kept by each quartermaster of the watch. When the watch on the bridge was changed, the "new" quartermaster made entries in his own rough log during the four hours of his watch. This informal "log" was consulted when the ship's daily log was written up, and it included a description of the weather, the level of visibility, and the actions of the ship with the times those actions were taken. The rough log was like similar handwritten logs that automobile and truck drivers once used before digital instruments recorded the speed, rpms, mileage, and fuel levels of their vehicles.

On 24 October, the quartermaster of the watch from eight a.m. to noon was QM3 (Quartermaster 3rd Class) William Ladd. He was questioned by counsel for the defendants on 31 October, the fifth day of the hearings of the Board of Inquiry, and his rough log was introduced as evidence. His log entries noted that visibility was very low but that the sea was smooth. He also looked at the bridge clock when the ships collided and noted that the time was 0807—seven minutes after eight o'clock—and he entered that in his log. He also testified from his log that at 0808 (eight minutes after eight) *Chicago*'s engines were "one-third ahead." When asked by defense counsel if perhaps he meant one-third astern, Ladd said, "If I remember correctly it was one-third ahead."[118] Ladd's recollection would be brought up again—in the libel hearing in the Federal District Court.

Ladd was followed by Chief Machinist John Kershaw, who had charge of the engine room watch starting at 8 o'clock the morning of the collision. Lieutenant Commander Glutting asked him, "How long would it take, going ahead standard, 173 RPM, to back full?" Kershaw answered, "About—between one-half and three-quarters of a minute, for all engines to be making full speed astern, 110 RPM."[119] In addition, Kershaw noted that there was no delay in reversing the ship's turbines—"Very snappy in getting engines reversed."[120] All four were "backing in excess of 100 RPM at the time of the collision,"[121] though they had not been "backing at over 100 RPM for one minute before the collision."[122]

This concern for *Chicago*'s backing power was also at the center of Glutting's questions for the next witness, Lieutenant Commander Ernest Colton, *Chicago*'s chief engineer. As Glutting noted, "it appears to take five or six minutes to work from 'Stop', or zero turns [on the turbines] to the 173 revolutions ahead." That increase in engine revolutions is what *Chicago* executed when it was clear that she could safely pass ahead of *Albion Star* on her starboard hand. Yet *Chicago* shifted from 173 revolutions ahead to 110 revolutions *astern* in "about a minute or minute and a half" using the "acceleration tables" that guided the throttlemen. Did the standard operating procedures for the engines expressed in the written acceleration tables really allow for this? Didn't *Chicago* have to accelerate and decelerate at the same pace?[123]

Below are entries from the "Speed Revolution Table" for heavy cruisers of 12,000 tons (i.e., full) displacement (less than a month after having the ship's bottom cleaned). It shows "Revolutions Per Minute Ahead to Make" two-thirds speed, standard speed, and full speed.

Knots	2/3 Standard Speed	Standard Speed	Full Speed
8	51	76	121.5
10	63.5	94	140
16	100	149	196
18	112	168	216
20	125	187	236

Source: U.S. Exhibit No. 7, Case 21666-L, RG-21, Box 1726, Folder "USDC, 21666-L," National Archives.

Colton, who had served as an engineering officer in *Chicago* since her commissioning in March 1931, explained that the standard acceleration tables were "for ships in formation, so that all ships will be doing the same thing. We could easily exceed the speed of that table—going up." Indeed, once *Chicago* reached a speed of 18 knots, she had "full steam on the boilers," and that meant she could throw her engines in reverse with much greater power than she could have if she were completely stopped.[124]

Colton illustrated this point with an example: "[I]n picking up airplanes when we are going through the water 15 knots and the next bell is 'Full speed, astern', and the next bell after that is 'Stop', in several cases that has been timed at exactly two minutes, …which would mean from 15 knots ahead they can stop the ship in the water in exactly two minutes. That is just ordinary 'Full speed, astern', two boilers."[125] If the ship were going only eight or ten knots, according to Colton, it might be possible to reverse engines and stop her in "a minute and fifteen seconds; but we have never done that. I have no record of it."[126]

After eliciting this information on the time it could take to bring *Chicago* to an emergency stop, Glutting then asked Colton how far the ship would travel if she were going eight knots and had to stop for an emergency. The answer was 190 yards. By contrast, if the ship were traveling at 18 knots, the distance would be 750 yards.[127]

The Board next listened to Ensign John Leeds, *Chicago*'s bow lookout at the time of the collision. Both Chicago and *Silverpalm* had bow lookouts, as the International Rules of the Road required, but what did the lookouts hear? For example, was *Silverpalm* sounding the proper fog signals? The rule was that both ships, when underway, had to sound one "prolonged blast" every two minutes.[128] However, as the 7th edition of the U.S. Naval Academy's *Modern Seamanship* pointed out to its readers, "the blast from a whistle might be so prolonged or so frequent as to lessen unduly the probability of hearing a signal from another vessel. There is also, no doubt, some danger that the hearing of an officer on the bridge may be in a measure dulled by the too frequent sound of his own whistle."[129] Yet a two-minute interval between fog signals was risky, and "the general practice of men-of-war and well regulated [sic] merchant steamers seems to be to make this interval, as nearly as may be, one minute, and to give the blast a length of from four to six seconds."[130] By 1933, a two-minute interval was the maximum that a steamer or a motor ship could leave between signals when moving through fog. If the ship were stopped, then she had to sound two prolonged blasts of her whistle or foghorn every two minutes.

So what did Ensign Leeds hear? He heard *Chicago*'s whistle "sounding the prescribed signals for a vessel under way with no way on" when *Chicago* stopped after hearing *Albion Star* off her starboard bow. When *Silverpalm* afterwards emerged from the fog bank to port, Leeds heard *Chicago* sounding "the prescribed signals for our engines backing. This was followed immediately by the collision signal."[131] When asked if he had heard signals from *Silverpalm*, Leeds responded, "I didn't hear any fog signal from that vessel until after the

collision."[132] Was this possible? Both Captain Cox and Third Office Stanley of the *Silverpalm* had testified that their ship was sounding the signal for a steamship moving in a fog. Weren't they telling the truth?

Perhaps they were. In Rear Admiral Knight's *Modern Seamanship*, 7th edition, he argued that, "under reasonably favorable conditions of wind and weather, a whistle should be heard not less than two miles, a fog-horn and bell not less than one mile." However, "a sound which, under most circumstances, would be clearly heard several miles, may, by some peculiar conditions of the atmosphere, be inaudible at a quarter of a mile."[133] Is this what happened? Did some fluke of fog or mist keep the lookouts on *Chicago* from hearing *Silverpalm*'s signals or from realizing the direction they were coming from was to port? After all, Ensign Leeds testified that he had not heard any fog signals from the ship that had been sighted on the starboard bow. But what, if anything, had that ship heard? Had she detected the fog signals of both *Chicago* and *Silverpalm*?

Leeds tried to settle the issue of who heard what and when in his closing statement to the Board: "I think that if the *Silverpalm* had been making fog signals I would have heard those signals, as I was able to hear on the previous watch the signals from our own vessels which were over 2,000 yards away."[134] As testimony in the federal district court hearings in 1934 would show, however, Leeds's testimony before the Board would not turn out to be the final word about fog signals.

The next witnesses were the two possible Navy defendants. Lieutenant Minter was the first to testify. Minter was a nine-year Navy veteran, and he'd served in *Chicago* about fifteen months. At the Board's urging, Minter recounted the events before and during the collision. He explained that Captain Kays had slowed and then stopped *Chicago* when the lookouts had detected *Albion Star*'s fog signals ahead and to starboard. He also testified that Captain Kays had ordered that the engines be started again on a course diverging from that of *Albion Star* once it was clear that *Chicago* could safely pass her on a new course—350 degrees "true." *Silverpalm*, looking like a "blur," was sighted soon thereafter, and Captain Kays rapidly issued a series of orders: first left, full rudder, then right, full rudder, then stop, and finally emergency full speed, astern.[135] Through all of this urgent action, Lieutenant Minter had not heard any fog signals from *Silverpalm*—at least he could not recall hearing any.

Minter was also asked about Captain Kays' decisions once *Silverpalm* came into view. Could *Chicago* have avoided her if the cruiser had stayed on her course? Minter did not think so. Could Captain Kays have done more than he did to avoid a collision? Minter didn't think that, either. When asked, "Did all personnel on the bridge, junior to you in rank, perform their duties with dispatch and efficiency during this critical period of time?" Minter said that they did.[136]

Captain Kays then testified that when he first saw what he later learned was *Silverpalm*, "[It] appeared to be heading directly for the bridge. I could see her bows on, 700 or 800 yards away, and about 20 degrees on the port bow." Kays' instinctive reaction was to order a swing to the left. But then, "Almost immediately I realized that this could not be done; she was coming on fast." From what he could see of the approaching ship, Kays thought "she was swinging to her left." Realizing that a collision was inevitable, Kays chose to stop *Chicago* and back her down, "and take the contact, if there was to be one, as far forward as possible." When struck, *Chicago* "heeled heavily to starboard and swung to the right, and the vessels' keels appeared to swing more or less on a parallel course—parallel heading. Our bows nearly touched together again—I should say the flat of the bow, and as they swung apart slightly I backed the engine

one-third to draw away from her. To the best of my recollection, I had stopped the engines just as she hit."[137]

Kays also explained why he had increased *Chicago*'s speed prior to the collision: "We had just installed in two boilers a new type of boiler front, a plaster called 'Hydrecon'. …it was recommended… that we go through a certain process of drying, which involved using the two boilers at practically full power for at least four hours." Kays therefore asked Vice Admiral Laning's permission to proceed to San Francisco at 18 knots, and Laning approved. So *Chicago* was "released at about 0715 on October 24 to proceed independently [to] carry out this work." Kays recalled directing *Chicago*'s engineers at "about 0726 to increase speed gradually, and… we had gotten up to 18 knots shortly before 0800."[138] Was there a risk going along at the speed? Yes, but Kays felt there was enough visibility so that *Chicago*, given enough warning, could rely on her powerful engines to avoid an accident.

Kays also had this to say about his crew: "I just want to add a word of commendation for the wonderful performance of duty by everyone on the *Chicago*. All hands went to their stations quietly. There was no confusion of any kind. And the difficult duties following the collision, in rescuing the injured and getting the ship into port, were performed to the greatest credit of all concerned."[139]

BEHIND THE SCENES

While Kays, Minter and others testified to the Navy Board of Inquiry, Federal District Attorney McPike was filing a libel *in rem* against *Silverpalm*, and Attorney Lillick was filing a cross libel against *Chicago* in the Southern Division of the United States District Court for the Northern District of California. McPike also filed a libel *in personam* against the Silver Line, while Lillick filed a cross libel against the United States. Lillick also filed a petition for exoneration from or limitation of liability on behalf of *Silverpalm*. In addition, on 3, 4, and 6 November, the U.S. Commissioner in San Francisco deposed members of *Silverpalm*'s crew in the presence of attorneys for Silver Line/*Silverpalm* and the United States/*Chicago*.[140] On 6 November, Attorney Esther Phillips formally answered the libel from Silver Line in Case No. 21665.

This filing and cross-filing was a surprise to me. I was still thinking in terms of a well-defined sequence of events, starting with the Navy Board of Inquiry. If the Board recommended that the U.S. government bring charges against *Silverpalm* and/or her owners, then the lawyers would move to the next deliberate step—to the preparation of their court cases. Instead, what was happening looked to me more like the climax to the Marx Brothers' "A Night at the Opera." When I threw up my hands in frustration, my older brother counseled patience. I may not have understood what was going on or why, but he assured me that the lawyers did—and that they acted every day in anticipation of the district court hearing.

WRAPPING UP

On the seventh day of the inquiry, 7 November 1933, Ira Lillick, acting as counsel for Captain Cox of the *Silverpalm*, and Esther Phillips, Assistant Federal District Attorney, informed the Board that they had examined under oath both Captain Cox and Third Officer Stanley as part of the "civil litigation pending." Moreover, the transcripts of their comments could be given to

the Board "in lieu of the witnesses themselves appearing…" In short, the Board was being offered what it could not obtain from Cox and Stanley when they first appeared before the Board. And that wasn't all. Lillick and Phillips had questioned the bow lookout and helmsman of *Silverpalm*. It had not been an easy task. "[E]ven with interpreters it was very difficult to obtain information from these two men, on account of their being so unfamiliar with the English language and the rest of us so unfamiliar with Malay." Lillick didn't want to have to find qualified interpreters again if the Board wanted to speak with these men separately, so he advised the Board to accept the transcript of their testimony. Finally, other witnesses from *Silverpalm*'s engine room "testified freely and without reservation…"[141]

Given this, and given that "counsel for the defendants was present throughout these hearings," Lillick asked the Board to accept the transcript; he wasn't alone—the defendants "urgently requested" the Board to accept the transcript. Lillick argued that the Board "should assume a liberal attitude with regard to any applicable rules of evidence" before it, and "not hesitate to accept this record in evidence."[142] His request was granted that very day.

There were two important witnesses left to testify to the Board of Inquiry. The first, who was examined on 13 November, the eighth day of the Board's hearing, was Commander Thomas Rickey, U.S. Navy Construction Corps, stationed at Mare Island. He had examined *Silverpalm* at Moore's Shipyard in Oakland on 29 October. He found that *Silverpalm* needed to be docked for approximately 45 days, and the estimated cost of the work that needed to be done was $100,000.[143] This cost was separate from any fees charged Kerr Steamship Company for cargo that could not be unloaded in the times specified by their shippers.

On 14 November 1933, the ninth day of the inquiry, G. H. Low, *Silverpalm*'s chief engineer, testified before the Board. Low had nine years of experience with diesel engines and had been chief engineer of *Silverpalm* since July.[144] Low explained to the members of the Board that the diesels on *Silverpalm* had first to be stopped before they could be reversed, and that the way to stop them was to shut off their fuel supply. And then wait. As the judge advocate to the Board pointed out, *Silverpalm*'s propellers would be turning if the ship were moving forward, and in moving they would be also moving the pistons of the diesel engines.[145] So the engine room staff had to wait for the propellers to stop—or at least slow to nearly a full stop. Counsel for Captain Kays and Lieutenant Minter asked Low if he had tested *Silverpalm*'s engines to see how long it would take to stop and reverse the engines when they were going the speed that *Silverpalm* had been alleged to be going the day of the collision. Low's answer was "no."[146]

The inquiry wrapped up most of its work on 18 November, the tenth day, with an accounting by *Chicago*'s Supply Officer of the various supplies damaged or ruined by the collision and the subsequent flooding. Then Board then turned to determining the facts—where the collision took place, the weather at the time of the collision, where *Silverpalm* struck *Chicago*, damages done to both ships, the casualties on *Chicago*, visibility of and from both ships when they sighted each other, the fog signals each ship made, and the lookouts posted on each ship.

THE FACTS AND FINDINGS OF THE NAVY BOARD

The most important facts determined by the Board were the following:

1. *Silverpalm*'s lookouts "first sighted the U.S.S. *Chicago* on her starboard bow at a distance of about 1300 yards about two minutes before the collision."

2. *Silverpalm*'s speed when her officers first heard *Chicago*'s fog signal and "when she first sighted the U.S.S. *Chicago* was 13.5 knots ahead."

3. Captain Cox "rang for emergency full speed astern about 1-1/2 minutes before the collision."

4. Though her engine controls were set on "Stop," *Silverpalm*'s "engines were still turning over in the ahead direction at the moment of the collision, and at this moment she was making at least 10 knots through the water."

5. It took about five minutes to reverse *Silverpalm*'s engines at her speed of 13-1/2 knots "under the conditions which existed on the morning of 24 October, [sic] 1933."

6. Captain Cox ordered right rudder once he could estimate the course and speed of *Chicago*. Unfortunately, "Little if any change in course resulted therefrom because the rudder did not reach its hard over position until immediately prior to the collision."

7. By the time of the collision, *Chicago* had been "proceeding independently" for about 50 minutes.

8. *Chicago* had an "adequate number of lookouts."

9. Before the collision, "*Chicago* was sounding fog signals as prescribed by the International Rules of the Road, except that while she was stopped and still had way upon her, she sounded two blasts."

10. *Chicago*'s lookouts sighted *Silverpalm* "on her port bow at a distance of about 800 yards and about 1-1/2 minutes before the collision, at which time the U.S.S. *Chicago* was making headway of about 10 knots."

11. When Captain Kays saw *Silverpalm* he ordered "full left and then immediately… full right, the engines to be backed emergency full speed, three blasts to be given on the whistle and collision call to be sounded."

12. *Chicago*'s rudder "got no further than 10 degrees left when the order was given, 'Full right'."

13. *Chicago* had "headway of about two or three knots" when the ships collided.

14. It was "impossible to reconcile the evidence given as to the courses being steered and bearings observed when the two vessels first sighted each other."[147]

The Board's opinions were as follows:

a. *Silverpalm* "was wholly to blame for the collision" because, first, she wasn't "proceeding at a moderate speed for the prevailing weather conditions." Second, "the order to stop her engines was not given when the fog signals of the U.S.S. *Chicago* were heard by her." Third, she didn't alter her course to starboard, "as required by the International Rules of the Road."

b. *Chicago* wasn't blamed for the collision because she was steaming "at moderate speed for the prevailing weather conditions and her maneuverability, as required by the International Rules of the Road."

c. When Captain Kays ordered "backing emergency full speed and turning to starboard," he was complying with Article 27, International Rules of the Road, even though *Chicago* had the

right of way. Kays also took "the best action that could have been taken under the circumstances to lessen the effect of the collision which was inevitable."

d. The deaths and injuries on *Chicago* were the fault of Captain Cox.

e. The "officers and crew of the U.S.S. *Chicago* carried out their duties in the emergency in accordance with the best traditions of the naval service."

f. "The fact that the U.S.S. *Chicago* blew two blasts on her whistle before she was dead in the water did not contribute in any way to the collision and its results."

g. The deaths of Lieutenant(jg) MacFarlane, First Lieutenant Chapelle, and Chief Pay Clerk Troy, and the injuries to Machinist Oehlers and Electrician Giard "occurred in the line of duty and were not the result of their own misconduct."[148]

The Board had a short list of recommendations:

(1). "That no further proceedings be had against any person in the naval service."

(2). "That civil proceedings be taken against the owners" of *Silverpalm* "for the damage and loss of life" to *Chicago* and her crew.

(3). "That criminal proceedings be taken against" Captain Cox "for the loss of life that occurred on board" *Chicago*, "the charges to be based on paragraphs 1 and 4 of the opinion above."[149]

The members of the Board, Captains Kimberly, Cage, and Freyer, then "adjourned to await the action of the convening authority," Vice Admiral Laning.[150] If the three officers thought the question of responsibility or liability had been settled, they were in for a surprise. There was still the liability/damage suit—which they had recommended the Federal District Attorney pursue—to come.

Chapter 5: The Alliance Between the Navy and the Justice Department

THE IMPORTANCE OF THE NAVY'S INQUIRY

The Navy Board of Inquiry finished its deliberations on 18 November. In its report, the Board found that *Chicago* and her officers were not responsible for the collision. In addition, the Board recommended that "civil proceedings be taken against the owners of" *Silverpalm* for the damage done to *Chicago* and "for the loss of life and injuries received by the personnel of the U.S.S. CHICAGO resulting from the collision." Finally, the Board urged the U.S. government to institute "criminal proceedings" against Captain Cox of *Silverpalm*.[151]

There were two responses to the Board's recommendations. The first was from Vice Admiral Laning, the Board's Convening Authority. The second response, which began even before the Board's recommendations were published, was from the Federal District Attorney in San Francisco.

Laning's response was an official letter of 18 December 1933, in which he announced that "the proceedings, findings, opinion, and recommendation of the court [or board] of inquiry" were approved by him, and that he would take no further action.[152] Then it was the turn of the next highest commander, Admiral David F. Sellers, Commander-in-Chief, United States Fleet. On 15 January 1934, Sellers also officially approved the proceedings, findings, opinion and recommendation in a letter to the Navy's Judge Advocate General.[153] To finally settle the matter as far as Captain Kays was concerned, Admiral Sellers, writing on his own behalf as well as for the Secretary of the Navy, eventually sent an official letter to Kays on 26 April 1934 saying that "The Commander-in-Chief [Sellers] considers that no blame whatever is attached to any officer attached to the CHICAGO at the time of the collision."[154]

Because the Navy, on its own, and using its own lawyers, could not sue the Silver Line, it was up to Federal District Attorney Henry McPike and his staff to act on the Board's recommendation that the government initiate civil proceedings against the Silver Line and *Silverpalm*. The issue of the criminal culpability of Captain Cox was a separate matter. McPike and Assistant Federal District Attorney Esther Phillips had already been preparing their case in cooperation with Navy personnel. They would be professionally linked with the Navy Judge Advocate General's staff for the rest of legal proceedings. Ira Lillick, counsel to Silver Line and the defender of *Silverpalm* had only his own staff to deal with.

THE LIBEL CASE: LILLICK STARTS IT OFF

Attorney Lillick filed suit in the Southern Division of the Federal District Court for the Northern District of California on 1 November 1933, alleging that *Silverpalm* was not responsible for the collision, the loss of life on *Chicago*, and the damages to the two ships. I was surprised when I discovered Lillick's filing. Again, my error was in thinking that Lillick would wait until the Navy board had announced its findings and made its recommendations before signaling that, on behalf of his client, he would challenge them. My brother explained that Lillick (and Attorney Phillips, too) had already followed the proceedings of the Navy Board of Inquiry. They could see where it was headed. Lillick's filing was a sign to the Navy, to the federal

district attorney, and to his own client (Silver Line) that he was confident he could win the libel case against *Silverpalm*. He was saying, through the law, that, "We're not bluffing."

McPike had expected this. In a 2 November letter to U.S. Attorney General Homer Cummings, he briefly reviewed the facts of the case for his chief and explained that the willingness of the 12th Naval District and the Navy's Judge Advocate General to have Assistant Federal District Attorney Phillips cooperate closely with the officers supporting the members of the Board of Inquiry was to the government's advantage. As McPike noted, Esther Phillips was "given opportunity to find out the facts, see the witnesses, etc." for herself "while the facts were still fresh" in the minds of the witnesses. Because Phillips sat in on the depositions and reviewed the testimony taken by the Board of Inquiry, "filing the libel [against *Silverpalm*]" was delayed "until the major part of the testimony was taken." The delay was fortuitous. It meant that Lillick would file *Silverpalm*'s libel against *Chicago* first, and also that McPike and Phillips would know beforehand what Lillick's basic legal argument would be.

As McPike told Cummings, "We know now, not only the strength of our own case, but what weak points it has." Indeed, "Some lines of inquiry were started even during the [Navy Board's hearings] for use in the civil suit." However, the Navy Board's hearings had revealed one potential flaw in the government's case against *Silverpalm*. As McPike wrote, the "question of [*Chicago*'s] speed in the fog is, to some extent, in doubt." He then acknowledged to Cummings that "You know, as well as I, what the courts hold in regard to speed of vessels in a fog." What both lawyers knew was that ships seeking to avoid a collision while steaming in a fog needed to proceed slowly and stop their engines on detecting a sign that there was another ship nearby. McPike went to say that "[A] full discussion of her speed by my representative [Phillips], and the officers, in the recesses of the Naval Court, and before and after Court, shows that the 'CHICAGO' had at the time an unusual amount of power for backing, 7 or 8 times what was normally necessary." That fact would serve as a defense against the charge that *Chicago* was moving in violation of the international rules.

McPike also informed Cummings that three officers on *Chicago* were killed while one more—Machinist Oehlers—was severely injured. One of the dead officers "left, as sole heir, a widowed mother, in straightened circumstances." Another left a widow; the third was survived by a widow with five children. Admiralty law permitted the United States to pursue compensation for those killed and injured, and McPike intended to do just that. He declared to Cummings that "not only humanity directs me to do this, but I consider it good strategy. In any case where severe personal injuries and death have resulted from a collision, the human instincts of the court may lean to giving these persons relief, if the facts permit it."

McPike also explained to the Attorney General that he had responded to *Silverpalm*'s filing of a libel against the United States with a libel of his own. He referred to it as a "skeleton libel" because it only claimed that *Silverpalm* needed to pay for the cost of repairs to *Chicago*. McPike said he'd file an amended libel once all the damages to *Chicago*'s stores and the destroyed personal effects of her crew were ascertained by the Navy. He also wanted to hear from all the heirs of those killed before he added their claims for damages to those of the United States.

McPike finished by noting that he "had preferred to have the libel of the United States on file first. But hearing the witnesses of the 'SILVERPALM', and comparing their appearance, intelligence and general qualifications with the witnesses from the

Cruiser, convinces me that it is to our advantage if at the trial the 'SILVERPALM' should be obliged to put on their case first. The contrast between their witnesses and ours is overwhelming."[155] And so, in the upcoming district court case to determine which ship was responsible for the collision, *Silverpalm*'s attorneys would go first.

NECESSARY PRELIMINARIES TO THE DISTRICT COURT HEARING

In the meantime, preparations for the hearing on damages proceeded in parallel with the Navy's Board of Inquiry hearings and the planning by McPike and Phillips for the district court trial that would determine which ship was at fault. For example, on 1 November 1933, Lieutenant J. M. Kiernan, a member of the Navy's elite corps of naval constructors and the engineer supervising the repairs to *Chicago*, submitted to the Board of Inquiry a summary of repairs needed to be done to the cruiser.[156] However, he had to coordinate all the repairs with representatives of the bureaus of Steam Engineering (BuEng) and Ordnance (BuOrd), as well as with his own superiors at the Bureau of Construction and Repair (BuC&R). The latter bureau was responsible for *Chicago*'s structure. Engineering was responsible for her power plant. Ordnance was responsible for her guns and shell and powder magazines.

In Washington, coordinating among the bureaus was often done by officers in the Office of the Chief of Naval Operations (OPNAV). Accordingly, the estimates of what needed to be done to put *Chicago* back into shape (and what it would cost to do so) were sent to both the three bureau chiefs and to offices in OPNAV, especially the division of Fleet Maintenance (OP-23). It was OP-23 that had to pull together the cost estimates from the three bureaus and make sure that the Chief of Naval Operations (CNO) approved them.[157] This meant that Lieutenant Kiernan had to stay in close touch with individuals in three bureaus and OPNAV. He was not simply handed money and authority and told to get the job done.

So much for the coordination of the physical repairs of *Chicago* and estimates of their cost. Coordinating the legal work was the responsibility of the Office of the Navy's Judge Advocate General (JAG). The JAG was Rear Admiral Orin G. Murfin, who had directed the laying of the North Sea Mine Barrage against German submarines during World War I and in the 1920s had successfully commanded light cruiser *Concord* (CL-10) and battleship *West Virginia*. Murfin was not a law school graduate or a member of the bar, but he had the command experience that qualified him for the position of the Navy's chief legal officer in the eyes of Chief of Naval Operations Standley and Secretary of the Navy Swanson.

As JAG, Murfin needed to stay in touch with—and if necessary mediate among—Attorney McPike in San Francisco, the Attorney General in Washington, the Secretary of the Navy, OPNAV, and the bureaus. For example, on 13 November 1933, Murfin sent a letter through the chiefs of Construction & Repair and the Bureau of Engineering to the Chief of Naval Operations, Admiral William H. Standley, to encourage Admiral Standley to provide information to U.S. Attorney McPike that McPike thought was essential to preparing for the district court libel hearing. McPike had sent his letter requesting information to the Attorney General, and the Attorney General had forwarded the letter to Murfin. Murfin then contacted the CNO and asked for the following information on behalf of McPike:

- An estimate when the trials on *Louisville* would be completed.

- When the trials and test of *Louisville* were finished, McPike and his assistants needed the information immediately. Murfin needed to be able to tell McPike that the data would be forthcoming.
- An assurance that the officers in charge of gathering the data through the trials of Louisville would be available for the libel hearing in case they were called as witnesses.[158]
- Proof that *Louisville* was in fact a sister ship of *Chicago* and that data from trials with *Louisville* would be essentially the same as those from trials with *Chicago*. McPike had wanted the Navy to take *Chicago* to sea to undertake the engine and maneuvering trials. However, as the presentation by Lieutenant Kiernan on 1 November had shown, *Chicago* could not be made ready for sea by mid-March, the anticipated date for the libel hearing. The only alternative was to use data from tests with *Louisville*.

The wheels of justice did not stop turning while Navy staff officers responded to Murfin's request (on behalf of McPike). To keep *Silverpalm* legally within reach while his office prepared for the federal district court hearing that Lillick's filing had prompted, McPike had his staff take a certified copy of the U.S. government's libel to the U.S. Marshall's office in San Francisco and request that *Silverpalm* be arrested. The "arrest" was made when a representative of the Marshall posted a notice on *Silverpalm* saying she was held in custody pending a hearing on her bail. Captain Cox was also served with a copy of the arrest order.[159] *Silverpalm*'s bail hearing was set for 14 November.

At the hearing, the owners of *Silverpalm* agreed to post a bond of $352,000 in order to free the ship from the custody of the United States government. The amount of the bond had been "agreed upon between counsel for the respective parties from an estimate made by competent appraisers" who had "estimated her value in her damaged condition."[160] The owners of *Silverpalm* wanted to get their ship repaired and back in the sea lanes, and the terms of the bond were finally agreed to on 30 November 1933.[161]

Meanwhile, back in Washington, the Navy's bureaucracy was responding to JAG Murfun's request for information for Federal District Attorney McPike. On 15 November 1933, the Chief of the Bureau of Construction & Repair (BuC&R) informed the CNO and the Chief of the Bureau of Engineering (BuEng) that *Louisville* was indeed a sister to *Chicago*, but that BuC&R did not know if the tactical data for *Louisville* had been collected. The letter from the chief of the Bureau of Construction and Repair also noted that *Chicago* had collected tactical data "taken off Santa Barbara on 11 April 1931" and that these data applied to all the cruisers of the class (heavy cruisers numbered 26 through 31). The letter also suggested—tactfully—that OPNAV should have those data. Finally, Construction & Repair wrote that it had "no knowledge concerning witnesses from the LOUISVILLE who may have compiled any tactical data on that vessel."[162] For those readers who have worked in a large bureaucracy, the meaning of this letter is clear: "You do your work. We've done ours."

Unfortunately for Chief of Naval Operations Standley, Rear Admiral George C. Day, head of the Navy's Board of Inspection and Survey in Washington, notified him that the Board had no record of the tactical data that was supposed to have been collected by *Louisville*. However, there was information on *Louisville*'s official trials, and that information was attached to Day's letter. Day also informed the CNO that "A photostatic copy of the tactical data obtained by the CHICAGO on 11 April 1931 off Santa Barbara" was also attached. Finally, Rear Admiral Day reminded the CNO that the commander of the Scouting Force "in his letter of 11 July 1932

recommended that, as the cruisers of the CHICAGO class were practically identical, and with a view to saving fuel, the Department authorize [sic] these ships to use the data obtained by the CHICAGO. This recommendation was approved."[163] In plain terms, the memo from Day said, "Here is the information that my organization has. It's not exactly what you say you need, but it's what's available and what you'll have to use." The CNO forwarded Day's memo to Murfin.

On 23 November, Federal District Attorney McPike in San Francisco filed an amended libel on behalf of the United States, on behalf of the survivors of those killed, on behalf of the officers and crew of the cruiser who lost their personal effects.[164] The libel alleged the following:

- First, that *Silverpalm* "negligently and carelessly collided with the Cruiser 'CHICAGO', causing damage to the vessel as hereinafter set forth. As a result of this collision, Lieutenant Frederick S. Chappelle, Lieutenant Harold A. MacFarlane and Chief Pay Clerk John W. Troy were killed, and the libelants Joseph A. Oehlers and Louis Giard were injured."[165]
- Second, that *Silverpalm*, "her owners, officers and crew were negligent…" because the ship "did not maintain a proper lookout," "did not have competent officers on watch…," "was not sounding proper fog signals," "was proceeding in the fog at a rate of speed which did not permit her to come to a stop or to maneuver within the limits of visibility at that time and place," had engines that could not quickly bring her to a stop, and had not stopped or reduced her speed or maneuvered to avoid a collision until it was too late.[166]
- Third, that *Chicago* suffered damage that it would likely cost $364,000 to repair. In addition, over the estimated 40 days required to repair *Chicago*, the Navy would have to pay the crew "wages and subsistence… not less than the sum of $15,000.00, and will lose the use and benefit of their services during said period…"[167] Survivors of those killed sued for compensation, as did the two injured sailors, one of whom sustained very serious injuries. Finally, the United States sued to recover losses "of clothing, stores and personal belongings which were the property of officers and members of the crew" of *Chicago*.[168]

Ira Lillick, Silver Line and *Silverpalm*'s counsel, filed a cross-libel in response to the amended libel filed by District Attorney McPike.[169] The cross-libel alleged the following:

- First, that the collision was not caused by "the negligence or carelessness" of *Silverpalm*.
- Second, that the claims that *Silverpalm*'s crew was negligent, that she was proceeding at too great a speed given the visibility, that she had not sounded the required signals, that she was "negligently constructed" with engines that could not be quickly stopped or reversed, and that she did not maneuver to avoid a collision early enough were not supported by the evidence.
- Third, that *Chicago* was "proceeding at a highly immoderate speed."
- Fourth, that the advocates for *Chicago* needed to present "strict proof" that she was on or almost on a course of 330 deg. true just before the collision, and that she had slowed significantly and was in the act of backing, and that *Silverpalm* had not reduced her speed once she sighted *Chicago*.

- Fifth, that the U.S. government had to prove that the alleged costs of the damages that resulted from the collision were correct.[170]

What District Attorney McPike had anticipated had come to pass. The basic case of the government was that *Silverpalm* was moving too fast given the visibility conditions for her to have time to stop her diesels and then reverse. He also had correctly anticipated that the lawyers representing *Silverpalm* would claim that it was *Chicago* that was moving too fast, and that *Chicago* lacked the power to back away from a potential collision, given the speed on her at the time.

Washington was quiet but not asleep. On 21 December 1933, Assistant Solicitor General Angus MacLean wrote to Rear Admiral Murfin, asking about trials data for *Louisville.* That was odd, given Rear Admiral Day's already cited correspondence with CNO Standley in November. Had the data needed by the lawyers been shanghaied or lost in OPNAV? Had the press of work kept an officer in OPNAV from paying attention to the request from Rear Admiral Murfin? MacLean was careful not to ask questions like those because they might be interpreted as accusations, and so he closed his letter to Murfin by saying, "May we suggest that the matter have your consideration and that you let us have the data requested as promptly as convenient?" He made sure to remind Murfin when the libel hearing would begin.[171]

Back in San Francisco, Federal District Attorney McPike needed something else by the time the trial began. It was a scale model of *Chicago*. On 8 January 1934, he wrote to the commander of the Mare Island Navy Yard, asking if the personnel at the Yard could make such a model. As he explained, "Our problem is to try the case before a Civil Judge, who has never been a navigator of a battleship and whom we wish to understand perfectly every bit of testimony given by any one of the CHICAGO witnesses." McPike went on to say that he was "sure you understand the advisability of this. Do you know of any better way to have such a complete understanding of all the facts to which a witness is testifying then by a ship's model? I do not."[172]

McPike admitted that it might be possible to have the court meet periodically aboard *Chicago*, and that such meetings might help him and Esther Phillips make the judge familiar with *Chicago* and the damage done to her. However, he claimed that it would not be the same "as having a witness, while he is testifying in court, actually pick out on the ship's model, the various points which he is mentioning." McPike thought that Mare Island could build the model he was asking for because the Yard had built *Chicago* in the first place. "It would only be a rather rough model, and yet it would be highly useful and a very graphic picture of the collision could be given with its assistance." McPike had worked with a detailed model of Mare Island itself in an earlier case, and he was convinced of the usefulness of scale models in court.[173]

THE DOXFORD DIESELS OF *SILVERPALM*

McPike also reported to Attorney General Cummings in Washington on 9 January 1934 that the "strange construction of [*Silverpalm*'s] engines… will be of great importance in the trial." He asked Cummings to request the Navy to recommend engineers with expertise in diesel engines who lived along the Pacific Coast. McPike needed to know "authoritatively whether a diesel engine so constructed that it cannot be reversed until the ship is brought to a stop in the water is the usual type of diesel engine or whether this is an unusual type." Why did it matter? Because "[T]he validity of limitation proceeding will probably depend on [sic] court finding that

such a diesel engine is inherently unseaworthy."[174]

On 12 January, Rear Admiral Samuel Robinson, head of the Navy's Bureau of Engineering, responded to Judge Advocate General Murfin's request for information about *Silverpalm*'s Doxford diesels. The Bureau's letter was just what McPike and Esther Phillips were primed to hear:

> "The Bureau of Engineering is not familiar with any marine diesel engine installations where inherently it is necessary that the ship be brought to a stop or even to a condition approaching that of being dead in the water before the engines can be reversed. Such a type of diesel engine installation is considered to be most unusual and in fact, would render the vessel unseaworthy and a menace to navigation."[175]

However, Rear Admiral Robinson went on to say that "the inability of the crankshaft of these specially designed engines to come to rest promptly is one of the consequences the builders have to accept, due to their having evolved an engine which wastes very little power in internal friction. For this reason, the air brake was evolved…"[176] On 15 January, Admiral David Sellers, Commander-in-Chief, United States Fleet, sent his own letter to Rear Admiral Murfin citing the unusual design of the engines in *Silverpalm*. As Sellers noted, "reversing the engines from any but excessively low ahead speeds" wasn't possible "in a reasonable time."[177]

On 15 February 1934, the Chief of BuEng again wrote to Murfin about diesels like those that powered *Silverpalm*. He quoted from a report prepared by a BuEng senior engineer who had examined diesel engines that were "almost identical with the engines" on *Silverpalm*. The senior engineer reported that it was in fact possible to build "stopping valves" into such engines. However, "The Bureau of Engineering has no knowledge of whether the same stopping device is utilized on Doxford engines built abroad, but it is patent that some device having the same function is necessary in order to make the engines readily reversible…"[178]

THE ATTORNEYS FOR *SILVERPALM* MAKE A SURPRISE MOVE

This expert assessment was a little late. On 14 February 1934, the attorneys for *Silverpalm* and Silver Line informed Federal District Attorney McPike in a letter that they were authorized "to offer to settle the claims represented by you on the basis of 'mutual fault', upon the understanding that the fund represented by the bond now on file in the limitation proceeding herein be deemed the limit of the liability of the owners of the SILVERPALM."[179] That same day, District Attorney McPike wrote to Attorney General Cummings, saying that he would forward the offer immediately

McPike believed that the decision whether or not to accept the offer would be made by the Navy, "quite regardless of recommendations from this office," but there were some points he felt he should make to the Attorney General. First, the owners of *Silverpalm* had not claimed "doubtful liability." The liability of their ship was "too clear to be subject to dispute." That is, "the offer is not giving us anything [in terms of admitting fault] so far as the SILVERPALM is concerned." Second, the attorneys for *Silverpalm* would, in a trial, argue that *Chicago* was going too fast for the conditions that existed on the day of the collision. McPike believed that his office could successfully counter that argument by showing that *Chicago* could and did stop "within the limits of visibility." To bolster that position, McPike

wanted data from "tests made by the CHICAGO herself," and he asked the Attorney General to pursue the matter with the Navy. McPike considered making such tests an "urgent" matter. "If it cannot be done prior to the trial, then I question whether or not it ought to be done after the trial, leaving the record open for depositions to be taken thereafter, showing the results of the tests."[180]

Assistant Attorney General George Sweeney wrote to Secretary of the Navy Claude Swanson on 17 February, asking Swanson to determine the Navy's position. Sweeney attached McPike's letter of the 14th and pressed Swanson to accept or reject the offer from *Silverpalm*'s owners that the case be settled on the basis of mutual fault. To influence Swanson's thinking, Sweeney explained that the Justice Department attorneys considered *Silverpalm*'s legal position to be weak because "she did not stop and reverse when the CHICAGO'S [sic] fog signals were heard." If *Chicago* were at all at fault, then it would have to be because she was moving at too great a speed—12 knots—in the fog that existed at the time of the collision.[181]

Was 12 knots too fast though? This was clearly a potential weak point in the government's case. Could *Chicago*'s acknowledged speed before she encountered *Silverpalm* be defended as reasonable under the circumstances? Sweeney cited the case of *Atlantic Coast Company v. United States* (13 F. [2d] 354) as the only one his staff knew of where 12 knots was "held reasonable within the fog rule." Sweeney also admitted that admiralty lawyers were still arguing among themselves whether the decision in *Atlantic Coast Company* was sound. As he put it, "The rule governing the speed in a fog, of course, is entirely relative, depending on the range of visibility at the time and the possibility of stopping the ship…"[182] Given this, did the Navy want the Federal District Attorney in San Francisco to continue the case?

The Navy's leaders needed to reach a decision because the date for the district court trial was fast approaching. On 21 February, Sweeney wrote to Rear Admiral Murfin, informing the Navy Judge Advocate General that District Attorney McPike had received a "Notice of Production of Records," requiring the Navy to produce at the trial *Chicago*'s log books, including those covering several months steaming at sea before the collision.[183] Sweeney knew what that meant. *Silverpalm*'s lawyers would try to find instances where *Chicago* moved or maneuvered in ways that were counter to what the government's witnesses said she could do and did when the ships crashed together. The lawyers for *Silverpalm* were taking no chances. If the Navy and the Justice Department would not settle out of court, then they intended to be ready to argue their case as strongly as the evidence allowed.

On 26 February, Rear Admiral Murfin wrote to CNO Standley, pointing out that *Silverpalm*'s owners were willing to settle the case without a trial "on the basis of mutual fault with the right of the SILVERPALM to limit its liability to the value of that vessel." While the liability of *Silverpalm* was clear enough because her captain could not back her down while moving ahead at a speed of about ten knots, the *Chicago* might, in a trial, be judged partly at fault.

Murfin did not favor settling, however, because "a settlement on a half damage basis will result in no particular advantage to the Government except to save the cost of litigation." If *Silverpalm* were judged solely responsible, however, the government—and the survivors of those killed on *Chicago*—would "recover a considerably larger sum than would be obtained" under the proposed settlement. Murfin repeated the warning that *Chicago* was at risk of being held at fault because of her speed of 12 knots "just prior to the collision," so could she have stopped when *Silverpalm* was sighted at a distance of 800 to 900 yards? Could a test be run to ascertain just what

Chicago could do, and could the test be run before the district court hearing was scheduled to begin on 13 March?[184] That was what McPike wanted. Unfortunately, *Chicago* could not be made ready in time.

The Navy needed to determine its official position on "mutual fault" before any tests could be conducted with *Chicago*. Consequently, the Navy's official position was laid out in a letter from Assistant Secretary of the Navy Henry L. Roosevelt to Attorney General Cummings on 6 March 1934. Roosevelt wrote that *Silverpalm* could not "escape being held at fault for her admitted failure to stop and reverse upon hearing the fog signals of the CHICAGO forward of her beam and also because of her inability to reverse her engines at any time prior to the collision. Therefore, the offer of counsel for the SILVER PALM to adjust the pending litigation on the basis of mutual fault appears to be of no advantage to the Government except to save the costs of litigation. It is the opinion of the Navy Department that no such agreement should be made unless contributory fault on the part of the CHICAGO is reasonably clear."[185]

This was a carefully worded letter that handed the responsibility for winning the libel case right back to the Justice Department's attorneys in California. Assistant Secretary Roosevelt did not say definitely that *Chicago* was without fault. He used the words "reasonably clear." But if the Assistant Secretary, acting on behalf of Secretary Swanson, and with the staff support of the Office of the Chief of Naval Operations, could not say that *Chicago* was clearly—not reasonably, but clearly—without fault, then how could lawyers McPike and Phillips prove that? After all, the Navy's line officers were sailors. They routinely operated ships at sea in all sorts of weather conditions day and night. Their expertise was readily available to Assistant Secretary Roosevelt. Yet here was the Assistant Secretary telling the civilian lawyers that they had the duty to defeat the other side's attorneys in the matter of "contributory fault." This responsibility would influence Phillips in the weeks and months ahead, and not always in a positive way.

On 28 February, Rear Admiral Day, head of the Navy's Board of Inspection and Survey, informed CNO Standley that *Chicago*, moving at 12 knots, could stop in "about 375 yards," assuming "that 27,000 backing horse power is used." Standley responded that *Chicago* could not verify that figure in time for the trial because she would not be repaired before 31 March.[186] District Attorney McPike, facing the need to organize the government's case by 13 March, sent a telegram to Secretary of the Navy Swanson on 7 March saying that he wanted to use a curve showing *Louisville*'s "reversing power from full ahead to full astern" based on official tests with *Louisville* conducted on 29 June 1931 and 25 January 1932.[187] Could Swanson see to it that the active duty officers who witnessed one or both of the tests be directed to testify at the trial if they were needed? Secretary Swanson agreed.[188]

That's where matters stood just before the trial. The Navy had chosen not to settle, at least partly because there were men injured and killed in the collision, partly because, as we've seen, District Attorney McPike was certain that *Silverpalm* was liable because of her engines, and partly because *Chicago* was doing her level best to avoid a collision in the moments before they crashed together. But was her "level best" enough?

DAMAGES

The district court's decisions regarding damages would depend on its decision regarding fault. If *Silverpalm* were judged to be solely at fault, then the government likely would ask the district court to accept the government's damage claims, and *Silverpalm* might be sold at auction. If the district court ruled that the fault was mutual, then under the law as it existed at that time the government would have to pay the cost of repairing *Chicago* while the Silver Line paid for the repairs to *Silverpalm*. The economic stakes for the Silver Line were very high.

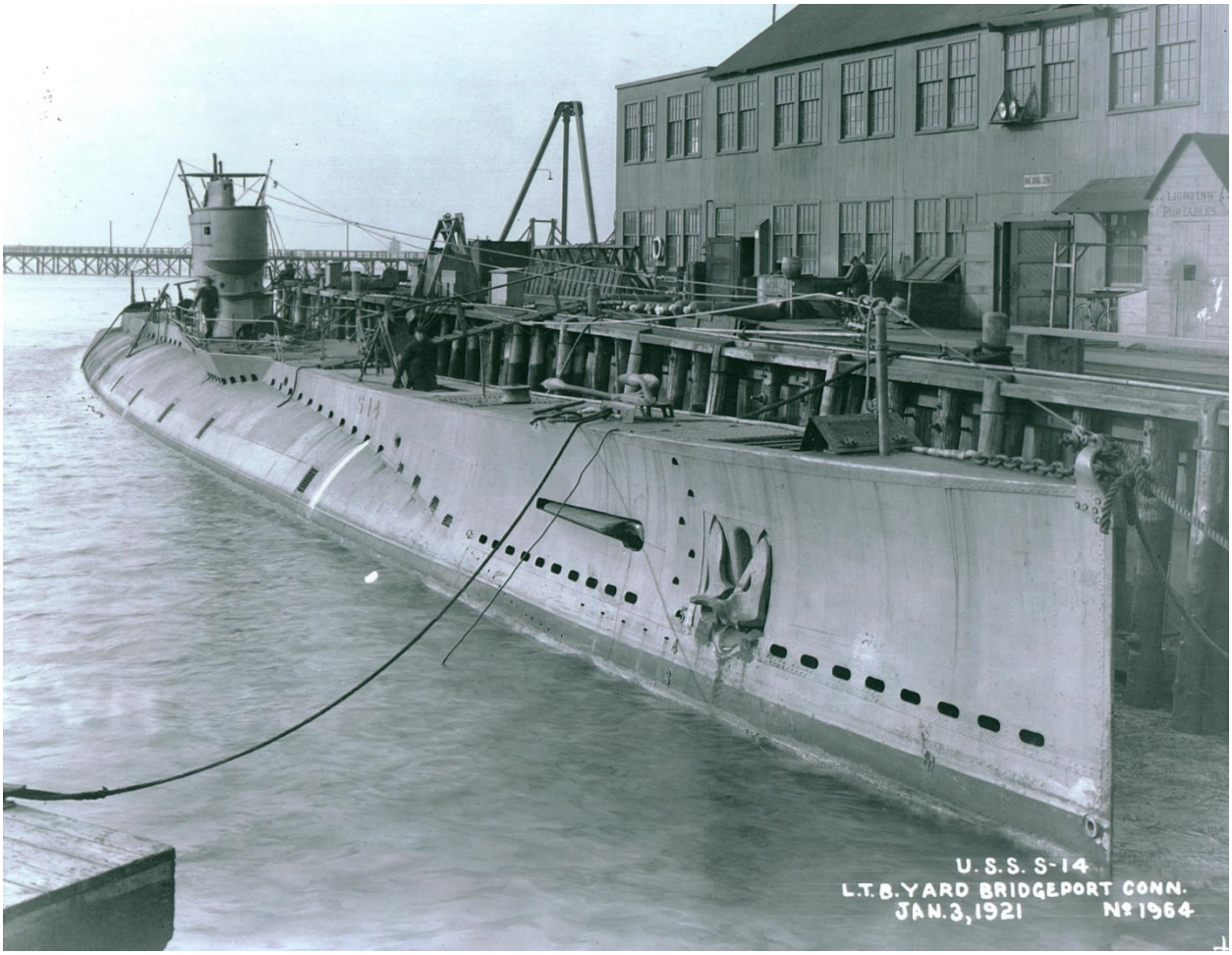
The lawyers for both sides did not set aside their work on damage assessments as they also prepared for the district court hearing that would determine fault. On 16 December 1933, Ira Lillick, acting on behalf of the Silver Line, submitted a "Petition for Exoneration From or Limitation of Liability" to the federal district court's Commissioner on Claims. On 20 January 1934, the government's lawyers disputed the petition and submitted to the Commissioner the damage claims of the government, of the sailors injured on *Chicago*, and of the survivors of the members of *Chicago*'s crew who were killed. Separately, lawyers representing the owners of cargo destroyed and damaged on *Silverpalm* also submitted their claim.

The Commissioner reported on 25 January the total value of those claims. It was almost $731,000.[189] The bond posted by the Silver Line was only $352,000. Was it legally possible that the U.S. government could gain a judgment against the Silver Line that was greater than the value of a repaired *Silverpalm*? The answer appeared to be yes.[190] It was therefore not surprising that the lawyers for the Silver Line began challenging the damage claims on 30 January 1934.

On 6 March 1934, District Court Judge Harold Louderback, slated to serve as the trial judge in the libel case, agreed to have the hearings on damages also assigned to him. That's where matters stood on damages as the district court trial opened. To make the legal issues manageable, the two sides in the libel case agreed on 16 December 1933 to consolidate all the libels into just three: (a) Silver Line, Ltd., (Libelant), vs United States of America, (Respondent); (b) United States of America (Libelant) vs *Silverpalm* (Respondent), and (c) Silver Line's petition for "exoneration from or limitation of liability."[191]

Chapter 6: Two Important Previous Court Cases

By the time *Silverpalm* rammed *Chicago* in October 1933, there were two court cases the outcomes of which should have been familiar to the captains of Navy ships. The first was the sinking of submarine *S-51* by the steamship *The City of Rome* on the night of 25 September 1925. The second was the collision of destroyer *Childs* (DD-241) and the large sailing schooner *A. Ernest Mills* on the dark night of 4 April 1929. There were other cases where Navy ships had collided with commercial vessels[192], but these were the two most important for the lawyers.



This is *S-14*, a sister of *S-51*. Her running lights were located on her short conning tower. *Source:* NARA.

S-51 V. THE CITY OF ROME

S-51 was rammed by the coastal steamship *The City of Rome* in Long Island Sound. The submarine sank in less than a minute, carrying 23 members of her crew of 36 with her. *The City of Rome* stopped and lowered a lifeboat and searched for survivors of the craft she had struck, but only three members of *S-51*'s crew survived, and none of them had been on watch on the submarine's bridge when the collision occurred. Ten other crew members apparently escaped the

submarine as she went down, but they were not found and were presumed drowned.[193]

According to Captain John H. Diehl, master of *The City of Rome*, his ship "sounded several short blasts of the whistle as a danger signal. As soon as we saw [the submarine] directly across our path, we swung about, but it was too late to avoid the collision." William Anderson, bow lookout on *The City of Rome*, first saw *S-51*'s white mast light "more than twenty minutes before the accident," and he watched the light "come out of the dark as a dim outline" before realizing that what he was looking at was a submarine. When *The City of Rome* struck *S-51*, "The sub turned lengthwise with our ship and went banging down our starboard side, scraping the plates and making a great noise." Anderson and other members of the crew of *The City of Rome* lowered the ship's emergency lifeboat and rescued three survivors, all of whom were asleep in their bunks when the ship and the submarine collided.[194]

S-51 fell to the bottom in about 130 feet of water. Divers that reached the stricken submarine on 26 September heard no tapping from the submarine's interior, and the ships sent to her aid assumed that any members of the crew still inside the submarine were dead. The Navy chose to bring the submarine to the surface, which led to months of hard, frustrating, and dangerous work, especially on the part of Navy hard-hat divers. The story of the salvage effort was told vividly by naval engineer and diver Commander Edward Ellsberg in his best-selling *On the Bottom*, published in 1929.

In the spring of 1926, under the supervision of then-Captain Ernest J. King, Ellsberg supervised the hard-hat divers (and made dives himself) as they struggled to chain the submarine to huge pontoons and then hoist it up to near the surface of the water so that both the sub and the pontoons could be towed to the Brooklyn Navy Yard. Successfully recovering *S-51* in June 1926 was a sign that the Navy would not abandon its submariners—that it would exert every reasonable effort to reclaim them if they perished under the sea.[195]

The legal consequences of the sinking of *S-51* were overshadowed in press reports and films by the drama of her salvage. However, the legal cases that followed the accident were important, even if they garnered less sensational media coverage. Testimony to the formal naval court of inquiry, which convened on 15 October 1925, came mostly from the officers, crew, and passengers of *The City of Rome* because none of the three sailors who escaped from the submarine before she sank had been on watch.

Captain Diehl repeated to the Navy court what he'd told the press—that he first thought the white light he could see off his starboard bow was that of a rum-runner. He also testified that he and his crew did "everything within our power" after the collision. "We circled round on 'slow bell' and drifted over the spot where the submarine went down without finding any trace of her or of her crew, except the three we rescued."[196] Yet Diehl did not drop a buoy to mark the spot where *S-51* went down, and, after ascertaining there were no survivors or bodies in the water, he took his ship to Boston, her original destination. He did not inform the Navy of the collision for almost two hours.

After reviewing the evidence, the Navy board of inquiry decided that *The City of Rome* was at fault for the collision and recommended that Captain Diehl be indicted by a federal grand jury for manslaughter. Captain Diehl's actions the night of the collision were also reviewed by the Board of Federal Steamboat Inspection in Boston in January 1926, and that Board suspended his master's license for two years.[197]

In July 1927, Captain Diehl was indicted by a federal grand jury in Boston, and that fall he was

"tried criminally before the United States District Court for the District of Massachusetts and was acquitted by a jury on charges of criminal negligence and failing to 'stand by'" *S-51* after she sank.[198] Lieutenant Commander (later Vice Admiral) Charles Lockwood, who would serve as commander of U.S. submarines in World War Two and in 1927 was slated to command USS *Bonita* (SS-165), was assigned to assist the assistant federal district attorney selected to present the government's argument to the judge and jury in the Federal District Court in Boston.

Years later, Lockwood recalled that the government's lawyer knew so little about the regulations governing ships on converging courses at night that he—Lockwood—though certainly not a member of the bar, nevertheless "asked permission to conduct the case" himself[199] His request was firmly denied. After its deliberations, the jury said that the captain of *The City of Rome* wasn't guilty of negligence, thereby not supporting the decision by the Board of Federal Steamboat Inspection. The jury also rejected the government's claim that *The City of Rome*'s captain was responsible for the sinking of *S-51*. The judge in the trial took the position that "the cause of the accident was defective lights on the submarine."[200]

There was still the question of liability *in rem* to be settled. In November 1927, the libel of the United States against *The City of Rome* was tried in the U.S. District Court for the Southern District of New York. The Court ruled that both vessels were at fault—*The City of Rome* because she was aware for twenty minutes of another vessel on a crossing course and did not act to avoid a collision, and *S-51* because "her running lights merged into her masthead lights at a distance of two miles or over." The Navy asked the Department of Justice to appeal the Court's decision because it was "impossible to space the lights sufficiently far apart on a submarine to prevent the lights merging at a distance of 2 miles, and also because the [sic] *City of Rome* had ample warning as to the running lights" first seen by bow lookout Anderson.[201]

To complicate matters, "A suit was also instituted against the United States, on behalf of the next of kin of certain of the officers who were lost as a result of the sinking of S-51," in the U.S. District Court for the Eastern District of New York.[202] The claimants argued that, under the Public Vessels Act of 3 March 1925 (Section 1 of 46 USCA, para. 781), their libels against the government were justified because the law provided for the recovery of "damages caused by a public vessel of the United States." Their point was that one form of such damages was loss of life, even if that loss was a consequence of a collision. In fact, if *S-51* had sunk *The City of Rome* and not the other way around, the next of kin of *The City of Rome*'s passengers who died would have had a claim under the Public Vessels Act against the United States. So if they could make such a claim, then why not the next of kin of the dead crewmen of *S-51*?

In February 1928, the owners of *The City of Rome*, the Ocean Steamship Company of Savannah, Georgia, filed suit in the United States District Court for the Southern District of New York for compensation for damages to their ship. At the same time, the firm denied liability for the submarine's sinking on the grounds that the cause of the *S-51*'s loss was due to errors on the part of her commanding officer.[203] The Navy had argued that "*The City of Rome* and the S-51 were on converging or crossing courses, and *The City of Rome* was the burdened vessel under the starboard hand rule [i.e., the international rule], provided the S-51 had, by the proper display of lights, indicated her position."[204]

However, the district court judge inferred from the evidence that *S-51* did not have the proper display of running lights, even though that was not the result of any negligence on the part of her

captain. It was, instead, a consequence of the submarine's design, especially her low conning tower and the way that her running lights were positioned on the conning tower. At the same time, the district court judge ruled that *The City of Rome* was also at fault because she "made no change in course until she was close upon the S-51 and it was too late, and then she failed to sound her whistle to inform the S-51 of the change."[205]

This ruling—liability divided equally—pleased none of the libelants. The Navy wanted to pin the blame on Captain John H. Diehl of *The City of Rome*. The Ocean Steamship Company, faced with a suit brought by the survivors of the sailors killed in *S-51*, wanted to see the Navy made fully responsible. The families of the dead sailors wanted the compensation which they thought they were due from both the owners of *The City of Rome* and the Navy; they wanted the report of the district court's commissioner affirmed.

These three parties to the libel suits appealed to the Second Circuit Court of Appeals. In August 1928, Judge Thomas W. Swan, speaking for that court, ruled that the Public Vessels Act of March 3, 1925 (46 U.S. Code Appendix Paragraphs 781-790) did not give the families the right to sue the government for compensation beyond that granted by the district court's decision. The district court's decision split the liability half-and-half between the steamship and the submarine. That meant that the survivors of the submarine's dead crewmen could claim a share of the compensation from the Ocean Steamship Company, but they could not claim any compensation from the Navy because the law did not allow it.[206]

The Navy also appealed to the Second Circuit Court of Appeals, but not over the issue of compensation for the survivors of those killed. The Navy's argument was that the district court's decision to split the liability 50-50 (or half-and-half) was in error because the *S-51* was not subject to the accepted rules of the road. How could she be, when the accepted rules required every ship at sea to have a masthead light at least 20 feet above the water? Submarines such as *S-51* did not have, and could not have, such a light. Neither could they have mounts for the red and green running lights that were above the height of their conning towers. Officers of *The City of Rome* had testified that they saw the red (port) running light too late for them to take the action necessary to avoid a collision. Their attorneys suggested that the placement of the required white running light just above the red and green side lights could obscure them. The Navy's argument was that there was no way around this problem. Submarines were a special case, and therefore the accepted rules didn't apply to them.

The Second Circuit's decision in the appeal was written by Judge Learned Hand, acknowledged to be one of the best writers on the federal bench. In his opinion of 17 February 1930,[207] he first reviewed and then approved the lower court's finding that *The City of Rome* had been partly at fault. Then he turned to the Navy's claim that *S-51* was not at fault, despite the ruling of the district court judge. He found that "The International Rules (section 61 et seq. title 33, U.S. C. [33 USCA Para. 61 et seq.]) apply to 'all public and private vessels of the United States'," and thus it was "apparent that the rules regulating lights were meant to apply to ships of war…" Moreover, the court had "no power to dispense with the statute, nor indeed has the Navy." Existing submarines, with running lights that were difficult to see or evaluate, were "unfortunately a menace to other shipping and to their own crews…" Judge Hand was very direct: "The safety of navigation depends upon uniformity; only so can reliance be placed upon what masters see at night." In so ruling, he affirmed the district judge's decision and created a significant legal precedent.

CHILDS (DD-241) V. *A. ERNEST MILLS*

The collision of destroyer *Childs* (DD-241) and the large schooner *A. Ernest Mills* in the evening of 4 April 1929 was like the 1921 encounter of *Woolsey* and *Steel Inventor*. *Childs* was heading south off the coast of North Carolina bound for Guantanamo Bay, Cuba, with two other destroyers, *Coghlan* (DD-326) and *Bruce* (DD-329). The schooner was heading north to Norfolk. *Coghlan*, the leader of the destroyer formation, sighted *Mills* in the darkness and successfully avoided her. *Coghlan* warned *Childs* of the schooner's presence, but the latter "crashed into the schooner between the main and mizzen masts, dislodging blocks, rigging, [and] sails, crashing down spars, and breaking her keel."[208] *Mills* sank in three minutes. *Childs* saved six of the nine members of her crew.

The New England Maritime Company owned *Mills* and filed a libel "in behalf of itself and as bailee of the cargo of salt on board, against the United States of America, under the so-called Public Vessels Act" of 1925, which allowed "suits against the United States, in admiralty" for damage done to private vessels by ships owned by the U.S. government.[209] The libel was amended to cover the claims of the surviving officers and crew of the schooner. The initial libel was also amended once the New England Maritime Company went bankrupt due to the loss of the *Mills*. The libel also maintained that the officers of *Coghlan* were negligent. In response, the government filed a cross-libel against the New England Maritime Company and the surviving officers of *Mills*. The survivors of the three crew members of *Mills* who were killed also

Destroyer *Childs* (DD-241) after colliding with schooner *A. Ernest Mills* in April 1929. *Source:* Author's collection.

filed libels against the United States, demanding compensation for the three lives lost. All the libel suits were consolidated by order of the federal district court.[210] This was an improvement over what had been done in the case of *The City of Rome* vs. *S-51*.

There were two primary issues before the district court as it considered which ship was at fault. First, was schooner *Mills* showing the lights required? Second, had *Childs* responded the way she should have given the warning from *Coghlan*? The court ruled that that the officers commanding the three destroyers were steaming in the dark "along the path of commerce, in a triangular formation, making a sweep of about half a mile in width, and at a speed of 18 knots. While so proceeding, they were taking upon themselves a great burden of responsibility."[211] As the court recognized, *Childs* had received *Coghlan*'s warning, and the young lieutenant who was the Officer of the Deck of *Childs* had tried to steer his ship so as to pass ahead of the schooner. Unfortunately, his timing was off.

The court found that the destroyers and the schooner "were approaching at the rate of a mile in about two and four-tenths minutes, occupying a great space in the path of commerce." Accordingly, *Childs* needed to be especially mindful of the warning given her by *Coghlan*, but she was not. She did not reduce her speed, and the court found that "Speed was a very vital element," and that "*Childs* "was plainly at fault for not keeping clear of *Mills*, either by slowing down from 18 knots' speed before coming up with the *Mills* or by not stopping or turning to her left after receiving the *Coghlan*'s signal."[212]

The government's position was that *Childs* had complied with the law by posting adequate lookouts. True, there was no lookout in the bow, and there was no lookout on top of the enclosed bridge or in the crow's nest, but the international rules did not require lookouts in those places under the circumstances which existed the night of the collision.[213] The court's view, however, was that "No sufficient reasons have been shown for not placing a lookout at the bow," and, moreover, "courts are insistent in requiring a lookout at the bow" at night or in bad weather, no matter the common—that is, informally accepted—practice.[214]

The district court also ruled that the survivors of the three drowned crewmen from *Mills* could bring suit against the government under the Death on the High Seas Act (U.S.C., title 46, chap. 21) and the Public Vessels Act (U.S.C., title 46, chap. 22). As the court's ruling noted, "the libelants in these death cases are correct in saying that a broad construction should be placed upon [the Public Vessels Act], that it was obviously the purpose of the act to waive the sovereign's immunity with respect to accidents on the high seas caused by public vessels, and thereby relieve Congress of the multiplicity of special acts necessary to compensate persons who had suffered damages either to their person or property."[215] There it was: *Childs* was solely at fault and the government had to pay damages to the next of kin to the three dead, to the six survivors, to the New England Maritime Company, and to the owners of the schooner's cargo at the time of the accident.

These earlier cases established several important legal precedents. First, the international rules of the road applied to Navy ships and submarines. The Navy could not claim, for example, that its submarines, *because of their configuration*, were exempt. Neither could Navy ships ignore the international rules governing the movement of ships at night, or in bad weather. Navy ships might proceed at speeds as high as 18 knots at night, but they were responsible for maintaining both a diligent lookout and the capacity to maneuver quickly to avoid any ships they might encounter. These precedents would be cited in the legal aftermath of the collision of *Silverpalm* and

Chicago. As Federal District Attorney McPike noted in his 2 November 1933 letter to Attorney General Cummings, "You know, as well as I, what the courts hold in regard to speed of vessels in a fog"[216]

On 28 October 1933, the New York *Herald Tribune* ran an editorial on the damage to *Chicago* and commented that "the fact that the *Chicago*'s forecastle was crumpled in… is a reminder, …, of how small is the armor protection in this class of ship. When the treaty cruiser was first developed the tendency of naval theory was away from protection. The idea was that these ships would simply have to use their speed and gun power to avoid getting hit at all." The *Herald Tribune* went on to say that this idea—that speed and gun power mattered much more than protection—was being abandoned by the major navies, but that the need for more protection would drive up the size and weight of cruisers and make it more difficult to limit their numbers.[217] That same day, Rear Admiral Joseph K. Taussig, the Assistant CNO, predicted that the formal investigation of the collision would lead to newer cruisers with improved strength and better armor protection. [218]

Strengthening the "treaty cruisers" was already happening, as Rear Admiral Taussig knew. But he also knew that, for now, what would matter for the Navy would be the performance of the lawyers in the Federal District Attorney's office in San Francisco.

Chapter 7: The District Court Trial

"I was never ruined but twice: once when I lost a lawsuit, and once when I won one."

—*Voltaire*

METHODOLOGY

Researchers have to be careful. If they start digging into what they believe is an important event, they may find that their understanding of the event depends on what information they find first. Initial impressions matter, whether we're talking about historical research or a blind date. As far as the story of U.S.S. *Chicago* and *Silverpalm* was concerned, I first found and read the records of the Navy Board of Inquiry in the National Archives in Washington, D.C. Then to my great surprise I found the volumes of the *Apostles on Appeal* for sale online, and I eagerly purchased them. I never figured out why they were called "*Apostles on Appeal*" instead of just the "transcript of the district court trial," but the law is full of arcane terms, and I was just happy to have the district court transcripts, whatever they were called.

I already knew that the lawyers for *Silverpalm* lost their case at the district court level. I also knew that they had appealed the district court's decision. I assumed that the *Apostles on Appeal* volumes were the basis of the appeals court deliberation. However, my brother Bill explained to me that the appeals courts regarded cases that they reviewed as taking place *de novo*—as "new," or happening for the first time. I had mistakenly assumed that the appeals court would begin where the district court had finished. I was wrong. There was no logical progression from the Navy Board of Inquiry to the district court trial and then from there to the appeals court review of the district court's decision. If my brother was correct—and I just knew he was, then I might slog through the nearly 1000 pages of the district court transcript and discover that the appeals court ignored it.

But I had no choice. I had to read the transcript carefully, and I ended up taking almost 100 pages of handwritten notes based on it. It was not the post-retirement entertainment I had planned for myself. However, the district court transcript was interesting and at times even a bit bizarre. How could I make sense of testimony so long and involved? Bill knew. He said that each side in the district court trial walked into the hearing room with a strategy. My task was to figure out what the two strategies were and then follow the lawyers as they implemented their respective strategies.

What I really wanted were the working notes of the lawyers. Bill laughed. "You'll never get those," he said. "Why not?" I wondered. "Because no lawyer wants to write down his or her strategy in case the judge gives the opposition the right to compel him or her to disclose it." "Then how," I asked, "will I ever know for sure what the lawyers were thinking and why?" "You won't. But there will be hints in the paperwork. You need to find them." Getting all the paperwork turned out to be a lot harder than I had expected. I had to fly to San Francisco and search the records of the National Archives branch in San Bruno, and even then I didn't find all that my brother said I should look for. But what I did find allowed me to understand the strategies of the opposing sides.

MORE BACKGROUND: THE OPPOSING LIBELS

To find the strategies of the opposing legal teams, I first read the libel statements filed with the district court. Remember that on 1 November 1933, the Silver Line's attorneys filed a libel against the U.S. government. That same day, the same attorneys filed a libel on behalf of *Silverpalm* against *Chicago*. The federal attorney in San Francisco, acting on behalf of the U.S. government, also filed cross libels against the Silver Line and against *Silverpalm* on 1 November. The attorneys for Silver Line also filed a petition for exoneration from or limitation to liability on 1 November. Though there were also libels filed against the Silver Line by the survivors of the three dead officers on *Chicago*, the legal dispute came down to one case with two parts. That is, which ship was responsible for the collision, and what damages would be awarded those injured (including the survivors of *Chicago*'s three dead) by the negligent ship?[219]

The initial libel filed by the United States placed the responsibility for the collision on *Silverpalm*, stating she "negligently and carelessly collided" with *Chicago*, damaging both ships. The libel also stated that *Chicago* "was guilty of no fault or negligence." *Silverpalm* was negligent because she didn't "maintain a proper lookout," was going too fast for the conditions of visibility, didn't sound the required fog signals, had engines that could not be reversed "until she was stopped in the water," and turned into *Chicago* as the cruiser was trying to turn away from her.[220]

The government's amended libel *in rem*, filed on 23 November 1933, described the collision in detail: *Chicago* was proceeding at moderate speed on course 350 deg. true when her officers "heard the fog horn of a vessel" on her starboard bow. *Chicago*'s captain then slowed her engines and stopped. "A freighter was then seen 2 points" on her starboard bow "on a course slightly converging. The *Chicago*'s rudder was put left to bring her to a course of 330 deg. true and her engines had been put ahead, and she was going at a moderate rate of speed," when *Silverpalm* "was seen approximately 2 points" on her port bow, "coming out of a fog at full speed" on a converging course. "No signals from the *Silverpalm* had been heard by the *Chicago*'s officers prior to seeing her." When they did spot her, they put the cruiser's engines "full astern, and she was given a full right rudder. The *Silverpalm* came on without substantially reducing her speed, and without changing her course until immediately prior to the collision." When the ships came together, "*Chicago* was slowly moving ahead in the water under 5 knots per hour, and the *Silverpalm* was moving at approximately 12 knots per hour."[221]

The answer to the government's amended libel *in rem* by the attorneys for Silver Line denied that the collision "was caused by the negligence or carelessness" of *Silverpalm*, and asserted that "*Chicago* was proceeding at a highly immoderate speed, not having any regard for the circumstances presented."[222] On her part, *Silverpalm* was not moving at full speed when she was first spotted by *Chicago*, and her counsel asserted that she did reduce what speed she was making before the collision. Silver Line's libel also denied that *Chicago* was slowly moving ahead in the water at 5 knots or less when the collision occurred and that *Silverpalm* was moving at "approximately 12 knots per hour."[223]

In their cross-libel, *Silverpalm*'s attorneys told a very different story about what had happened: At "about the hour of 8:11 a.m. … without any previous warning," the officers of *Silverpalm* "saw the cruiser *Chicago* loom up in the haze some distance ahead off the starboard bow." They realized "almost immediately" that "although the cruiser *Chicago* was on the starboard bow of the *Silverpalm*, the former's course was being

directed to starboard and directly across the bows of the *Silverpalm* in such a manner as to expose the port bow and side of *Chicago* to the *Silverpalm*." *Silverpalm*'s captain changed course to starboard (to his right) in an effort to pass the cruiser port-to-port, "although when first seen the *Chicago* was in a position where, had she directed her course to port, the vessels would have safely passed starboard to starboard." Because *Chicago* "was proceeding at an improper rate of speed under the circumstances presented, and, having changed her course, her bow crossed directly in front of the *Silverpalm* in such a manner as to cause a collision…"[224] That was it—*Chicago* was totally responsible for the accident.

It was obvious that the two sides were coming into court claiming no responsibility for themselves and total responsibility for their opponents. Recall that in mid-February 1934 Attorney Ira Lillick, acting for Silver Line, had proposed that his client and the U.S. government settle the legal dispute by having each side admit to fault (and hence to liability), thereby avoiding a trial. The government had declined to accept the offer of mutual fault. From that point on, it was "all or nothing" for the litigants.

The attorneys for both sides had agreed on 16 December 1933 to stipulate that the libel case and the damages case be consolidated, and Federal District Judge Harold Louderback had ordered that it be done. There was initially some doubt whether a libel for damages could be brought by the Silver Line (a British firm) against the United States under the provisions of the Public Vessels Act of 3 March 1925. The answer was that it could, provided that Great Britain would allow an American firm to sue the British Admiralty in a British court in a libel case similar to that of *Silverpalm* vs. *Chicago*. An American firm could indeed do that, and so the movement toward the court hearings proceeded.[225]

THE DISTRICT COURT HEARING: THE STAGING

Courtroom hearings are drama. Sometimes high drama; sometimes low and petty. They are performances, carried on by people trained to perform as advocates in front of judges and sometimes at the same time in front of juries. There are, therefore, actors and audiences, supplemented with a few critics and by a few essential "extras," especially the court reporter who creates a written record of the proceedings. Each advocate has a script and a story to tell while trying to refute the story of the opposing side. Certain trials are therefore ready-made for staging—for turning into films, plays, and memorable books. HermanWouk's *The Caine Mutiny*, already cited, contains a classic example of an exciting Navy courtroom hearing—a fictional hearing that was brought vividly to the screen.

The United States vs. *Silverpalm* was not expected to be that sort of emotionally laden case. Nevertheless, there was drama. Three members of *Chicago*'s crew had been killed—crushed and broken—and one had been severely injured, and the Navy Board of Inquiry had recommended that the U.S. government pursue a civil case against the Silver Line and a criminal case against *Silverpalm*'s captain. It was, from the Navy's point of view, a rerun of the tragic sinking of *S-51* in 1925 by *The City of Rome*. Yet the lawyers for both sides had to have been aware of the outcome of the case of the destroyer *Childs* vs. the schooner *Mills* in 1929, where the speed of *Childs* was the deciding factor for the court. As Federal District Attorney McPike told Attorney General Cummings on 2 November 1933, "You know, as well as I, what the courts hold in regard to speed of vessels in a fog." As we shall see,

speed in fog was a major issue in the negligence hearing—and beyond.

THE DISTRICT COURT HEARING: THE ADVOCATES

The opposing sides in the trial were represented by experienced professional advocates. They knew admiralty law—a complex array of decisions and rules without an obvious analog in the law for people, firms and organizations that stayed on land. You can see how seriously the two sides regarded the trial by considering the qualifications of the lawyers who represented them. On one side was Ira S. Lillick, a lawyer with substantial experience in maritime cases. Born on a farm near San Jose, California, Lillick completed his undergraduate education (including his education in law) at Stanford University in 1897 and that same year began his career as an attorney. He was also, for a time, what we today would call a "political activist" in San Francisco, campaigning for reform in local government. At the time of the 1934 trial, he was a senior partner in the firm of Lillick, Olson and Graham of San Francisco. He was also a member of Stanford University's board of trustees, where he served alongside former President Herbert C. Hoover.

Opposing Lillick was Esther B. Phillips, Assistant United States Attorney for the Northern District of California. Lillick's was a "traditional" success story—the young farm boy who worked hard and built a fine reputation as a lawyer. Esther Phillips was a similar case, but she was also practicing in a field where female lawyers were—to use a cliché of the time—rare as hen's teeth. After graduating from the University of California at Berkeley in 1909, she decided she wanted to pursue a degree in law. Though her father—a judge—advised against it, she saved her earnings from teaching school, gained admission to the School of Jurisprudence at the University of California, obtained her degree, and was admitted to the California bar "at the top of the list" in 1916. She was the first woman to serve as editor-in-chief of the *California Law Review*—and therefore "the first woman to edit a law journal in any American law school."[226] Selected as an Assistant U.S. Attorney in 1926, Phillips served after 1929 as the first woman on the Board of Governors of the San Francisco Bar Association. Her appointment as Assistant U.S. Attorney was not the consequence of a political decision but was due to her demonstrated ability as a lawyer.[227]

Both attorneys had been involved in the case since the collision occurred. Now was their time on stage. Libel cases can turn on points of law or on disputes about the facts—or on both. Attorneys Phillips and Lillick disputed the facts. They didn't dispute the law. For example, both sides acknowledged that ships encountering a fog needed to slow down or stop. But how much did they slow down on the morning of the collision? And when—if at all—did they stop? If they disagreed about what was done by the two ships and when it was done, then how could the court know which side was telling the truth?

The curtain rose on the trial in federal district court on 13 March 1934. The judge, San Francisco native Harold Louderback, had obtained a law degree from Harvard Law School in 1908 and then had gone into private practice. He served in the Army in 1917-1919 and then returned to San Francisco to practice law. In 1921, he was appointed a superior court judge in San Francisco. He held that position until being elevated to the federal bench by President Calvin Coolidge in March 1928. At the time of the libel hearing, Louderback was under a cloud. He'd been impeached by the House of Representatives in February 1933 for appointing incompetent and

corrupt receivers in bankruptcy cases, and he only narrowly avoided being convicted by the Senate that May. I'll come back to this point later on.

THE DISTRICT COURT HEARING: FIRST MOVES

The task facing Lillick and Phillips was to "educate" Judge Louderback without implying that he was not competent to rule on the maritime matter before him. Remember that they had been involved in the Navy Board of Inquiry's investigation while Judge Louderback had not. Consequently, their first task was to tell Louderback what their respective positions were. The government's argument was summed up in its initial libel and its libel *in rem*, both of which have been described at the beginning of this chapter. Counsel for *Silverpalm* had fired right back, denying negligence and carelessness. *Silverpalm*'s submission to the court said that *Chicago* was not moving at a "moderate speed and/or observing due and any caution under the circumstances." Quite the reverse; the cruiser was "proceeding at a highly immoderate speed…" That meant *Chicago* could not have been moving just before the collision at or below a speed of 5 knots as the government claimed. Moreover, *Silverpalm* was not moving at 12 knots as the government alleged. Each side in this case argued that the opposing side had gotten certain essential facts wrong.

Almost immediately, attorney Lillick asked the judge to exclude all witnesses from the court room except Captain T. A. Ensor, the representative of the Silver Line, the owner of *Silverpalm*.[228] Assistant Federal District Attorney Phillips agreed, but with one exception, and that was Navy Captain Frank B. Freyer. As Phillips informed Judge Louderback, Captain Freyer wasn't a "witness to any of the facts, but I expect to call him prior to the close of the case as an expert witness."[229] Phillips also formally informed the judge that the government was prepared to argue its case in the libel for responsibility and in the libel for damages.

Then it was time for the government to introduce its exhibits. A Mare Island Navy Yard draftsman presented the court with a large model of *Chicago*, with the area of the ship that had been damaged outlined. He also presented a model of *Silverpalm* built to the same scale. Under questioning by Attorney Lillick, the draftsman admitted that he had never actually seen *Silverpalm*, and Attorney Phillips reacted to this news by informing the judge that if Lillick objected to the use of the model in court that she would have it taken away.[230] Lillick, however, chose not to object. Then Phillips called as witnesses a Mare Island Navy Yard photographer and a commercial photographer. The first had taken photographs of the damage done to *Chicago*; the second had photographed the damage done to *Silverpalm*. I've included a few of their photographs in this paper.

THE GOVERNMENT'S WITNESSES

After these exhibits were accepted in court, Assistant District Attorney Phillips began taking testimony from the government's witnesses. The first one called to the stand was Vice Admiral Harris Laning. The admiral basically repeated what he had said to the Navy Board of Inquiry. However, Judge Louderback, who said he was familiar with most nautical terms, had to ask Laning just what he meant when he said that he saw a ship [later identified as *Albion Star*] "broad on the starboard bow" of *Chicago*. Laning explained that in "nautical terms if you want to

describe the position of something, …, you will say it is 10 degrees on the bow, 20 degrees on the bow and so on, until it gets around 40 and 50 degrees, and then you say it is broad on the bow."[231] This was the first time Louderback asked a witness to explain the meaning of a nautical term. It would not be the last time.

Fortunately for the government, Laning was an articulate witness, and Phillips knew how to take advantage of his knowledge and his ability to express himself. She had him point out the location of the "maneuvering bridge" and the flag bridge on the model. The pilot house, which was in fact the "maneuvering bridge," contained the devices necessary to control the ship, such as the wheel that controlled the rudder, the ship's compass, and the engine room telegraph. Duplicates of those devices were also housed within the armored conning tower. Below and behind the conning tower was the ship's main communications station, and down below that was the admiral's cabin. In his testimony, Vice Admiral Laning described moving from his cabin and then up through the flag bridge and continuing farther up to the signal bridge, which was a wing off the pilot house.

Under oath, Laning estimated the speed of *Chicago* and the other ships the morning of the collision and also estimated the distances between them. Attorney Phillips wanted the judge to know why Laning was confident of those estimates. And so she asked, "Has your training, and assignments to duty while in the Navy, given you any training in the estimating of distances and speed?" He acknowledged that it had, and then, when prompted by Phillips, explained how he and others developed that skill: "In order to insure that we may know at all times the distance from the ships near us we have two instruments on the bridge, one a stadimeter, and the other a range finder, a short range finder which we use for measuring the distance very accurately. We do this constantly, and in doing it and in checking up constantly we finally acquire the habit of being able to look at a ship and are able to estimate within a very few yards" its distance. "That is every day work on ships, and so we become very accustomed to estimating distance. The same relates to speed."[232]

District Attorney McPike had guessed that Laning's testimony would be significant, and he was correct. The only element of his testimony that was uncertain was time. Unlike Captain Simons, Laning had not consulted his wristwatch. Attorney Lillick did not question Vice Admiral Laning about time, however. Instead, he questioned him about speed—in this instance, about the speed of the *Albion Star*. He got Laning to admit that he hadn't seen any bow wave from *Albion Star*, and then he said, "I wondered whether during [the] 40 or 50 seconds" when *Albion Star* was in sight "you then had come to the conclusion that the *Albion Star* was proceeding at a more rapid speed than the *Chicago*?"[233] This might have led to questions that undermined Laning's confident assertion that he could estimate another ship's speed with accuracy, but Lillick did not follow up.

Lillick needed to. He was the underdog. There were three strikes against his client. The first was the nature of the diesel plant in *Silverpalm*. It had to be stopped almost completely in order to be put into reverse, but it could not be stopped quickly. The second strike was the behavior of Captain Cox of *Silverpalm* the day of the collision. Cox knew he needed to start slowing down his ship for some time before he needed his ship to stop, yet he didn't begin reducing speed when he first sighted *Chicago*. Instead, he hesitated. True, even Vice Admiral Laning, when he first saw *Silverpalm*, didn't believe a collision was inevitable, but he did not know that *Silverpalm* could not reverse her engines quickly, and he assumed that the ship he saw would not hesitate to slow and even reverse its engines in order to avoid striking *Chicago*.

The third strike against Lillick was the statement Captain Cox made when he came ashore after the collision. This statement, approved by Lillick's law firm, said that *Silverpalm* was moving at "reduced speed" and then "came on cautiously, sounding [her] whistle" when Cox sighted *Chicago* "a mile away."[234] Cox's words were at odds with those of the captain and officers of *Chicago*. Lillick obviously needed some means to cope with these three strikes against his client—as well as any other potentially negative information regarding the movements and speed of *Silverpalm* that might pop up during the trial. His strategy was to search for any information from witnesses that would put any part of the blame for the collision on *Chicago*.

Lillick eventually abandoned his effort to cast doubt on the veracity of Laning's testimony and shifted attention to Laning's decision to free *Chicago* and allow her captain to increase her speed in order to anneal the special new coating in her boilers. Lillick was direct: "It is a fact, is it not, Admiral, that had it not been for those tests you would not that morning have been running at eighteen knots an hour?" At that point, Assistant District Attorney Phillips interrupted: "Just a moment: Counsel is trying to get the witness to say what he would have done had he been captain of the ship."[235] Judge Louderback agreed with her, and Lillick began another way of asking the same question , but Laning cut him off by saying that the fleet's ships operated under a standing order to not steam above 12 knots.[236] That was the kind of order Laning could give—a general order on the cruising speed in normal sea conditions of all the cruisers under his command.

After a brief recess, Captain Herbert E. Kays of *Chicago* was sworn and seated. An essential part of his story about what happened the day of the collision was his account of what he ordered when he first sighted *Silverpalm* close aboard. Kays told Attorney Phillips that his first order was "Left rudder." He acknowledged that he couldn't "tell the time between that and the next order; it was a very short interval, probably less than half a minute," and then he ordered "Full right rudder." The judge asked, "When you said 'Left rudder' did that mean a full left?" Kays responded, "I don't remember whether I said 'Full left' or not. If I said simply 'Left rudder' they would not go full." Judge Louderback continued, "What would they do under the circumstances if you simply said 'Left rudder'?" Kays answered, "He [the helmsman] would come to 15 or 20 degrees on left rudder, and if I had said 'Full,' he would have come to 30 to 35 degrees."[237]

Phillips asked, "Had the *Chicago* had time to swing to the left rudder before you countermanded the order and ordered right rudder?" Kays responded, "No, I am sure she would not have." Phillips went on, "When you ordered 'Right rudder,' was that a full right rudder or a partial right rudder you ordered?" Kays answered, "Full right rudder." She then asked, "How many degrees did this mean?" The answer was "35 degrees." Kays could not recall whether he gave the rudder orders first or the order for the ship to go full speed astern first, but he estimated that the difference in time between the order for right rudder and "Full speed astern" was a matter of just a few seconds.[238]

Both Phillips and Lillick had monitored the testimony given to the Navy Board of Inquiry. But Judge Louderback had not, and so Phillips wanted to make sure that he understood how little time Kays had to react and how responsive Kays was when he grasped the danger to his ship. At the same time, both advocates and the judge had difficulty seeing in their minds the relative positions of the two ships. When *Silverpalm* reacted to the sight of *Chicago*, did she turn left (to port for her) or right (to starboard for her)? As that was happening, was *Chicago* also turning? Would the two ships have missed one another if *Chicago* had gone left (port for her) instead of

turning right? Louderback's later comments suggest that these questions remained unanswered in his mind.

When the testimony of Captain Kays continued the next day, 14 March, Attorney Phillips asked questions that allowed her to further "educate" the judge. She began by saying to Kays that "it might be useful if you would explain a little more in detail to the court what you mean by the point at which the ship turns under a change of course." In other words, what really happened when the rudder was turned? Kays answered, "When the rudder is put over, the first motion of the ship is, for instance if we give her a right rudder, … a bodily translation to the left, and then the head of the ship turns to the right, and she moves around the course. The point at which she turns about is the pivoting point."[239] The 1944 edition of Knight's *Modern Seamanship*, a detailed manual on handling and navigating a ship that was used for decades by the United States Naval Academy, defined a ship's pivoting point as "That point of the ship about which the ship turns when the rudder is put over. The position of this point varies with different ships. Normally it will be from one-fourth to one-third of the ship's length from the bow…"[240]

Why did this concept matter? Because a ship like *Chicago*, when making a turn, actually seems to be in a skid as it swings into and through its turn. What traces the path of the ship in the turn is its pivoting point. The ship does not turn like an automobile, and that fact needs to be kept in mind if we are to understand the actions of the captains of *Chicago* and *Silverpalm*. Automobiles steer from the front; their front wheels can turn sharply while also propelling the whole vehicle through the turn.

To think that a ship—particularly a large ship—turned the same way in 1933 was to make a serious error. As Knight's *Modern Seamanship* explained, "When the rudder is put over at the start of the turn, the stern will first move away from the direction of the turn. The whole ship then 'crabs' off in the same direction as it slowly begins to turn. Due to her momentum along her original course, the ship will range ahead along that course for two or three [ship] lengths before beginning to gain ground in the desired direction."[241] This had to be explained carefully to Judge Louderback through questions asked of Seaman First Class Julius K. Deming, the man at the wheel of *Chicago* when the collision occurred.[242]

Once you realize how large ships of that era turned, you can understand why Captain Kays first ordered "left rudder" and then quickly amended his order to "right rudder." The command "left rudder" might have been the proper one if there had been room to make the course change. But without adequate room, his goal became one of getting out of the way of *Silverpalm* by initiating a violent maneuver coupled with an order to back his ship's powerful engines. The international rules governing the movement of ships at sea required ships encountering one another head-to-head, or "head on," to pass one another portside to portside. If that wasn't possible given the conditions of visibility, then both ships were required to "take such action as will best aid to avert collision."[243]

The 1918 edition of Knight's *Modern Seamanship* summarized Kays' dilemma: "One of the most trying positions in which an officer can find himself is that of holding on [continuing on course] with a prospect of collision where the other vessel ought to keep clear but takes no action to do so."[244] Ideally, one ship would begin a course change and the other ship would see that and begin a complementary change.

For the moment, Attorney Lillick set aside how *Chicago* maneuvered. Instead, with Captain Kays on the stand, he chose to focus on *Chicago*'s speed. Almost casually, Lillick asked, "You were

using a table of standard acceleration that morning, were you not?" Kays agreed that *Chicago* was, but he also took time to explain what a "table of standard acceleration" was and how it was created. It was a table showing the relationships between the speed at which the ship's propellers revolved and the speed of the ship through the water. Over time, this relationship was measured, and then an average value of the relationship was plotted "to obtain a calibration curve, and from this curve a table of revolutions required for any speed [was] made up…"[245] *Chicago*'s enginemen increased or decreased the revolutions of their engines according to this table. An actual speed-revolution table is reproduced below.

When, on the morning of the collision, *Chicago* began increasing her speed from 12 to 18 knots, her enginemen followed a standard protocol to gradually but steadily increase their turbine engines' revolutions. As they did so, they kept track of what they were doing on specially made log sheets. Lillick would return to those log sheets later in the hearing. What about stopping? Did a ship have to pass through or down a table of deceleration in order to stop in an emergency? Captain Kays said "no." When the bridge rang up "Stop" on the engine room telegraph, the enginemen closed their throttles immediately and then noted that action on their log pages.[246]

Speed-Revolution Table for Heavy Cruisers

Knots	2/3 Standard Speed	Standard Speed	Full Speed
8	51	76	121.5
10	63.5	94	140
16	100	149	196
18	112	168	216
20	125	187	236

Source: U.S. Exhibit No. 7, Case 21666-L, RG-21, Box 1726, Folder "USDC, 21666-L," NARA

Lillick next brought up *Albion Star*. When Captain Kays heard her whistle off *Chicago*'s bow, he ordered his ship to stop engines. "Probably two minutes" later, *Albion Star* emerged from a fog bank to the right. As Kays recalled, "She appeared plainly." He quickly realized that *Albion Star* and *Chicago* were on converging courses as both headed northward.[247] Kays then decided that "I could come left and clear [*Albion Star*], and I could see well ahead, so I decided to go ahead." He added, "I came to the conclusion that it was safe, as far as she was concerned, to go ahead; out on my port bow I could probably see ahead a mile, and I decided to get by her as soon as possible."[248]

Kays did not know that *Silverpalm* was about to emerge from a fog bank to his left, and she would only be about 700 or 800 yards distant when she did. Lillick was able to get Kays to admit that he had "no clear recollection of looking at both [*Albion Star* and *Silverpalm*] at the same time."[249] Lillick's questions suggest that he did not have a clear picture in his head of the relative positions of the three ships—*Chicago*, *Albion Star*, and *Silverpalm*. Through his questions to Captain Kays, he was trying to suggest that the captain didn't either, and that therefore *Chicago* was vulnerable to the sudden appearance of a ship from the left—the *Silverpalm*. It wasn't enough for Kays to say that the way ahead was clear. *Chicago*'s captain had also to think about what he could do if another ship suddenly appeared close by.

LILLICK: WHO'S ON FIRST?

In his effort to unearth mistakes made by *Chicago*'s captain and certain members of his crew, Lillick at times ran into trouble because of his lack of knowledge about how much the judge knew how a ship like *Chicago* worked. For example, when the helmsman, Seaman Julius K. Deming, testified that Captain Kays had ordered, "Left, 330," Lillick asked, "When you commenced to execute the order left 20 degrees, did you throw your rudder full over and commence to catch the swing, and then catch her as she returned over with a return rudder?" Deming answered, "I just put it in 15 degrees left rudder." Lillick responded, "Instead of 20?" … "Why did you put it on 15 instead of 20?" Deming answered, "Fifteen is standard rudder…" Lillick went on, "Was the order 20 degrees left from your course?" Deming: "Repeat that." Lillick: "My understanding was that when you were steering a 35 degree course the order was left 20 degrees. Am I right about that?" Deming: "No, they [sic] did not say that, he just said, 'Left, and the new course will be 330.'" Lillick: "Then you turned your rudder what you think is a standard turn, to get your course 15 degrees left. How long would you have left that on a 15 degree change before adding the other five degrees?" Deming: "Adding what five degrees?" Lillick: "The difference between 15 and 20. You do not understand that?" Deming: "No."

Lillick, obviously frustrated, then said, "What I am trying to visualize is, because I am not accustomed to handling the rudder, the difference between the 15 degrees that you are talking of or have testified to as the standard change on your rudder, and following that with the 20 degree order that you had on your course. Will you tell me the difference so that I will understand it?" Deming: "I do not understand what you are talking about." At that point, the judge intervened, asking "Why didn't you make a 20 degree course instead of 15?" Deming: "Twenty degrees of the rudder?" The judge: "That is what he is talking about." Deming: "I told you I used 15 degrees unless I received orders for more." The judge: "Didn't you receive orders for more?" Deming: "No."[250]

This sort of confusion would set in again. Lieutenant Robert Minter, USN, testified after helmsman Deming. Minter had been Officer of the Deck (OOD) at the time of the collision. His authority to order changes of course or speed and respond to any emergency ended once Captain Kays entered the pilot house. As OOD, however, Minter was responsible for recording what happened while he was on watch, and he did so the day of the collision, writing out his observations after his watch ended at noon. Attorney Lillick had Minter read his logbook entry for 24 October 1933. It basically contained what the Navy board of inquiry had accepted as an accurate account of events. As Lillick brought out in his questioning of Minter, the Lieutenant had drawn on the quartermaster's rough log, which was a series of notes in pencil describing what was done on *Chicago* and when. In examining the quartermaster's rough log, Lillick had noticed an erasure. Minter had not noticed it, and had used words apparently written over the original words for his own logbook.

Lillick questioned Minter closely about it—too closely and at too great a length, in attorney Phillips' view. She thought Lillick was just fishing. As she told the judge, "If counsel goes into every question he can possibly conceive of on cross examination we will be here, I believe, until the first of July." Lillick said that he had not intended to drag out his cross-examination of Lt. Minter, but then he did exactly that. In questioning Minter about *Chicago*'s speed, he

said, "[W]e have had records indicating the ringing up of two-thirds speed, with standard speed, for a portion of the time that morning, 12 knots an hour. What speed does the *Chicago* make, running at standard speed of 12 knots an hour, when she is operating under a two-thirds bell?" Phillips immediately spoke up: "Just a moment; I object to that as unintelligible, and I object to it as not proper cross-examination." Judge Louderback reacted by saying, "I do not understand the question, and I am not in a position to know as to whether the witness knows."[251] With that, Lillick more or less finished with Lt. Minter. His effort to find weaknesses in Lt. Minter's testimony was over.

A RETURN TO SANITY

Attorney Phillips next called Rear Admiral (formerly captain; he had been promoted on 1 March 1934) Manley Simons. Simons had been Vice Admiral Lanings's Chief of Staff at the time of the collision, and he had commanded *Chicago* from 10 March 1931 until 25 March 1933, when Captain Kays succeeded him. Simons' testimony to the Navy board of inquiry has already been covered, and in the hearing on 15 March 1934 Attorney Phillips went over it again. As she well knew, one reason his recollection of events was important to the board of inquiry and, later, to Judge Louderback was the fact that Simons consulted his wristwatch both before and then at the time of the collision.

Establishing times as accurately as possible mattered to both sides in the case, but especially to Attorney Phillips. She wanted Simons' testimony to establish as fact the government's assertion that, at the time of the collision, *Chicago* had either stopped in the water, was moving ahead slowly, or was actually reversing, as Captain Kays had ordered. Simons first testified that the Navy's Board of Inspection and Survey had "repeatedly noted that the *Chicago* was faster in getting action to signals to the engine room than any other cruiser that [the Board] had tested."[252] Moreover, Simons had actually tested the ability of the steam turbines in *Chicago* to bring the ship to a stop. At a speed of five knots, *Chicago* could be stopped between 36 and 42 seconds from the time the order was sent via the engine room telegraph. Even at high speed—33 knots—it took just from 110 to 135 seconds to stop the ship after "full astern" was ordered.[253] Once her turbines were reversed at the order of "full speed astern," she would travel 1000 yards in two minutes before stopping.[254] If the judge accepted as true Simons' testimony, then he could understand why Captain Kays had ordered right rudder and then followed that order with "reverse" once he realized that his ship would likely be struck by *Silverpalm.*

Attorneys McPike and Phillips had hoped that the Mare Island shipyard could repair *Chicago* in time for trials to be run with her before the district court case convened, but that was not possible. Their back-up plan was to run trials with cruiser *Louisville* (CA-28), a sister ship. Accordingly, Phillips temporarily excused Rear Admiral Simons and began examining Lieutenant Commander Robert C. Starkey, *Louisville*'s navigator. Starkey described the trials run with *Louisville* on 6 March 1934 near San Clemente Island. The cruiser began the trials while steaming ahead at 18 knots. Then the ship was stopped; next—after two minutes—the ship was ordered ahead at 12 knots; at three minutes, the order "ahead standard" was given; finally, at four minutes, the engines were put at "emergency full speed astern." This maneuver was an effort to duplicate the movement of *Chicago* just before she collided with *Silverpalm*.

Attorney Phillips aimed to show that *Chicago* was in fact moving ahead very slowly when the collision occurred. To do that, she took

Lieutenant Commander Starkey over what had happened when *Louisville* tried to duplicate *Chicago*'s performance. She asked Starkey about the readings from *Louisville*'s "Sal" log. The Sal log was a mechanical device attached to the hull of the ship that used the principle of a Pitot tube to measure the ship's speed.[255] Changes in the pressure of the water entering the tube could be translated into the ship's speed through the water. The readings of the Sal log could be used together with the records of the revolutions of the ship's turbines to graph an accurate picture of a ship's changes of speed.

When his turn to cross-examine the witness came, Lillick took time to cast some doubt on Starkey's expertise. For example, he was able to have Starkey admit that he "never had any experience in the engine room." Starkey also admitted that he and other members of the crew of *Louisville* knew when the trial was run that "somebody was going to have to testify,"[256] and Lillick knew that he could build on this testimony to argue that the trial with *Louisville* had not been fair. Lillick had never granted that trials with *Louisville* were representative of what *Chicago* had done the day of the collision. *Louisville* might be identical to *Chicago* in many ways, but what really mattered when you came down to it was what Captain Kays and his subordinates had done with their graceful ship under the pressure of events.

The court adjourned on 15 March and reconvened four days later. The first witness was Ensign John R. Leeds, a 1932 graduate of the Naval Academy. Leeds and Seaman Fred Connarn were stationed in the bow of *Chicago* just before and during the collision, and he repeated much of what he said to the Navy Board of Inquiry: that at the moment the ships collided, *Chicago* was almost dead in the water, that he hadn't heard any whistles blown by *Silverpalm* until after the collision, but that he had in fact heard several whistle signals from his own ship before the accident.

Then Attorney Lillick asked Leeds whether he recalled telling the Navy Board of Inquiry that he estimated *Chicago*'s speed at five knots when he sighted *Silverpalm*. Leeds said yes. Then Lillick said, "You have changed your mind since about that, have you?" Leeds said that he had. Lillick also asked Leeds if he had looked over *Chicago*'s side to see if *Chicago* was still moving ahead. Leeds said, "No, I did not." Then Lillick responded, "And yet you told me that you remember looking over the side and that she was dead in the water."[257] Leeds admitted that he had. Lillick had skillfully maneuvered Leeds into discrediting some of his own testimony.

Lillick then turned to Seaman Fred Connarn, who had been standing with Ensign Leeds at the bow of *Chicago*. He asked Connarn about the fog. Was it thicker in one direction—the direction from which *Silverpalm* approached *Chicago*—than in any other? Connarn said no. Had Connarn turned around to look up at *Chicago*'s foremast? No. But Connarn remembered that it was so foggy that he could not see the sun.[258]

Had Connarn and Leeds sighted *Albion Star*? Yes, and both watched that ship as it went out of sight ahead of *Chicago*. Perhaps without intending to, Attorney Lillick got Connarn to corroborate the government's claim that *Chicago* had stopped when *Albion Star* was sighted. As Lillick said, "as I understand you, you were, up to the time when you saw [*Albion Star*] going faster than she was, and then she pulled away from you afterwards, is that right?" Connarn answered yes, clearly implying that *Chicago* had stopped or at least slowed significantly.[259]

Then Lillick asked Connarn how long it took for *Silverpalm* to emerge from the fog. Connarn said, "A matter of seconds." Lillick acted surprised, and came back with, "Yet you have no idea how far away she was?" Connarn answered no. Then Lillick asked, "How many lengths of the *Chicago* away was the *Silver Palm* when you first saw

her?" Connarn could not say. At that point, Attorney Phillips spoke up: "That is objected to as requiring the witness to give an estimate of the distance that the witness has repeatedly said he could not do, and I object to that as asked and answered." Lillick rephrased his question to Connarn. "Is it because you are not willing to tell me how many ship lengths away the *Silver Palm* was when you first saw her, or is it because you don't remember?" Connarn answered, "I couldn't tell you. I don't know. I couldn't estimate a thing like that."

Then came this rather bizarre exchange between Lillick and Connarn.

> Lillick: So that it is your testimony that though the *Chicago* is 600 feet long, you don't know whether the *Silverpalm* was one length of the *Chicago* or 20 lengths away?
>
> Connarn: No.
>
> Lillick: You don't know whether she was one length away or 100?
>
> Connarn: No.
>
> Lillick: You don't know whether she was one length away or 1000?
>
> Connarn: No.
>
> Lillick: That is all.[260]

The judge made no comment about this except to ask Connarn, "Your duties required you to keep looking ahead didn't they?" The answer was yes.

Lillick had so far searched without success for an opening in the government's case. He'd examined the officers on *Chicago*'s bridge at the time of the collision, and he'd questioned the lookouts. They had not given him an opening. His next field of inquiry was the sailors in *Chicago*'s engine room.

LILLICK FINDS HIS OPENING

The first witness from *Chicago*'s after engine room (engine room C-2)[261] was Chief Machinist John L. Kershaw. Attorney Phillips had Kershaw present his credentials to the court: He was a 28-year veteran of the Navy, and he had served on the cruiser since mid-August of 1930, before the ship was commissioned. Kershaw, under Phillips' questions, then explained how the engines were controlled by trained sailors who regulated the amount of steam introduced into the ship's turbines. There was one sailor manning each of four throttles in the C-2 engine room. The sailor controlling the number 2 throttle was the "leading throttle man." This individual, with more experience than the other three, led the response of the others to instructions from the bridge by introducing steam that would produce the rpms needed to reach a certain speed.[262]

Imagine controlling the speed of your car with the tachometer alone. You don't—not unless you know the speed your car will be going given any particular setting on the tachometer, and you won't know that unless and until you build a table that relates engine rpms to actual speed. The throttle men on *Chicago* had such a table—an "acceleration table." Attorney Phillips asked Kershaw to explain how such a table was used. His answer was as follows:

> "If we have a standard speed of say 15 knots, and they ring up one-third, the engine throttle would be opened and the speed would come up to 50 revolutions on the dial in front of the throttle man within the first minute. Following that we would remain at that speed until two-thirds speed was rung up, which would be 100 revolutions a minute at 15 knots.

Throttle board of battleship Missouri (BB-63) on the left. The wheel with red spokes controls steam to the turbines when the ship goes astern. The wheel with green spokes controls steam to the turbines when the ship goes ahead. Note the throttleman's log on the clipboard. On the right are the engine revolution counter and engine order telegraph indicator from destroyer The Sullivans (DD-537). There is motion picture film on You Tube of a throttleman actually changing his throttle and marking his log on destroyer escort Charles E. Brannon (DE-446).

> As the throttle man would open his throttle a little more, and [sic] at the end of the second minute he would be at 15 knots. At the end of the third minute, if standard speed was rung, he would be up to revolutions corresponding to 15 knots and in that case it would be approximately 145 revolutions, and then each knot from there on would be so many revolutions per minute."[263]

As Kershaw told Phillips, the throttle men had no way of telling the ship's actual speed through the water. One reason new warships were put through careful trials was to compile the information needed to create the acceleration tables. In her examination of Kershaw, Phillips was again "educating" the judge. She had to explain through witnesses why engine rpms mattered—how they related to *Chicago*'s speed—before she could move to the climax of Kershaw's testimony, where he said that "All four throttles were going astern in excess of 100 revolutions" at the time of the collision with *Silverpalm*.[264]

Lillick had a strategy for dealing with Kershaw's testimony. First he got Kershaw to admit that the four throttle men in the engine room were not following the standard table of acceleration at the time of the collision. The number 2 throttle man was setting the pace of rpms based on his own judgment, and Kershaw had to remind him to follow the acceleration table. Then Lillick made sure the judge understood that each throttle man was responsible for noting changes in his engine's revolutions in his own "bell book," a log of what changes in rpms were made in response to orders from the bridge. And then Lillick went over the bell book of the number 2 throttle man in detail minute-by-minute, starting at 8:00 am.

The other throttle men were supposed to follow the lead of number 2, but had they? If they had, then did they properly note that in their bell books, as they were required by Navy regulations to do? In reviewing the bell book for the number 3 throttle man, Lillick compelled Kershaw to admit that entries for the number 3 engine did not make sense—the engine rpms for two-thirds speed and for standard speed were almost the same, and they should not have been.[265] Moreover, Lillick asked Kershaw about a Second Class machinist's mate by the name of Haynes. Haynes was apparently in the engine room to assist First Class machinist's mate Wommack, who was throttle man for the number 3 engine. As Kershaw stated, Wommack "had been on the throttle a short time and possibly Haynes had gone down to the engine room to help him handle

the log."[266] But whoever made that bell book entry, it was incorrect.

Could a correct figure be ascertained? Yes, said Kershaw, with the information from the "rough log" of the number 3 engine that was kept by the "turbine bearing man." This log contained engine rpms, engine oil and steam pressures, and engine temperatures.[267] Lillick, however, had forced Kershaw to admit that the records shown to the court for number 3 engine were not reliable. Were there other errors? At that moment, the judge didn't seem to care. He adjourned the court until 10:00 am the next morning, 20 March.

Lillick went after Kershaw's testimony right away once the trial resumed. His argument was that the bell books for engines 1 and 4 showed a certain sequence of actions in response to a sequence of orders from the bridge. The bell book for number 3 engine did not agree with those for engines 1 and 4. What was correct? Kershaw said that though there appeared to be a mistake in the bell book for engine 3, that engine was in fact synchronized with the others. The mistake was in the way numbers had been entered into the bell book. Lillick then drew the logical inference. As he said to Kershaw, "Then you deem your recollection of the events that morning, with your observation of what occurred on the throttle [sic] of four different engines, as being more accurate than the written record made by the throttle man himself at that engine?"

Phillips objected. As she put it to the judge, "this witness has stated that he never made any of these records himself. Now [Lillick] is asking him to superimpose upon these records his conclusion as to the method of taking them without taking into consideration the testimony of the men themselves." Lillick responded that "It is my understanding in a cross examination of this character, counsel cross examining has the fullest latitude with respect to testing the memory of a witness, and in testing that memory to compare his testimony with written records, and ask the witness in the face of those written records whether he still would say that his recollection is best." Judge Louderback's view was that what Lillick was asking was whether Kershaw was certain of his testimony. When Lillick asked Kershaw if he was, Kershaw said he had no uncertainty about it.[268]

The challenge that Phillips made to Lillick's cross examination of Kershaw was just the first of several. Phillips even accused Lillick of misquoting a witness's testimony.[269] Their exchanges over Kershaw's testimony were serious. The Navy Board of Inquiry had accepted as fact that the evidence of the *Chicago*'s throttle bell books was correct. Had the Board made a mistake?

Before the district court, Lillick really only had two avenues of attack against what the government was claiming. His first avenue—against the testimony of senor officers such as Laning and Kays—had led nowhere. So he went after the engine room records. As he could have said—and indeed would imply—the ship's officers might have given sensible orders, but were those orders in fact executed properly and promptly by the engine room personnel?

What followed in the trial was an effort by Lillick to find errors in the documentation and testimony of the men responsible for the engines. Yet to highlight an error or errors, he had first to do what he had already begun to do with Chief Machinist Kershaw, which was to explain in detail to the judge—again through witness testimony—the way that orders were received and executed by the men responsible. This required Lillick to draw out from Kershaw and others a mass of particulars, such as which engines drove which propellers, whether there was one engine annunciator in the pilot house or two, and just how the throttle men adjusted the steam to the engines. Lillick kept probing. Was there a

deceleration table as well as an acceleration table? Why did it matter? Who drew up the tables? There were two engine rooms on *Chicago*. Was Kershaw aware of what was happening in both?

Even Judge Louderback queried Kershaw. "There are discrepancies in these records, are there not?" Kershaw admitted that there were. "Haven't you a regular system on the warships of keeping records?" Kershaw: "Yes, but in time of emergency your whole mind is on carrying out the orders, in stopping the ship or reversing. Your secondary consideration is the revolution counter and the bell book." Louderback: "Have you known of other instances of discrepancies in the records?" Kershaw said yes, and that the differences were usually caused by differences in the various clocks that were at use in different parts of the ship.[270]

After questioning *Chicago*'s chief radio electrician Warren S. MacKay, Lillick watched attorney Phillips take testimony from Machinist's Mate First Class Frank P. Davenport. Davenport, who had served on *Chicago* since 9 March 1931, was in the forward engine room (C-1) "reading the press news" after completing his 4 am to 8 am watch. When he saw "emergency full speed astern" on the engine room telegraph, he "started the main circulator and told the throttle man [on engine 4] to open up, to give her everything they had, and after I started the main circulator I assisted him on the throttle for he was logging his bells." Phillips wondered, "Is it unusual for you to be in the engine room off duty?" Davenport said it wasn't, that he "assisted the chief machinist's mate in the engine room, looking out for the work" and that he "would go down lots of times when I was off watch and see if anything needed to be done."[271]

Lillick asked Davenport if he gave copies of the "press news" to the throttle men. The answer was no. Did Davenport read out loud from the "press news"? No. Had Davenport been talking to the throttle man on engine 4 at the time of the collision? No. Had Davenport handled the throttle before the ships collided? Yes. Why? So that the throttle man could enter his changes on his bell sheet. Lillick had the bell sheet. Had the throttle man actually made his entries on that sheet? Davenport said yes.[272]

The next witness called to the stand was Chief Machinist's Mate William P. Birchmire, a 16-year veteran of the Navy, who was in charge of *Chicago*'s forward engine room at the time of the collision. He told attorney Phillips that he noticed that the engines were in fact going astern at "about 120 revolutions" when the two ships came together. He also revealed to her that he was responsible for all the entries in the bell books of the throttle men. When she asked him what he did with the bell books at the end of his watch at noon, he admitted that he had signed the sheets for the throttle men. He also noted that he had not seen the bell books since the day of the collision.[273]

Lillick cross examined Birchmire regarding erasures in the bell book for number 4 engine. Birchmire admitted that the throttle men were not allowed to erase any entry. If a throttle man made a mistake, he was to make a correction in a note in a space on the sheet of the bell book. Lillick: "Your instructions to your men are never to erase a record of this sort [sic] are they not?" Birchmire: "Yes." Lillick: "You now have no independent recollection of [an erasure] before you signed [the bell book]?" Birchmire: "No." This was the admission that Lillick had been waiting for—evidence that at least a few of the bell book entries had been changed after they had been first written down.[274]

What had happened? Lillick asked Birchmire if Davenport had entered the engine room "that morning as one of the boys to see his friends at the throttles and chatted to them?" Phillips

jumped on that, asserting with some heat, "That is an unworthy suggestion, one that is not warranted, and I object to it." Lillick said he'd withdraw the question if the judge ruled that it was improper. The judge asked Lillick to rephrase it, which Lillick did.[275]

I was surprised to read that the next day, in court, Attorney Phillips told the judge that "I was quite wrong in objecting to Mr. Lillick's question to Mr. Birchmire; he was right and I was wrong. I do not know whether I so stated when I finished Mr. Birchmire's testimony—I don't know as I used the word 'apology' but I intended to convey that to your Honor." Lillick's response was gracious: "… I feel that it is very unusual for counsel on the other side to do what Miss Phillips just has done, and I wish to express to Miss Philips before your Honor my appreciation of the manner in which she has treated counsel on the other side…" Phillips wrapped up this exchange before the judge by saying, "The best way to admit a mistake is to own up to it."[276] As a layman, I was surprised that Phillips would apologize. However, as my brother pointed out, she was wise not to irritate the judge. Lillick could risk doing that.

Phillips then called Lieutenant Commander Carl W. Brewington, Chief Engineer of *Chicago*'s sister ship *Louisville* (CA-28), to the stand. Her goal was to explain to the judge why tests had been done in *Louisville* and what they had shown. Once she had done that, Attorney Lillick asked Brewington questions about the manning of *Louisville*'s engine rooms, and then he asked, "You have heard, have you, Mr. Brewington, that at the time of the collision on the *Chicago* there was another man in the after engine room named Haynes with the number 3 throttle man?" Brewington answered that he had never heard that. Lillick went on, "It is not usual on the cruisers to have men not a part of the actual working force at the time, in the engine room, is it?" Brewington said it was not, "unless there are some of the men attached to the engine room that are off watch overhauling the machinery." Brewington also noted that not allowing men not on watch to be in the engine room was not a regulation, but it was "not according to good practice …" and "It should not be done." Lillick would return to this matter later that same day, when testimony was taken from Lieutenant Commander Ernest B. Colton, Chief Engineer of *Chicago*.

Colton had joined the crew of *Chicago* before she was commissioned. He was for 14 months the assistant engineer, and he had served as chief engineer for two years. Phillips led him through his account of his actions when the two ships ran together, and she also drew a great deal of technical information from his testimony. In particular, she had him explain in detail what a throttle man did while manning his station: "His first duty of course is to carry out the orders of the captain, that is, he answers the bell, the signal received from the bridge, sets the engine as the captain wishes, adjusts the circulating pump and the auxiliary steam ready to answer the next signal. In addition to that he is required to enter to the best of his knowledge the reading of the revolution counter; when these signals are received he naturally carries out the captain's orders first and then his bookkeeping later. He enters the reading to the nearest minute. There may be an error of 58 seconds in any reading, as 29 seconds before and 29 seconds after, at which he would enter the same minute."[277]

Phillips asked whether Colton relied on bell book readings. Colton: "Not unless I actually observe the recording of the data." "Why is that?" she wondered. He responded, "It is impossible for one throttle man to carry out all his duties and get a perfect laboratory record of engine room counters." What qualified a sailor to serve as a throttle man? Colton, of course, gave her the answer that she expected: "A steady man, …, and able to handle the throttle quickly… in other

words, I want a good mechanic there that understands the engine and can handle the throttle quickly." Phillips: "Do you have in mind any qualifications as to their ability to keep books?" Colton: "No, I am not interested in that."[278]

Lillick was not about to let Colton get by with that response. He led Colton through a close examination of the bell book for number 4 engine, asking Colton to identify—and swear to—an erasure. Colton did say that the likely erasure identified by Lillick was probably an erasure, but he also said that he could not and would not swear that an erasure had been made unless he saw it done.[279] That led to a brisk back-and-forth between Phillips and Lillick. She objected that Lillick was asking the same question again and again. Lillick responded that "I have a right, following the witness' reluctance, apparently, to swear to a thing, his opinion as to it." The judge allowed the questions.[280]

Colton was a key witness. His competence was an essential element of Phillips' argument. Lillick was trying to undermine that image of competence by suggesting that Colton was arrogant. At one point, Lillick put the following to Colton: "It has been suggested, Mr. Colton, that with respect to the efficiency of the engine room crew, in rating your men did you rate them at all with respect to the action of the men with respect to these [the bell book] sheets?" Colton shot back, "No, I did not want bookkeepers; I wanted operating engineers."[281] After sparring with Lillick for additional minutes, Colton stated that "when the Navy Department wants accurate data, they send trained observers to the ship, who have nothing to do but read the [revolution] counters. For instance, on our official trial they sent 20 extra trained observers so that each man would only have one thing to do." Lillick reacted to that by asking, "Because the efficiency of your throttle men is defective?" [282]

In her redirect examination of Lieutenant Commander Colton, Attorney Phillips asked, "Are the written instructions by the department of engineering of the Navy as to the entries in the bell book, mandatory, or directive?" Lillick immediately objected, arguing that any answer Colton gave would be "purely a conclusion." Phillips responded that "The rule of this court has always been, …, that the interpretation of instructions by a department of the Government having the enforcing of those instructions is admissible in evidence." She went on to remind Judge Louderback that he himself had ruled in favor of her argument in earlier cases. And she added, "the Departmental construction of regulations is admissible in evidence, which your Honor has had raised in the tax cases."[283]

The judge allowed Phillips to proceed, but she nonetheless reframed the question, and then, after asking it and hearing Colton's response, she queried, "Do you regard errors in bell book entries as disregarding of orders?" Colton answered, "I do not." Phillips: "Have you ever subjected a man of your staff to discipline for errors in bell book entry?" Colton: "I have not, and never will." Phillips: "Have you ever punished or disciplined a man for making an erasure in bell book entries?" Colton: "I have not." Judge Louderback intervened at that point to note that Colton was only speaking of accidental errors.[284] Colton agreed, saying that he would dismiss any sailor who "made an erasure to cover something up that was wrong."[285]

Attorney Lillick wasn't done yet with the distinction between "mandatory and directive" instructions, and so Lieutenant Colton gave him a short lecture on the difference: "Mandatory instruction is given either point blank or when it is an order that allows no discretion… A directive order is if the captain said, 'We will get away at 10 o'clock tomorrow morning', I would be ready to get under way at 10 o'clock tomorrow morning." If he said "make as much speed as you

can to get ready" that would be a directive order. With a mandatory order I would have no discretion in using my judgment. The decision has been made."[286] That answer didn't satisfy Lillick, and he wondered if Colton could remember a time before the collision when there were corrected errors on three of the bell book sheets at the same time.

What Lillick was getting at was a near collision between *Chicago* and a commercial tanker on 20 July 1933 as *Chicago* was leaving San Francisco harbor in a heavy fog. Phillips objected that asking Colton about that encounter was not proper cross examination. As she said, "I think the examination now is proceeding beyond all lawful bounds of cross examination, and I make that objection." Lillick came back with an explanation for his questions: "Your honor will remember that in testifying to the erasures upon the bell sheet for October 24 [1933] … My next question was whether he [Colton] had ever, on a similar occasion, known of such erasures, and he said he had never known of a similar situation. I now propose to contradict that statement by showing the witness records of his own ship on another occasion and ask him whether, … he still wishes to stand by his other statement. I am not offering it for the purpose of bringing into the record what happened on the other occasion at all."[287] Phillips objected that the information from the incident of 20 July 1933 was "immaterial, irrelevant and incompetent." Lillick was trying to introduce information that had "no relevancy to the issues in this case."[288] Judge Louderback ruled that what Lillick wanted to introduce as evidence be received as an exhibit.

THE SWIMMING POOL SIMULATIONS

That was essentially the end of Lieutenant Commander Colton's testimony. Attorney Phillips next began questioning Baldwin M. Woods, a professor of mechanical engineering at the University of California. The government had commissioned Woods and one of his colleagues to conduct model tests in a swimming pool at the University. Given the tests, and regarding the positions of the two ships after they collided and then separated, what must have been the speed of *Silverpalm* when she struck *Chicago*? Professor Woods and his colleague suggested—based on numerous trials with their models—that *Silverpalm* was moving at a speed of from 10 to 12 knots and that *Chicago* was moving at either one knot ahead or one knot astern. Lillick probed in detail what Woods and his colleague had done and then questioned the value of the model trials.

The analytical basis of the model tests was an abundance of experience with scale models in towing tanks. Naval engineers had learned that the results of such trials could be meaningful for full-scale ships. If correctly built and weighted, the models would act like real ships, and the U.S. Navy's towing tank in Washington could actually simulate wave action to give designers and engineers information about how various hull designs would behave. Lillick did not question that the towing tank trials were reliable, but he did ask question after question of Professor Woods in order to highlight for the judge any sloppiness inherent in the trials conducted in the swimming pool.

For example, how had the models been propelled? The answer was that Professor Woods and his colleague used rods and string to position the models and then set them in motion. In many cases, the motion of the models did not duplicate the motion of the actual ships. The testimony of witnesses had already established that *Silverpalm* had struck *Chicago* forward on her port side at approximately an angle of 40 degrees. So trials where the two models came together at about that angle were judged valid. Trials where the model *Silverpalm* hit the model of *Chicago* at her stern

or right at her bow or at a 90 degree angle were not counted as valid or as useful.

After a great deal of testimony concerning these trials with models, Lillick asked Woods what was the purpose of the trials. Woods answered, "They were intended to ascertain what positions the vessels would assume after the impact, under a variety of initial conditions of speed, with the maintenance of a fixed point of impact, and a constant angle of approach."[289] Later, he put it somewhat differently: "The purpose of the test was to determine what the resulting positions would be under the special conditions assumed."[290] Judge Louderback noted that Professor Woods had "testified that the only thing he tried to prove was the angle of impact and the speed at the time."[291]

The next day—23 March—Phillips put Carl J. Vogt, an assistant professor of mechanical engineering and Woods' colleague, on the stand. Vogt testified that the trials with the models did in fact usually result with the two models, after colliding and rebounding, resting parallel to each other but facing in opposite directions.[292] Attorney Lillick asked Vogt if things would have been different if the models had been equipped with motors, propellers and maneuverable rudders. Vogt said no. As he told Lillick, "We performed the experiment to determine just what the action of the vessel was at the time of impact, and checked them up with the photographs [of damage to the two ships] that we had available."[293]

That was almost the end of the government's case. There were some details, however, that needed to be documented. *Chicago*'s gunnery officer, Lieutenant Commander Randal E. Dees, was sworn; he testified that he had found a record of Machinist's Mate Dallas Hanes (at times referred to as "Haynes"). Hanes had enlisted in the Navy on 19 January 1930, joined *Chicago* on 2 February 1932, and had been honorably discharged on 17 January 1934. His whereabouts were not known. Dees also confirmed the operations of *Chicago* in the four months preceding the collision, and he also testified that Lieutenant Commander Colton had not issued an order "barring any men not on watch from the engine room."[294] Attorneys Lillick and Phillips also spoke with one another and with the judge about making sure that the government's requests for deck logs and engine room logs from *Silverpalm* were being satisfied. Finally, Attorney Lillick presented the court a number of depositions taken from members of *Silverpalm*'s crew, including transcripts of testimony given to the Navy Board of Inquiry. I'll return to one of the depositions later.

THE DISTRICT COURT HEARING: *SILVERPALM*'S CASE

Attorney Lillick's first witness was James Barclay, an experienced draftsman and naval architect employed by the Moore Dry Dock Company, Oakland, California. Lillick showed Barclay a photograph of *Silverpalm*'s damage and asked him whether Barclay could tell from the photo whether, at the time of the collision, *Chicago* was "dead in the water, going ahead, or going astern?" Phillips immediately objected, because Lillick had not shown that Barclay had the qualifications to answer the question. As she argued, "He has not really given us what a naval architect is supposed to do. He has indicated a naval architect designs ships and in his capacity repairs ships, but when it comes to analyzing forces, amount of forces, and direction of forces, combination of forces, and conflicting forces, I do not think he has shown anything at all."[295] The judge asked Phillips if she wished to examine Barclay about his qualifications, and she said that indeed she did.

Just prior to this, Judge Louderback had asked Barclay, "In repairing ships have you been acquainted with at what angles the accident to those ships took place?" Barclay had answered, Yes, to a certain extent."[296] When it was her turn to ask questions, Phillips queried Barclay, "What do you mean by 'to a certain extent'?" His answer was that he could tell "Just by observation of the damage to the vessel that came in to be repaired: we can visualize in what manner that damage has been done. It is a matter of experience in shipbuilding." Phillips came back with, "Have you ever made any experiments to show the effect of colliding bodies such as ships?" Barclay said no, and he also admitted that he hadn't drawn on the testimony of the officers on both ships. At that, Phillips said she still objected to having Barclay sworn as an "expert witness."[297]

Lillick tried to defeat her objection by drawing from Barclay his experience and his description of his work, which entailed always examining "the damage on any vessel that comes into the yard; we have to examine it for survey to satisfy the classification societies." Did Barclay examine *Silverpalm* when she was in the dry dock? Yes. Did he determine from that examination which side of the ship's bow had been hit? He did. Then Lillick got to his point: "In the photographs which I showed you can you show me anything from which you can determine from which side the pressure was exerted against that bow?" Before Barclay could do more than begin to answer, Attorney Phillips intervened and asked permission from the judge to ask questions of her own. Her questions focused on Barclay's responsibility for repairing damage, and not on whether or not he inferred from the damage done just how it had been done. As she told Judge Louderback, "I do not object to the witness testifying as to the visible things he saw, but when it comes to stating the causes of the things he saw, he has certainly shown by his own statement not to be qualified to give the causes."[298]

The damaged bow of Silverpalm when the ship docked at San Francisco after the collision.

Louderback then questioned Barclay directly: "Do you feel that you have had experience enough so as to testify as to whether [the damage] was due to the other object moving or the angle at which there was impact?" As Barclay attempted to respond, the Judge interrupted: "You could not go that far?" Barclay said no. Then the Judge said, "In other words, you can say from the physical condition of that object that a force in a certain direction produced that [observed] result?" Barclay answered that that was his intention. Louderback's response was to observe that Barclay could not "say whether it was a moving object or a non-moving object that was struck." That is, the damage Barclay saw could have been the result of *Silverpalm* striking something or of *Silverpalm* being struck.

Attorney Lillick then asked Barclay if he could tell the court "from which direction the force was applied to the bow of the *Silverpalm*," based on a

photograph taken of the ship while it was drydocked. Phillips again objected, and on the same grounds as before—that Barclay was not qualified to draw certain inferences from what he saw. Judge Louderback said, "I suppose he can testify that the bow was bent over to the left." Phillips agreed that he could, and he did: the starboard bow of *Silverpalm* "was crushed in and the port bow was bulged out."[299] But Phillips repeated her objection; Barclay could not "make inferences as to causes…" After listening to her and to Lillick, Judge Louderback ruled that Lillick could ask Barclay "as to whether the force was from the starboard or from the port."[300]

Under cross examination, Attorney Phillips asked Barclay if the damage to *Silverpalm*'s bow was done when it struck the armored ammunition handling room below the 8-inch gun turret of *Chicago*. Barclay said no. "I think the damage was done before the *Silverpalm*'s bow entered so far into the ship." Phillips quickly reacted: "You are just guessing now, aren't you?" Lillick politely reminded Phillips that Barclay was about to say something, and Phillips urged Barclay to do so—and he said that the amount and nature of damage to *Silverpalm*'s bow indicated to him that both ships were moving when the collision occurred.[301]

Lillick's next expert witness was engineer and naval architect David W. Dickie.[302] Dickie had more professional experience than Barclay. When Lillick asked him if he had examined the damaged *Silverpalm* after she reached San Francisco, Dickie said he had and then explained how he had done it: "I made a count of planks in the dock, and using the dock as a base line, using Pier 46 as a base line and Pier 44 as a base line, laid off the angle and made a sketch of the damage of the ship just as she lay in the water alongside the pier."[303] Here was the real expert. As he testified, "My first impression was that… the *Silverpalm* was still and that the vessel with

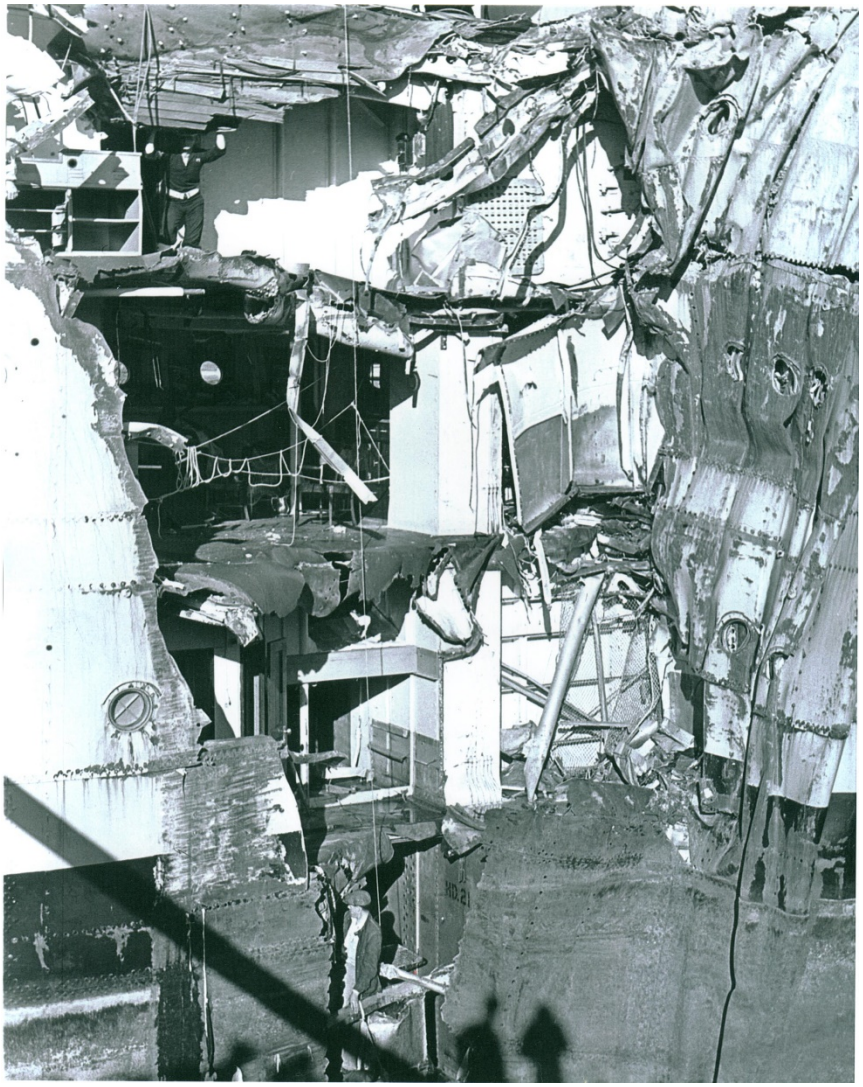
Chicago's damage, portside forward. Photo taken after she was docked for repairs. The accordion-like compression of the hull plating is clearly visible on the aft side of the gash made by Silverpalm. Source: NARA.

which she had been in collision had come at her from the starboard side and had pushed the bow over toward the port side and caused all the damage."[304]

Lillick asked Dickie "whether in comparing the forward line of the cut to the after portion of the cut you can tell us whether the *Chicago* was in motion at the time that cut was made?" Dickie's answer was yes, and the reason he gave for that answer was "Because the plating which covers the side of the *Chicago* is torn from the forward side of the gash, and all of the intervening material between the forward part of the gash and the after side of the gash is crumpled up into a bunch at the after side."[305]

Lillick then asked Dickie if what the photographs of *Chicago* showed indicated that *Silverpalm* had rammed the cruiser at "approximately a 40-degree angle at a rate of speed anywhere between 8 and 10 knots per hour" while *Chicago* was not moving. Dickie answered "No." He asserted that *Chicago* was moving ahead at 6 to 7 knots while *Silverpalm* was going at 5 or 6 knots.[306]

With Dickie's professional opinion now part of the record, Lillick wanted to compare it with the results of the model trials that the government had had conducted. Lillick briefly described the trials done by the faculty members of the University of California in the University's swimming pool. Once he had done that, he asked Dickie whether such trials would be as accurate as trials done with full-size ships at sea. At that point, attorney Phillips interrupted and objected that Dickie had not "been shown to have any knowledge or experience with model ship tests."[307] Dickie therefore recounted his experiences.



A close-up of the gash in Chicago's port side. Photo taken when the ship had been drydocked. *Source:* NARA

Most of his contact with model towing tanks in England and Germany had taken place when he was a student many years before. However, he also stated that he had built a small boat that he used to test his "theoretical work." With that boat and even with full-size ships, he had simulated how ships would act after collisions. As he explained, "I took a full-sized ship and ran her up to the full speed that she would go. I then shut the engines off and reversed her and I measured the time and the distance that it would take for her to stop…"[308]

The judge commented that the test Dickie described was not the sort of test that Phillips had asked him about—the test run over and over by the two University of California engineering professors. As Louderback explained, what the two professors were trying to ascertain was "how two objects of certain relative weights in the form of ships which struck one another at a certain angle" would act. He asked Dickie, "[H]ave you conducted investigation, either from study or from actual experience in connection with models or ships whereby if they strike at certain angles, taking for granted that they had certain speeds, as to just what way they would turn? Do you feel that you have studied that?" Could Dickie compare the knowledge that he had against that allegedly revealed in the trials run by the two professors?[309] Dickie said yes.

The judge adjourned the hearing until 27 March. The first thing Attorney Lillick did once the court reconvened was to review what had taken place on 23 March and remind the judge that Attorney Phillips, speaking for the government, had objected that Dickie was not qualified to judge the validity of ship model tests. Lillick noted that the two professors called to testify by Phillips had not been to sea, either, and she admitted that. But she returned to her main objection—that Lillick had asked Dickie "to compare a ship model test with vessels maneuvered at sea when he is shown to have no experience or qualifications in the maneuvering of vessels at sea." Lillick responded that Phillips' objection might "run to the weight of this witness' testimony, but certainly not as to its admissibility."[310] Judge Louderback agreed with Lillick that Dickie's testimony did "go to the matter of weight" rather than admissibility, but he also allowed Phillips to have an "exception" to Dickie's opinion.[311]

THE ISSUE OF SPEED

Lillick and Phillips would continue to spar over Dickie's testimony. At issue was the question of the speed of the two ships. How fast had each been moving—if indeed they both were in fact moving—at the moment of collision? The two sides in the trial had very different opinions about this. The government argued that *Chicago* was almost stationary; *Silverpalm*'s lawyers argued that *Chicago* was moving forward. Both attorneys who addressed the witnesses tried to build their cases around the physical evidence provided by the ships themselves. There was no way that *Silverpalm* and *Chicago* could be repaired and then be driven into one another at sea. Even were that possible, it would have to be done twice—once to mimic what the government asserted had happened and once to try out the collision based on the claims of the lawyers representing *Silverpalm*. The two sides differed fundamentally about what had happened. The attorneys took the same photographs, showed them to sympathetic witnesses, asked the witnesses to interpret them, and then tried to show the judge that what the opposing side claimed was true was not true at all.

The government had relied on the ship model tests to show that what was accepted fact—that the ships were facing different directions after they pulled apart—"fit" the case that the government's attorney—Phillips—had put together. Lillick used Dickie's testimony to cast doubt on that story. For example, he asked Dickie whether the "actual bending of the bow of the *Silverpalm* in the position shown by you [in Dickie's drawing] could have been the result of the *Silverpalm* having penetrated the port bow of the *Chicago* to a depth where she finally brought up on… the forward turret of the *Chicago*?" Dickie's answer was no—"The bow of the *Silverpalm* would be crushed back in a straight fore-and-aft line, if she penetrated the *Chicago* lying at rest rather than by crushing over to port the way she does in the drawing."[312]

The contentious back-and-forth between Lillick and Phillips over Dickie's testimony came to a temporary end when Lillick asked Dickie if he had participated in actual tests of *Silverpalm*'s speed after the ship was repaired in San Francisco. Dickie answered that he had, and then he described a trial at sea "to determine the time for the engines to start going astern, the time for the ship to stop and the distance that the ship run up [sic] to the time that she stopped in the water."[313]

One test devised by Dickie was ingenious. As he described it,

> "I think I had some 200 cardboard boxes about 3[.5] feet long, possibly 18 inches wide and 16 inches high, and I formed

> them up into a square… I stationed second officer Sheldrake, of the ship, on the after navigating bridge, Captain Cox and the third officer were stationed on the bridge, and the Malay quartermaster was at the wheel, and at the moment when I said 'Mark' Captain Cox blew a whistle and immediately the boy down on the deck below threw a box overboard. When this box passed the second officer on the navigating bridge aft, which was 312 feet away, he blew a whistle, and instantly the captain blew another whistle and another box went overboard, and this process continued, box by box, until the last box went overboard, whereupon I rushed down the ladder and followed the boxes along, noting the time that the box passed certain stanchions and certain places on the ship, and I afterwards went and measured this distance back to the bridge, so that we had the simultaneous time taken by myself on the bridge and of the second officer, Sheldrake, aft, and the distance between, the final distance from where the box came to rest and our position on the bridge and the compass course."[314]

Dickie continued, "At the time of the first signal the third officer, Stanley, threw the telegraph of the engines into reverse, and we listened to the exhaust of the engines, and it indicated by a slight noise about the equivalent to a polite sneeze at a lesson service that it had started to reverse, and we took the time at that moment." To make one run of the overall test more realistic, at between 45 and 50 seconds into the second run, the Malay quartermaster turned the rudder "hard astarboard" and Dickie read the compass "at intervals of 15, sometimes 17 seconds, …, and when I had finished I plotted a curve through these readings and then wrote off the 10-second intervals."

Dickie learned that "the average time to stop the engines was two minutes and fifty seconds." From the time "full speed reverse" was given until *Silverpalm* came to a stop, the average distance run was 3158 feet and the average speed was 6.02 knots. When Lillick asked Dickie how much time it took, on average, for *Silverpalm* to come to a full stop, Dickie answered that the "average time was four minutes fifty-eight seconds."[315]

Surprisingly, in her cross-examination, Phillips did not ask Dickie about the implications of the information he gained through this "experiment." Instead, she focused on what the damage to the two ships implied about their speed and maneuvering before the collision. Phillips first asked Dickie what speeds the ships were making at the time they crashed together. He said he calculated that *Chicago* was going about 6 knots and that *Silverpalm* was going just over eight knots. Then she began questioning him about how to interpret what the photos of *Chicago*'s damage implied. He took—and stayed—with the position that the "corrugated pleating" shown in photographs of the gash in *Chicago*'s side meant that *Chicago* had been moving forward when the ships collided. Moreover, he claimed that "The damage to the *Silverpalm* will be entirely different if the *Chicago* is moving than if the *Chicago* is at rest." Phillips tried relentlessly but unsuccessfully to undermine his claim the morning of 27 March. Dickie continued to assert that *Silverpalm* was swinging to starboard when she rammed *Chicago*, and the cruiser was going ahead at 5 to 6 knots.[316]

THE DISPUTE OVER WHAT THE DAMAGE TO THE TWO SHIPS MEANT

The basic issue was how to explain the damage to the two ships. In presenting the case for the government, Phillips had drawn on the model trials to argue that *Silverpalm* was—for whatever reasons—essentially going too fast and therefore could not stop or maneuver quickly enough to avoid *Chicago*. Lillick's witness David Dickie had argued that the responsibility for both stopping and maneuvering had been *Chicago*'s, and that the photos of the damage done to *Chicago* proved that the cruiser had neither stopped nor significantly slowed when the two ships crashed together. Judge Louderback tried to figure out if the trials with the models were valid. Were the results of the trials with the models consistent with the facts as he understood them? Dickie had insisted that they could not be. Phillips disagreed.

After Dickie was excused, Lillick reminded the judge that he had to address the court regarding the evidence that he believed would limit the liability of Silver Line, Ltd. Phillips agreed. As she told the judge, "[W]e might as well proceed and finish our rebuttal on the navigational issues, and then we may go ahead with depositions on the limitation proceeding, and thereafter complete that evidence in court if need be." But she also added that she wished to call "one man on the limitation proceedings."[317]

That "one man" was Captain Frank B. Freyer, USN. Freyer had been trained as a navigator, and Phillips had asked him to take the testimony of Captain Cox of *Silverpalm* and plot the merchant ship's positions as it approached *Chicago*. In court, she asked Captain Freyer to also diagram the movements of *Chicago* in the moments leading up to the collision.[318] What Phillips was trying to show was that if Captain Cox's testimony was true, then *Chicago* would have had to have been accelerating as she approached *Silverpalm*—and there was no evidence that *Chicago* had been doing so.[319]

The next day, 28 March, Phillips questioned Lieutenant Wesley M. Hague, the naval constructor from the Mare Island shipyard who had been in charge of repairing *Chicago*. Hague took the stand armed with a detailed plan of the damaged area of the cruiser. Using that plan, Hague responded to Phillips' questions about what had happened to *Chicago*. In the course of doing that, he gave a detailed account of the ship's structure and refuted the testimony of David Dickie.

Hague had detailed scale drawings of the damage suffered by both ships. He showed Phillips and the court how the scale drawings fit together. As he testified, "What happened… was that the *Silverpalm* came in, carried away Bulkhead 21[a transverse bulkhead], due to the force of the impact, bashed it back against bulkhead 23[.5], and the pressure of all this wreckage piling up against the bow of the *Silverpalm*, the *Silverpalm* coming in, pushed the *Silverpalm*'s bow from starboard to port…"[320] Indeed, so much wreckage had packed up between *Silverpalm*'s damaged bow and *Chicago*'s armored structure that it took twenty-four hours to cut through it when *Chicago* was drydocked for repairs, even though Hague's initial estimate of the time it would take was just eight hours.[321]

Phillips asked Hague what his detailed inspection of the damage to Chicago told him about the angle at which the cruiser was struck by *Silverpalm*. Hague answered that "The angle of impact must have been about 40 or 45 degrees." Phillips: "Are these lines of cleavage on the *Chicago* consistent with the *Chicago*'s being at rest, or nearly at rest at the moment of impact?" Hague answered yes and then explained why. It was partly this explanation that made it clear to the judge that Hague's expertise was genuine and superior to that of Dickie's. Hague did not simply stop by saying that *Silverpalm* had hit *Chicago* at an angle of about 40 degrees. That was not the end of the motions of the two ships. *Silverpalm*

kept going, penetrating *Chicago*'s side and pushing the cruiser to starboard, while *Silverpalm*'s inertia caused her to swing to port around the point where her bow was embedded in *Chicago*. The end result when the two ships stopped moving was that they "lay alongside of each other approximately parallel."[322]

Attorney Lillick did not attack Lieutenant Hague's analytical ability—his facility with diagrams and his engineering expertise. But he did compel Hague to admit that he did not know the details of the structure of *Silverpalm*'s bow, and he also got Hague to admit that he could not say for certain that *Chicago* was motionless when she was hit by *Silverpalm*. Lillick also made sure that Hague admitted that his scale drawings were made based on the assumption that *Chicago* was in fact not moving.[323]

On redirect examination, Phillips asked Hague if the "accordion pleating on the after side of the cut" in *Chicago*'s side was—as Dickie had stated in his testimony the day before—a consequence of *Chicago*'s forward movement. If *Chicago* had been stationary, or nearly so, wouldn't the cut in the cruiser's side have been "clean on both sides"? Hague said no. Why not? Because the cut was clean on both sides below the waterline. As Hague put it, "Above [the waterline] we have the accordion pleating. If [Dickie's] theory were sound then at the moment of actual contact and collision the upper deck of the *Chicago* must have been making considerable speed while the lower deck was still [i.e., motionless] in the water, which, of course, is impossible and absurd."[324] At that point, the judge adjourned the court until the next day, 29 March.

Phillips did not go back to Lieutenant Hague. Instead, she recalled Professor Baldwin Woods, the lead member of the team that conducted the trials of models in the university swimming pool. She showed him photos of the damage to *Chicago* and asked him what she had asked Hague—whether the corrugated pleating on the after side of the gash in *Chicago*'s side meant that the cruiser had been moving when it was hit. His answer was no, and he gave his reasons for saying so. He also produced a candle and a wooden box, explaining that he wanted to "simulate what could happen with a substance that might be deflected and represent its deflection." This brought Lillick to his feet. He objected to the proposed simulation, saying "I insist that the comparison [of the box and a ship] is so absurd that it will [not] help the Court to come to a conclusion with respect to the issues." Phillips responded, "If the Court does not feel that should be illustrated we will let it go." Woods chimed in and said he had a drawing that would make his point, and the judge received it as an exhibit for the government.[325]

Phillips proceeded to ask Woods if it were possible to know before a collision how the bow of a ship would bend, "regardless of the condition encountered in the ship" that was hit. Lillick had never been impressed with Woods' methods, and he immediately objected to Woods' statement on the ground that it was "immaterial, irrelevant, and incompetent; we are not concerned with any issue involving what someone might think before the impact occurred. We have no testimony of any character with respect to that in this case." Phillips came right back: "My questioning of the Witness Dickie very specifically was upon a very general question, and he stated a universal rule. … If you will refer to the transcript you will find it." Phillips then quoted from the record: "I am asking you [Dickie] a general question on stresses and strains… Here is a structure A-B and it is in motion; we will assume the structure D-C hits it; you would say that the structure D-C is going to bend in that direction that A-B is moving ahead?" Dickie had answered yes. He even went farther; he said that the bending he described was "invariable."

Phillips asked Woods if he agreed; he didn't. He said that the nature of the bending would depend on the "characteristics of the structure" that was hit. He then began, "It was this particular point which I wished to simulate with the candle and the pasteboard box, using the candle to represent…" Lillick interrupted: "I beg your pardon." Phillips jumped in: "Never mind that. Is [the bending] going to depend on the conditions it strikes?" Woods answered yes.[326]

This triggered a contentious back-and-forth between Lillick and Phillips. Lillick claimed that Woods could not tell the court anything that the judge didn't already know. Phillips accused Lillick of doing what he had objected to, which was basing his interpretation of the damage photographs on what he believed had happened. If that was improper cross examination, then Lillick was guilty of it. Lillick came back with "The witness is not shown to be anything but an expert upon mathematical computations with respect to bodies meeting each other." In an effort to keep the two lawyers from squabbling further, Judge Louderback again intervened, asking Woods if he could really tell what had happened by looking at the photograph of the gash in *Chicago*'s hull. Woods answered, "I think I can, to a certain degree." Lillick objected, saying that all Woods had to do was say "yes" or "no." He followed that up with an assertion that Woods "can look at the photograph, as he has looked at it, and his opinion is worth no more than any one of the witnesses in the court room."[327] The rancor continued.

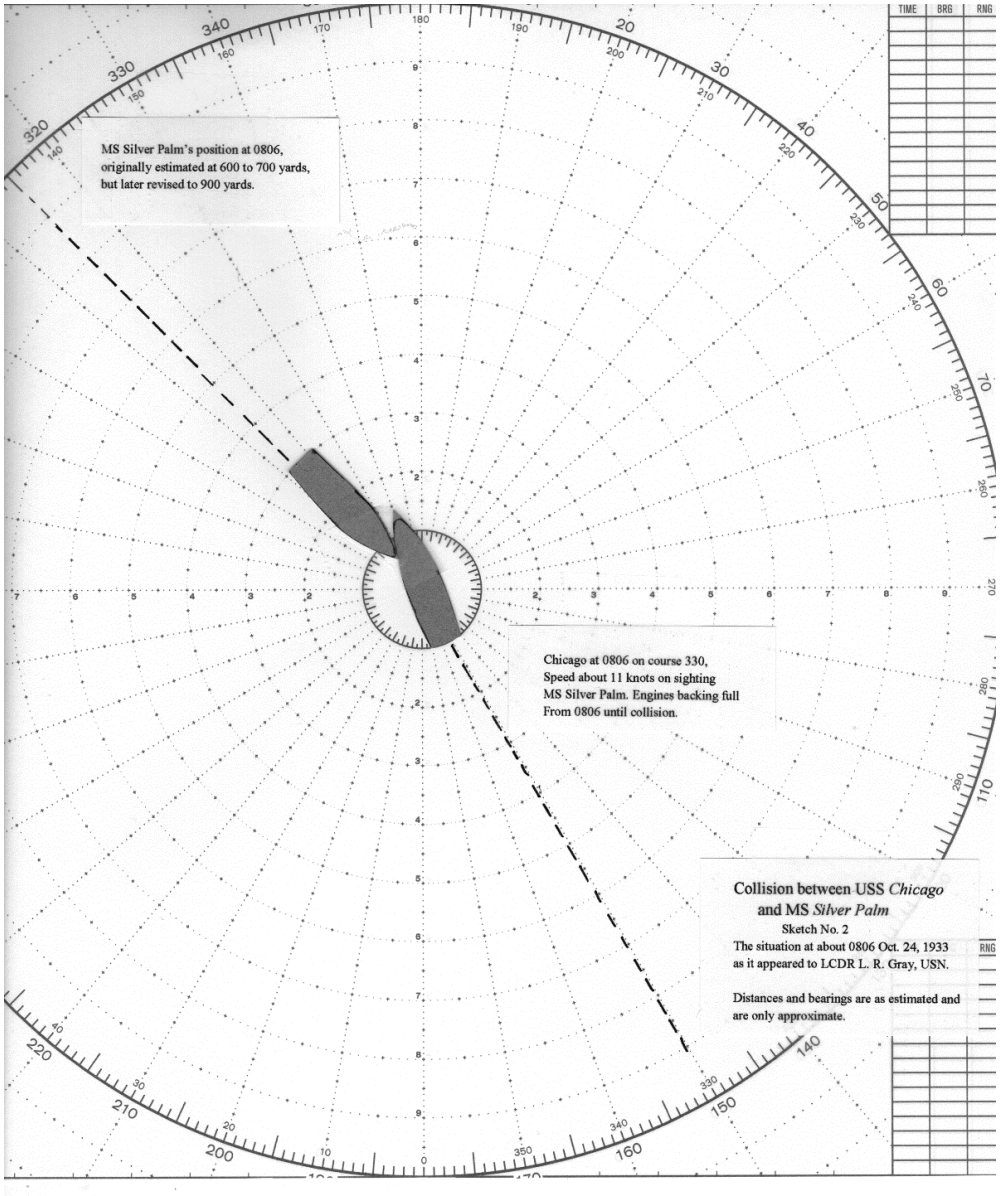
Lillick quoted Rear Admiral David W. Taylor's *The Speed and Power of Ships*, perhaps the most authoritative explanation of the quantitative relationships among ship speed, ship displacement, and the power needed to move a given ship through the water at a given speed. He asked Woods if he agreed with statements from Taylor's book. Woods wasn't sure what Lillick was asking him. The judge then had Lillick's question read by the court reporter. Woods responded that he still didn't understand the question. The judge didn't seem to understand it, either. Phillips had had enough, as well. She told the judge, "I am going to make the objection that counsel is going beyond all bounds of reasonable cross-examination. … I absolutely object to this cross-examination, and I think, your Honor, the record will bear me out."[328]

However, Lillick kept after Woods, accusing the professor of surmising what happened because he didn't really know what had taken place. Phillips kept accusing Lillick of improper cross-examination, and the court transcript bristles with charge and counter-charge by the attorneys. Finally, Phillips reminded the judge that he would "remember that my questions to this witness upon what might happen after penetration of the side of the *Chicago* were all directed to contradicting the testimony of the witness Dickie, yesterday, that invariable results were obtained." Lillick then said that "the only reason for the length of my cross-examination" was "to definitely and positively put in this record that this is all hypothetical from Professor Woods, and when checked with what actually happened, the two do not check." Despite Phillips' best efforts to use Woods' expertise, the last shot went to Lillick, who challenged Woods to explain why he could not show what damage *Silverpalm*'s stem had done to *Chicago* but could—on the basis of his work with the ship models—show why parts of *Chicago*'s hull had been folded, accordion-like, when *Silverpalm* rammed her.[329]

CAPTAIN FREYER AS AN EXPERT WITNESS FOR THE GOVERNMENT

After that, Woods left the stand, and Phillips recalled Captain Frank Freyer. Freyer had drawn up three "maneuvering boards" to show what Captain Cox had testified were the positions of

Silverpalm and *Chicago* when the two ships were 2500 yards apart, 1800 yards part, and in collision. I could not find the originals of those maneuvering boards in the court papers that had been preserved in the National Archives, and some photocopies that had been preserved were difficult to interpret. So I drew simplified versions for my own use. One is shown to the right. It is based upon the testimony of Lieutenant Commander Gray of *Chicago*.



Source: Folder 5, Container 1, RG-118, NARA (San Bruno)

Silverpalm is shown on the upper part of the original chart; *Chicago* is approaching the center of the chart from the bottom. Freyer noted that when the two ships were 2500 yards apart, *Chicago*—then appearing as a blur to Captain Cox in *Silverpalm*—was bearing 16 degrees on *Silverpalm*'s starboard bow. When the ships had closed to 1800 yards, *Chicago* was 26-and-a- half degrees on *Silverpalm*'s starboard bow, according to Captain Cox. Freyer testified that, in order to reach the collision point from that position 1800 yards away, *Chicago* would have had to speed up to over 40 knots.[330] That was not possible.

So Freyer assumed that Captain Cox had made a mistake, and he then made three additional plots of the ships' locations and the distances between them. One had the ships starting at 2000 yards apart instead of 2500; the second had them starting while separated by 1500 yards; the third showed them 1000 yards apart. Attorney Phillips asked Freyer, "in the second, third, and fourth plots, as I take it, what you assumed was that

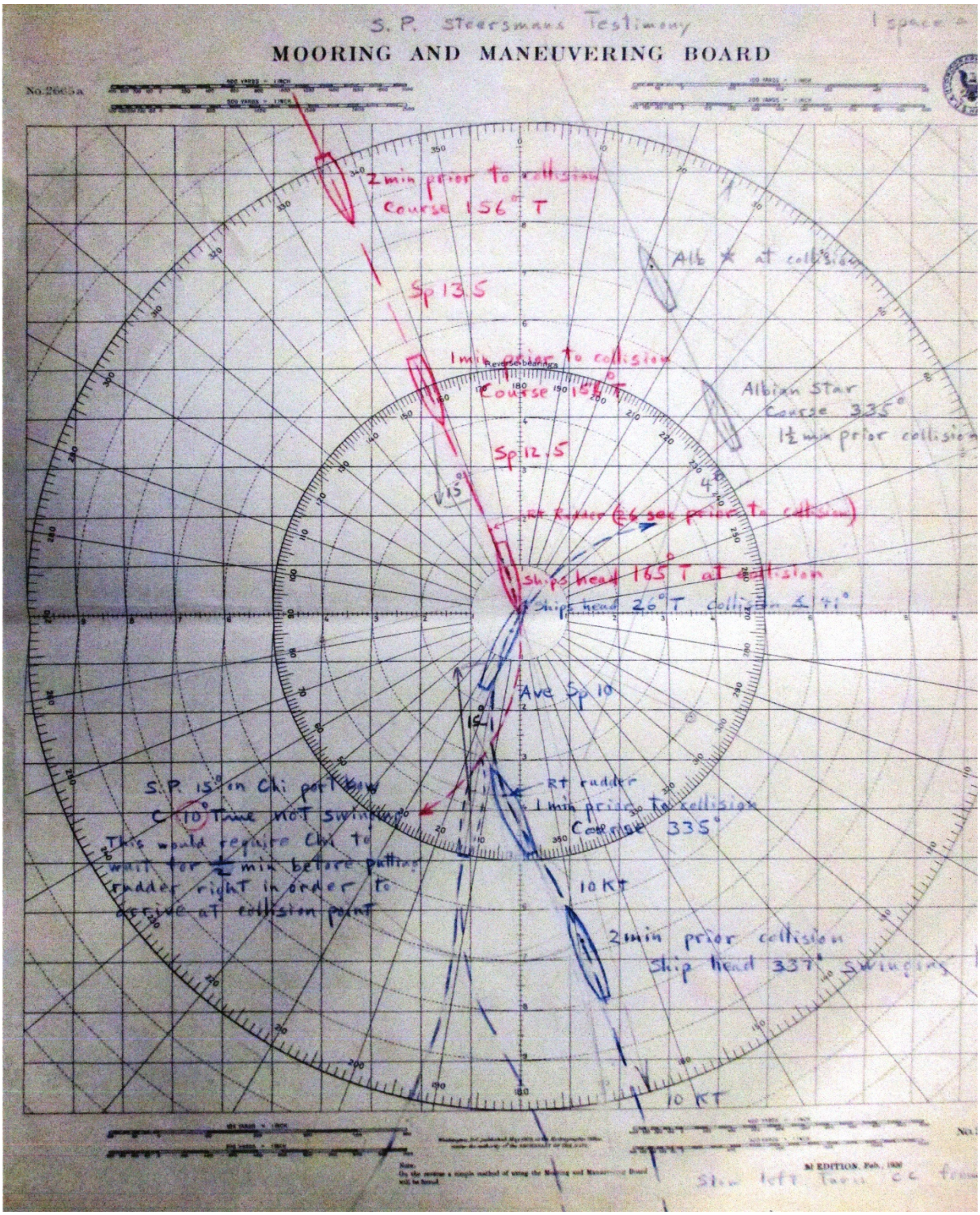
Captain Cox, as to the angles, might have been correct, but that he made a mistake as to the distance?" Freyer said yes, he had. He answered that the officers on the two ships were more likely to have estimated the bearings correctly than the distances. In each plot, the position of *Silverpalm* remained the same "because the assumptions are the same as to her… course and speed. The only difference then would be a difference in the position of the *Chicago* and in the results."[331]

Where the two ships were as they approached the point of collision was a matter of dispute, despite the efforts of the Navy Board of Inquiry to develop a clear picture of how the ships stood in relation to one another. With Freyer on the stand, Phillips asked, "[I]f the *Silverpalm* had in fact been on course 156 true, and if the *Chicago* had in fact been on course 350 true, from which side would the witnesses on the *Chicago* have seen the *Silverpalm*?" Freyer answered, "If the *Chicago* had been 16 degrees on the *Silverpalm*'s starboard bow then the *Silverpalm* would have been 18 degrees on the *Chicago*'s starboard bow." Phillips: "And the captain of the *Chicago* would have seen the *Silverpalm* on which side?" Freyer: "On the starboard side." Assuming the two ships acted once they saw one another, there was room to maneuver so as to avoid a collision.[332]

When he was deposed, Maharis Ben Latip, *Silverpalm*'s helmsman, had testified that *Chicago* had apparently turned to starboard across *Silverpalm*'s bow. His recollection was used as the basis for the original maneuvering board below, which shows *Chicago* angling left to pass *Albion Star* and then swinging to the right. The chart shows *Chicago* on course "335 deg. true" one minute before the collision. *Silverpalm* is steering "156 deg. true." But was this in fact the case? If so, then *Chicago* could have stayed on course and the two ships would have passed safely, starboard to starboard. But there was no agreement among the witnesses as to the accuracy of this chart.

Because the witnesses could not agree conclusively on this chart or any alternative, Attorney Lillick took another tack. When he questioned Freyer, he asked about the captain's experience at sea: Wasn't it "extremely difficult to estimate the distance between you on one ship proceeding rapidly toward another ship, when that ship is rapidly coming toward you?" Phillips let Lillick ask one additional question of Freyer about estimating distances at sea before she objected that Lillick was "proceeding beyond the limits of cross-examination." As she told the judge, "I offered the captain [Freyer] solely for the purpose of computing a chart from what Captain Cox said." Lillick responded that "when I am cross-examining a witness on a subject so involved as diagrams put in evidence before this Court which result in the conclusion that there could not have been a collision, at all, I certainly have a right to elicit from the witness an explanation that will enable the Court to look at the diagram and come to a correct conclusion about it."[333]

That led to a conversation between Lillick and Judge Louderback about the validity of Phillips' objection, and the judge finally told Lillick, "The ruling is you are exceeding the scope of cross-examination at this time, and the objection will be sustained." Lillick then proceeded to ask Fryer about distances a ship would travel at several different speeds, and Phillips again objected, saying that Lillick was "proceeding in the face of the Court's ruling." Lillick replied that he was examining a witness that he had made his own. Phillips argued that she had not yet finished her case. She had no objection if Lillick wanted to "call Captain Freyer as his own witness, … but let us proceed in an orderly fashion." Judge Louderback then ruled that Lillick could complete his cross examination of Freyer.[334]



Source: RG-118, Folder 5, Container 1, National Archives.

His ruling did not put an end to the dispute between Lillick and Phillips. Lillick argued that "I must explain the diagrams [of the maneuvering boards]." Phillips reacted by arguing that "The diagrams explain themselves." As she pointed out, the diagrams had "distance, angles, and the

time marked on them." Lillick wondered, "Am I to be precluded from comparing distance and time?" Phillips answered, "Captain Freyer said he took these diagrams, which show the angle, distance and time, and charted them. Now Counsel is trying to get him to discuss what is correct." Judge Louderback sustained Phillips' objection, but Lillick asked the judge to withhold his ruling until he made one point. As Lillick put it, the "diagrams are offered in evidence for a purpose, to show how incomprehensible the collision was, computed by the testimony of Captain Cox. If I am to be precluded from putting before the Court the reason for that, I will have to learn the rules of evidence over again, because in all of my experience I have been taught that it is proper cross-examination, where a witness has been put on as an expert, to ask him upon what he has computed this and then after that compare times, distances, and results."[335]

Louderback replied, "I think your statement would be correct if there was any question as to what he took as a basis of his computation." That is, where did Freyer get his speeds and times? Was Lillick trying to suggest that Freyer's data were incorrect? As Louderback noted, if the data points were not plotted correctly, then Lillick had every right to ask why that was so. But as far as the times used as the basis for the plots on the charts were concerned, Freyer had just assumed that the times themselves were correct. Louderback's view "was that the witness said that it was more likely that where an angle was known that it would be more accurate than when there would be an estimate of distance on the part of someone giving him that data." He went on to say that Freyer was "taking Captain Cox's data and applying it to a plot apparently to show it would not show a condition that could possibly have existed."[336]

Phillips got into the back-and-forth between Lillick and the judge by pointing out that Freyer had "taken angles and time in each case just the way that Captain Cox gave them. Now, Mr. Lillick is trying to argue with the witness whether or not Captain Cox could have made a mistake in this data or the other. I think that is not proper cross-examination." She repeated her claim that Lillick had not cross-examined Freyer "on the points" that he had testified to. In the meantime, she had introduced another chart. Its purpose "was an endeavor to show the picture as generally testified to by the officers of the *Chicago*, and then to place the position of the *Silver Palm* as related by the officers of the *Silver Palm*, which shows that the courses and bearings are irreconcilable." Judge Louderback restated Phillips' claim in the form of a question to Freyer: "[Y]ou attempted to take the story told by the officers of the *Chicago* and compare it with the story told by Captain Cox of the *Silver Palm* and make what you thought was probably the true situation?" "No," answered Freyer, "it is only a possible solution."[337]

Lillick then restated his position: "I am unable to understand why my cross-examination should be limited, in an endeavor to put before the Court facts upon which the court [sic] can come to a reasonably correct solution of the problem." In an effort to get out of this debate about Freyer's testimony, Phillips said she'd withdraw "the last exhibit," though "I thought it would help your Honor if you had been able to see an average of the time, distance and speed, from which your Honor could have computed variations." However, "if counsel objects to that I will withdraw the last exhibit." Lillick replied to that gambit by saying, "I will not permit it." Phillips asserted that she'd withdraw it, but Lillick responded by saying "It is offered in evidence, and I insist that it has made its mark upon the Court's mind, and that being true [sic] a withdrawal of the exhibit will leave me in the situation where unconsciously there has been a psychological effect on the Court that I have a right to controvert." Phillips still stated that she

would withdraw it, despite the fact that she believed that "it would be very helpful to the Court."[338]

Judge Louderback asked Phillips if her purpose "was with all the data which was available to explain a possible solution of the accident, was it not?" She agreed that it was, and she added, "I sat as a member of the Court of Inquiry which heard the testimony given in this case, and as the testimony was developed it was difficult to understand…" Before she could finish, Lillick said, "Might I be pardoned for interrupting, it is quite objectionable." Louderback ignored Lillick's interjection and asked Phillips, "In other words, you were trying to help the Court by showing a synthetic picture of what occurred in so far as possible?" When she said yes, Louderback went on: "And it would be persuasive to the Court that in this way in all likelihood you contend that the collision occurred?" When Phillips responded "No," Louderback said, "It is not supposed to aid the Court to that extent, then. Then what value is it?" Phillips answered that "[T]he testimony as to courses and bearings is irreconcilable." Louderback wondered whether that could throw any real light on why the collision occurred.[339]

Phillips then admitted, "I am still wondering, your Honor, how the collision occurred." Louderback reacted by saying, "I don't know as that will help the Court out very much, then." Phillips reacted by telling the judge that "if your Honor took this diagram your Honor could use it to make recomputations on all of the elements involved." Louderback then addressed Lillick, saying "I think on the first four plots of Miss Phillips where the witness used nothing but an arbitrary collection of data you would be in an awful position to say you could inquire as to the accuracy of that data. The only thing he did was he accepted the data and plotted it to show where the vessels would be if that data was accepted." However, Louderback was still not happy with the last plot because it wasn't "an attempt on the part of Captain Freyer to give a solution of what transpired at that time." Lillick answered, "That is also true of the other exhibits, because they all start with the collision and work back." Phillips denied that, and the judge observed that the other plots were based on the data given by Captain Cox. However, he agreed to adjourn for the day so that Lillick could review the testimony of Captain Freyer.[340]

LILLICK AND DICKIE VS. FREYER

The next day, 30 March, Phillips announced that she had no further witnesses to call, but she did introduce several exhibits—pages from *Silverpalm*'s bell book, entries from that ship's rough log, and a page from *Silverpalm*'s engine room log. Lillick, having perused Freyer's testimony of the previous day, recalled David Dickie. Dickie accepted most of the testimony given earlier by Lieutenant Hague of the Mare Island Navy Yard regarding how the two ships came together. As Dickie informed the judge, after the collision *Chicago* kept "swinging to the right I think about 40 or 45 degrees, and the *Silver Palm* kept swinging to the left for 165 degrees or almost half a circle, until she was swung around from a point in a southerly direction to a northerly direction."[341] Given the damage that resulted—the damage described by Lieutenant Hague—it actually made more sense, according to Dickie, if you assumed that *Chicago* was moving. In a sense, Dickie compared the collision to a situation where you thrust a wood chisel into the side of a board and then had someone push the board against the chisel. The stem of *Silverpalm* was like the chisel, and the body of *Chicago* was like the board. *Chicago* had to have been moving

at a speed of about 4.8 knots for the damage to be what it was.[342]

There was really nothing new in this part of Dickie's testimony. It was an alternative explanation for the evidence that Lieutenant Hague had already presented. But then Lillick asked Dickie if he had "prepared a diagram with the courses of the respective vessels and the bearings of the *Albion Star* and the times shown by the testimony with respect to the relative positions of the vessels as they approached each other and came into contact?" Dickie had, and Lillick asked him to explain it to the Court. Dickie told the judge that, before the collision, *Silverpalm*'s course was 160 degrees true, while that of *Chicago* was 350 degrees true. When the ships collided, Captain Cox testified that *Silverpalm* was steering 168 degrees true. Dickie asserted that, based on evidence provided by an officer on *Albion Star*, the *Chicago*'s bow was pointing 22 degrees true. Dickie said that the figure of 22 degrees true was consistent with previous testimony and also conformed to the turning circle curve of *Louisville* that had previously been introduced as evidence.[343]

Phillips objected that Lillick was "offering something in evidence that is not rebuttal." She continued, "I am going to ask counsel to direct attention to what part of the testimony of Lieut. Hague, Professor Woods, or Captain Freyer the testimony of the last witness, in regard to the plot that he made, to which point is this testimony offered?" Lillick answered, "This is in rebuttal of the entire case made out by the Government in rebuttal of our case." Phillips insisted that Lillick was "offering at this time on surrebuttal something that I did not take up on rebuttal." Lillick acknowledged her objection and said, "We will withdraw this then entirely, Miss Philips."

But what was Dickie's point? The judge understood it. As he said to Dickie, "Within that last minute, then, according to your drawing, the *Chicago* brought herself into jeopardy by turning to starboard?" Dickie said yes, and then Louderback asked, "Had she maintained her course she would not have struck the *Silver Palm*?" Dickie answered, "No, certainly not." Dickie claimed that "the record shows that the captain of the *Silver Palm* turned to his starboard the moment he observed the *Chicago* turning to her starboard." The judge was puzzled. He asked, "To port?" Had either ship turned to port? If both were turning away, why had they collided? Phillips was more than puzzled. She objected to Dickie's chart work, saying "I think the record is going to show this exhibit is purely theoretical, showing what the ships might have done… and had the witnesses testified other than they did testify." Louderback chose to accept the chart as an exhibit of the Respondent.[344]

When Phillips cross-examined Dickie, she didn't pull any punches. Phillips: "At the moment that the *Chicago* sighted the *Silver Palm*, according to your exhibit, from which bow should the officers of the *Chicago* see the *Silver Palm*?" Dickie: "It should have been from the starboard bow." Phillips: "From their own starboard bow?" Dickie: "Correct." Phillips: "Instead of the port bow?" Dickie: "Yes." Phillips: "As Admiral Laning, Admiral Simons, Captain Kays, Lieut.-Commander Minter, Lieut.-Commander Gray and the various lookouts sighted her?" Dickie: "That is correct." Phillips: "They are all wrong?" Dickie said that what had happened was that *Chicago* had yawed, as her officers said that she often did.[345]

Phillips did not relax. She continued by asking Dickie, when the cruiser first sighted *Silverpalm*, "which side of the *Chicago* should the captain of the *Silver Palm* have seen at that moment?" Dickie answered, "He should have seen the starboard side of the *Chicago*. I understand his testimony is to that effect." Phillips came back with, "No, his testimony is the direct reverse, that

he never at any time saw the starboard side of the *Chicago*. That is one of the exact points I had in mind." Judge Louderback declared, "That is argumentative." Phillips agreed, but she also told Louderback, "The captain of the *Silver* Palm testified, as your Honor will find, that he never at any moment saw the starboard side and that is one reason the court should reserve a ruling on this." Lillick had to have his say: "I do not want to leave their statement unchallenged, though I may be in error, after the *Chicago* had turned on the hard left rudder my recollection is that he said that the masts were out of line." Louderback brushed this comment aside with "This is argumentative." Phillips repeated, "I make the objection on the ground I stated."[346]

Phillips went after Dickie's understanding of the movements of the two ships once more, claiming that Dickie did not remember correctly the testimony of Admiral Simons. The judge was losing his patience. He told Phillips, "Let us not have any discussion."[347] After just one more exchange between Phillips and Dickie, both Lillick and Phillips rested their cases. Testimony was closed. It was 30 March 1934.

Chapter 8: After the District Court Hearing

MCPIKE'S VICTORY LAP

Federal District Attorney H. H. McPike wasted no time informing Attorney General Cummings in Washington that the district court trial was over and that he anticipated a decision in favor of the government and *Chicago*. In a 31 March 1934 letter to Cummings, McPike noted that the "case was a most fascinating one to prepare and try," and he stressed the contributions of the Navy officers who assisted his deputy Esther Phillips in her presentation of the government's case. Captain Frank Freyer "was a most enthusiastic and devoted assistant," and Lieutenant Commander Randall Dees, *Chicago*'s gunnery officer, "sat at the counsel table throughout the trial" and "located several excellent witnesses on the *Chicago* who had not been called before the Naval Court [sic] of Inquiry." McPike told Cummings that these two officers, though "not named as attorneys before the Court, were "to all intents and purposes" members of the government's counsel staff. McPike also praised Lieutenant Commander Ernest Colton, *Chicago*'s engineer officer, Lieutenant W. L. Hague, who supervised the repairs to *Chicago* at Mare Island Navy Yard, and Lieutenant Robert Minter.[348]

In McPike's opinion, the Silver Line "presented no defense." Instead, the firm's attorneys focused on the cruiser's speed. As he put it, their "effort will be to try to convict the *Chicago* either of excessive speed in the fog" or of an incorrect maneuver that placed *Chicago* in the way of *Silverpalm*. McPike judged that "neither claim has been proved."

McPike finished his letter to Cummings saying that he hoped the Court would rule against *Silverpalm*, declaring her to be solely at fault for the collision. However, "win or lose, we wish to state to you that we had most enthusiastic co-operation from the Department of the Navy, and have no criticisms to make and nothing but praise to give."[349] The Assistant Attorney General, George C. Sweeney, wrote back to McPike on behalf of Attorney General Cummings on 9 April, telling McPike that the Attorney General had sent a copy of McPike's 31 March letter to the Secretary of the Navy.

THE ORAL ARGUMENTS BEFORE JUDGE LOUDERBACK

I had assumed that the district court trial ended when the testimony in the *Apostles on Appeal* ended. I was wrong. Bill told me I needed the "Reporter's Transcript." That's where attorneys Lillick and Phillips would make their final appearance before Judge Louderback. "It has to exist," Bill said, "and you need to read it." Exist it did, but it had to be in the archives at San Bruno, and by the time I knew I needed to read it I was back home in northern Virginia. Fortunately, researcher Marisa L. Lee and Charles Miller of the archives staff found the transcript and copied it for me.

It made interesting reading. The two attorneys appeared before Judge Louderback on 23 April. Attorney Esther Phillips spoke first. She argued that "the International Rules of the Road place upon vessels the obligation to operate at moderate speed in a fog without defining what moderate speed is. The cases, however, have defined moderate speed in a fog as the speed at which a vessel can come to a stop within the limits of visibility."[350] She wanted to make sure that the

Court understood that the central point of the government's case was that *Chicago* steamed at all times before the collision at a speed where "she could bring herself to a stop within the limits of visibility."[351]

By contrast, *Silverpalm* was moving too fast. Moreover, Phillips argued that Captain Cox of *Silverpalm* failed to put his ship's helm over early enough. As she noted, Cox "stated that he put her helm hard over 75 to 90 seconds before the collision." But in the trial of 20 December 1933, *Silverpalm* swung "12 degrees in 30 seconds," and the inference Phillips drew from that was that Cox "did not put his helm over until the last thirty seconds."[352]

She switched gears at that point and argued that the case for *Chicago* not being negligent was sustained by the testimony of Vice Admiral Laning. As she said, "43 years in the United States Navy means something. It requires something in our Navy for a man to rise to the position of vice-admiral." She went so far as to claim that, had he been the government's only witness, the Court "could have decided this case on the strength of Admiral Laning's testimony alone." In her words, he was "the most competent, most experienced witness either side produced."[353]

Phillips then directed the Court's attention to one thing that both sides in the hearing had agreed on—"that when the two vessels first sighted each other their headings placed them on crossing courses." Here she returned to her earlier argument regarding Captain Cox's control of *Silverpalm*, saying that "We do not know what the 'Silver Palm' did with her helm. Her own witnesses did not know or could not tell the Court just what she did. We have to leave it as a mystery." Yet it wasn't a complete mystery. It was clear that *Silverpalm* did not turn to starboard to the degree that Cox had claimed in his testimony.[354]

As far as *Chicago*'s engine room bell books were concerned, Phillips put forward the comment by Lieutenant Commander Colton that what he cared about as engineering officer was whether the throttle men controlling the engine rpms did that promptly and properly. She agreed that the "bell-book entries were of less importance."[355] Besides, the trials at sea of cruiser *Louisville* were, as she noted, "a perfect check up on our witnesses' testimony." Data from the trials, when combined with the rpm numbers from *Chicago*, indicated that *Chicago* was moving at about eight knots when she sighted *Silverpalm*.[356]

Phillips also defended the swimming pool tests of ship models performed by the two university faculty members. Her argument was that there was so much money involved in the case that it strained common sense to accept Attorney Lillick's claim that it was difficult to find an experienced engineer who could knowingly critique the tests of Professors Woods and Vogt.[357] Her point was one that she had already made—that it wasn't possible to stage a real-life reenactment of the collision, and so what had to matter to the Court were the efforts by the government to document, mainly through testimony of sworn witnesses, what had taken place. The swimming pool tests of the model ships had to be seen as buttressing that testimony.

Phillips had two further points to raise before the Court. The first, based on witness testimony, was that the collision of the two ships was in fact two collisions—the first was when *Silverpalm* crashed into *Chicago*'s hull, and the second was when, after recoiling back, *Silverpalm* pushed into the gap she had already made in *Chicago*, which had rebounded after initially heeling away. This was a point not stressed by the government in the district court hearing, though the testimony of then-Captain Simons had pointed to it. Phillips brought it to the Court's attention because it could conceivably explain the so-called "accordion effect" to *Chicago*'s damaged side plating.

Finally, Phillips suggested that Captain Cox's testimony was not reliable. Attorney Lillick had relied on it, but it had contained one critical flaw. Cox had testified that when he had first seen *Chicago*, he had seen her starboard side. But this testimony ran counter to the testimony of Admiral Laning, Captain Kays, Lieutenant Minter, Ensign Leeds, and Lieutenant Gray, all of whom had said under oath that they had seen *Silverpalm* to port and definitely not to starboard. Had the Navy officers perjured themselves? As Phillips said, "I do not believe your honor is going to accept such a contention as that."[358]

Phillips finished with a flourish: "I think your Honor is going to find in reviewing this case that there is not one scintilla of evidence in the case which would convict the 'Chicago' of fault."[359]

Before Attorney Ira Lillick spoke for the Silver Line and *Silverpalm*, Judge Louderback had the opportunity to ask questions of Phillips. One function of the day set aside for oral arguments was to give the judge the opportunity for some back-and-forth with the attorneys on both sides. In this instance, Louderback had one question for Phillips. Had she said that the relatively clean cut into *Chicago* below the waterline could not be reconciled with the photographic evidence that showed the accordion-like piling up of hull plates on the back edge of the gash in the upper hull? Could she enlarge on that point?

She tried. First she reminded the judge that it was Silver Line's witness Dickie who informed the Court that it was obvious that *Chicago* had not been stationary when struck. If she had been stationary, so Dickie's argument ran, the gash in the cruiser's hull would have been clean. But the gash wasn't clean, and therefore, by Dickie's reckoning, *Chicago* wasn't stopped. She was moving forward at six knots. Plating had piled up, accordion-like, on the aft edge of the gash, and Dickie asserted that the folded hull plates proved his point. Phillips noted that Dickie had argued that *Chicago* was moving because of the evidence of the accordion-like effect on the upper hull. So why wasn't there an accordion-like effect in the gash in the hull below the waterline? Why the effect in the hull above the waterline and not in the gash in the hull below? Phillips said Dickie's testimony provided no sensible answer—that it was "ridiculous" and could not account for the damage to *Chicago* resulting from the two times that the cruiser and *Silverpalm* had crunched together.[360]

Attorney Ira Lillick followed Phillips. After first observing that he and Phillips had spent "hours and days in eliciting testimony that in a sense was immaterial," he informed the Judge that there was only one navigational issue in the case: Were the two ships "proceeding at a moderate rate of speed in the fog? What did "moderate rate of speed in fog" mean?[361] Lillick then informed the Judge that he would use only the testimony of *Chicago*'s witnesses to show that the cruiser was not moving at a moderate speed in the fog. Lillick would not defend *Silverpalm* except in what might be considered a backhanded way. His argument would be based solely on the testimony of the government's witnesses. That was not something he had proposed to do in his initial brief in November 1933, when he asserted that *Silverpalm* had not been negligent.

Lillick also declared to the Judge that he would not rely on *all* of *Chicago*'s witnesses. He would set aside the testimony of Vice Admiral Laning and newly promoted Rear Admiral Simons and build his argument from the entries in *Chicago*'s log books and from the testimony of those officers who were actually directing the cruiser's course. Lillick mentioned Lieutenant Commander Gray, *Chicago*'s navigator, who "testified the 'Chicago' was going at 11 knots an hour when the 'Silver Palm' was sighted."[362] Lillick asserted that that speed—11 knots—was

"unjustifiable" under the fog conditions that existed on the morning the collision occurred.[363]

For Lillick, the real cause of the collision was *Chicago*'s passing to port of *Albion Star* while accelerating. The maneuver distracted the bridge personnel on *Chicago* and the ship's relatively high speed led them "directly into the jaws of danger from the 'Silver Palm'." As Lillick emphasized, "That was the reason, … for the collision."[364] Lillick reconstructed the situation for the Judge, starting with Captain Kays' sighting of *Silverpalm*. Kays ordered *Chicago* to port, where she began to turn. But as Lillick pointed out, a turn at that speed meant that *Chicago* at first skidded to the right. When Kays ordered full right rudder, *Chicago* then skidded to the left, placing herself in the path of *Silverpalm*.[365] In effect, Lillick told the Judge that the left turn followed almost immediately by a right turn was more dangerous for *Chicago* than just steaming ahead while slowing down. Lillick even had a drawing that he thought would help the Judge understand what had happened.

After saying he would skip "a large portion" of what he had intended to say, Lillick made one comment about a past case, repeated his assertion that *Chicago* had been moving too fast, and began accepting questions from the Judge. What, Louderback first asked, was the purpose of the diagram that Lillick handed him? To show that *Chicago* was moving faster than her witnesses had claimed? Or was it to show how *Chicago* had moved just before the collision? Lillick answered "yes" to both questions. Yes—*Chicago* was moving too fast for the fog condition, and yes—*Chicago* had found herself in an emergency situation, which was just what *Knight's Modern Seamanship* had warned against. And it was a situation that *Chicago*'s captain had set up himself.[366]

However, Louderback, in examining the diagram that Lillick had given him, said it looked to him like it made "no difference whether the Silverpalm manipulated its rudder in any way whatsoever, because the Chicago had placed herself across her course and she was going to be struck." Lillick agreed with the judge. He put it this way: "Sitting as your honor is, having heard both sides of this story, there must be a practical explanation of the collision. There must be a reasonable train of circumstances leading up to what occurred…" Yet no matter what that train of circumstances was, if the act that began it was "in error, those responsible for that error are responsible for the collision."[367] Phillips had argued the opposite—that Lillick's "train of circumstances" was a series of discrete actions, and that once *Chicago* began passing *Albion Star* to the left there were still steps that could—and should—have been taken by *Silverpalm* to avoid the collision.

Louderback then asked Lillick whether he was asserting that both ships were moving at "immoderate" speeds. Lillick's response was "That is a difficult position to place myself in because the justification of my vessel is a justification brought about by the fault of the Chicago [sic]." Indeed. Lillick had entered the Court claiming that his client (*Silverpalm*) was free of fault for the accident. He could be taken as now asserting that *Chicago*'s errors were enough to demonstrate *Chicago*'s total and complete fault, no matter what *Silverpalm* did. Lillick was no longer saying that *Silverpalm* had acted without fault. Instead, he was saying that what *Silverpalm* did or did not do didn't matter.

Judge Louderback pressed on, saying that "there is testimony on the part of Captain Cox to the effect that he gave instructions to the helmsman at quite a distance from the 'Chicago' to go full to starboard, and yet there is no record here of any movement until right practically at the moment of collision." Why was that? Lillick answered that Captain Cox had incorrectly estimated the distance between *Silverpalm* and *Chicago*. The

Judge came back with a question: When Captain Cox gave the order to the helmsman to steer the ship to starboard, weren't the ships about half a mile apart? Before Lillick could answer, Attorney Phillips did it for him, saying, "No, 1800 yards when the order was given to the helmsman." The Judge observed that this distance "was even further than I had recalled," and Lillick then declared that the estimate of distance provided by several witnesses was in error.[368] Had Cox waited too long to give the order because he had mistakenly estimated the distance between the two ships, or had the estimates of other witnesses been wrong?

Lillick got himself out of this awkward situation with the Judge by immediately calling Louderback's attention to the errors and changes in *Chicago*'s log books, both those used by officers on *Chicago*'s bridge and those kept by personnel in the ship's engine room. Lillick claimed that he had found errors and erasures in the quartermaster's "rough log" and in the "smooth log" that was based on entries in the rough log. He made sure that the Judge recalled the testimony on this, and even went so far as to state that "in the engine-room [bell books]" there was "such a series of erasures as I have never seen in a collision case before."[369]

Yet what was the effect of those changes in the log books? As Judge Louderback put it, "Can you explain at this time what result those modifications might have had?" Were all of them in favor of *Chicago*'s claim that she was not responsible for the collision? As the Judge asked Lillick, "[W]hat is suppressed, if those figures that are stricken out had been allowed to remain?" When Lillick answered, "This is what has been suppressed," the Judge came back with "I do not want any mystery about this."[370] Lillick could have responded to the Judge by saying that what mattered were the improper (by Navy instructions) changes—that just making the changes was proof of negligence, no matter what the effect was of the changes. Instead, he focused on the psychologies of the officers and enlisted personnel involved—on how they wanted their ship to be what they thought it was: the best of the new heavy cruisers. In a sense, he gave the men of *Chicago* an excuse for their behavior, but at the same time Lillick stuck with his argument that *Chicago* had been negligent.

It was ironic that, on the one hand, Lillick relied for his defense of *Silverpalm* on information supplied by *Chicago*'s witnesses and logs while on the other hand he pointed to changes in the logs as evidence that certain log entries, and hence several of Chicago's witnesses, could not be trusted. The Judge obviously sensed a kind of contradiction here, which is probably why he had asked the questions of Lillick that he did.

Lillick finished his remarks by ridiculing the tests done by Professors Woods and Vogt in the university swimming pool. He said that "the balance of their testimony" was "so absurd and so utterly ridiculous" that the Court couldn't use it "as a basis for coming to any conclusion about what the speed of the 'Chicago' was at the time of the collision." As if that weren't damming enough, Lillick went on to say that "These two men might as well have taken a couple of chips in a bathtub and floated them around and hit them together" in order to determine what had taken place during the collision.[371]

The Judge went back to the question that had been on his mind as he listened to the two attorneys. How fast was *Chicago* going at the time of the collision? What did the evidence show? Lillick's "personal opinion from the record" was approximately five knots per hour, and he informed the Judge that he had reached that conclusion mainly from the testimony of Lieutenant Commander Gray, *Chicago*'s navigator.[372]

Next in line to interact with the Judge was attorney Harold M. Sawyer, "proctor for innocent cargo." Sawyer thought his position was unique; unlike Lillick and Phillips, he didn't have a stake in the argument over which ship was responsible, and he believed that he was therefore better able to evaluate the evidence. And his conclusion, after evaluating what Phillips and Lillick had argued, was that both ships were responsible.

But Sawyer had something more important to say than that: "As far as the 'Silverpalm' is concerned, I have not heard anybody recite any facts in defense of her, so it seems to me that her case is poor. On all of the authorities cited by Mr. Lillick she stands condemned, she was undoubtedly proceeding at an immoderate rate of speed in the fog. I agree with Mr. Lillick that that is the only issue in the case."[373] Of course that issue also applied to *Chicago*, and Sawyer noted that "at eight o'clock they were proceeding at 18 knots an hour, an absolutely preposterous speed. I would say that I have never seen a collision case in which there was such wanton recklessness and willful disregard of the ordinary rules of the road governing the operation of vessels in a fog as I have seen in this case."[374]

In Sawyer's view, *Chicago* had committed "a statutory fault" and therefore had "the burden of establishing not only that the fault did not contribute to the subsequent collision, but that it could not." Sawyer argued to the Judge that "from the time the two vessels hove in sight collision was practically inevitable," and matters would not have been that way if *Chicago* had not run at a speed of 18 knots. As he continued, "I consider the case one of extreme simplicity, because we come right straight back to the initial error," immoderate speed at eight a.m.[375] He finished by saying, "I do not think in my entire experience with the admiralty bar I have seen a collision case of two vessels in a fog where the failure of both vessels is more palpable than in this case, and I submit the proper finding by the court should be that both vessels are to blame."[376]

After Sawyer completed his remarks, Lillick and Phillips wrangled yet again. She accused him of trying to submit a brief to the Court that contained facts not covered by him in his oral argument. Because she therefore didn't have the opportunity to respond to these facts, she asked the Judge to disregard Lillick's brief. Lillick responded with astonishment, whether real or feigned, and he asked the Judge to give him time right then and there to continue his argument if the Judge ruled on his brief as Phillips requested.[377] The Judge reacted to this angry back-and-forth between the lawyers by asking them whether they had agreed on rules of procedure outside the court before their oral arguments were heard. Lillick said they had, and that it was unfair for Phillips to say that she was being blindsided by his submission of a last-minute brief. Phillips said that she had talked with Lillick's associate about it because Lillick was then out of town.[378]

Phillips then made a very important point. Like attorney Sawyer, she was surprised that Lillick had not drawn on *Silverpalm*'s witnesses and documents to defend *Silverpalm*'s actions leading up to the moment the two ships collided. As she said, "I have yet to hear Mr. Lillick say one word in defense of 'Silver Palm.' I devoted fifteen minutes to charging fault on the 'Silver Palm' and I do not have to go any further, his ship is convicted." She went on to say that she could readily answer Lillick's challenge to find a case where eight knots had been "held a moderate speed," and then she mentioned several examples to prove her point.[379] She also tried to refute Lillick's interpretations of testimony by Lieutenant Commander Colton and Lieutenant Commander Gray, and she also noted that the engine room log of *Silverpalm* showed that "She never did reverse between the time the order was given and the time of the collision."[380]

She also criticized the document that Lillick had just given the Judge, saying "If your Honor will look at this your Honor will see that the 'Chicago,' according to this exhibit, sighted the 'Silver Palm' on her starboard hand, her right hand." Yet all of *Chicago*'s officers who had seen *Silverpalm* bearing down on their ship said that *Silverpalm* approached from port. For that reason, Lillick's claim that *Silverpalm* was to starboard of *Chicago* when the two ships first sighted each other was "ridiculous," and Lillick's last-minute exhibit was "only fit for the wastebasket."[381]

Phillips and the Judge had one last exchange. Judge Louderback wanted to know—finally—if *Chicago* was moving forward at the time of the collision, even if her engines were reversing. He asked that question because, as he said, "there seems to be a great deal of testimony to show that there was actually a speed of somewhere about four knots at the time of impact." If that were so, if *Chicago* still had some way on her when the two ships came together, would that cause Phillips to change her argument? Her answer was "Not a bit." Then the Judge said to Phillips that her defense of *Chicago* was based on her contention that the cruiser was "dead in the water," and so if the Court concluded that *Chicago* was moving forward would that change her oral argument? "Not a bit" came the reply.[382]

After 23 April, both attorneys still had time to submit their final briefs and memoranda to the Court, and both did so. In a lengthy "Memorandum of Points and Authorities on behalf of Respondent," attorney Lillick repeated his assertion that the Court's ruling should be based on the correct answer to one question: What is a moderate rate of speed in a fog?[383] As the Memorandum put it, "we confidently assert that no case has ever been decided in which a vessel proceeding at 10 knots an hour has been held free from fault in a collision case in a fog of the character of that the morning of the collision."[384]

The rest of the Memorandum restated points already made at the hearing or in the oral argument of 23 April—that the sighting of *Albion Star* by *Chicago*'s officers had distracted them; that the ship model "tests" in the university swimming pool were absurd; that *Chicago* didn't need to go 18 knots to set the Hydrecon [sic] in its boilers; that *Chicago*'s log books and engine room bell books had been improperly modified; that the burden of proof in the case rested with *Chicago*; that the evidence offered by *Chicago*'s navigating personnel was at odds with the evidence offered by her engineering personnel; and that all Lillick needed to sustain his arguments against *Chicago* was the testimony and documents of *Chicago*, herself. Lillick spent just over three pages of a 55 page memorandum defending *Silverpalm*. In a final brief, dated 28 April 1934, he stressed the importance of the altered logs and bell books and repeated earlier arguments. He had nothing substantially new to offer the Court.[385]

THE DISTRICT COURT HANDS DOWN ITS RULING

On 8 May, the two sides in the libel case filed their briefs in Judge Louderback's court. On 19 June, the Court found *Silverpalm* "to be solely at fault for the collision, and the Cruiser 'Chicago' is exonerated."[386] Attorney Lillick immediately submitted a petition for a rehearing on behalf of the Silver Line and *Silverpalm*.

On 20 June 1934, Assistant Attorney General Sweeny informed Rear Admiral Claude C. Bloch, who had replaced Admiral Murfin as the Judge Advocate General of the Navy, that Judge Louderback had ruled that *Silverpalm* was "solely at fault…" Sweeney added that "Miss Phillips, who handled the case for the Government, is to

be complimented" for her "unusual preparation and forceful presentment before the Court…"[387] On 22 June, Esther Phillips received an additional formal compliment from Rear Admiral Thomas J. Senn, the Commandant of the Twelfth Naval District, who had commanded battleships *North Dakota* and *West Virginia*, and won the Navy Cross for his service in World War I.[388]

Senn well understood the risks a captain could encounter while in command of a major warship. In June 1924, he was captain of the new battleship *West Virginia* (BB-48) when the ship ran aground on soft mud while departing from Hampton Roads, Virginia. The primary cause of the grounding was the failure of the ship's steering and engine room telegraphs. These electrical failures denied Captain Senn the ability to steer his ship and even bring it to a stop. The board of inquiry investigating the accident also found that the ship had not been given accurate charts of the channel in which the battleship grounded. Accordingly, the board recommended that Senn and his navigator not be court martialed.[389] But Senn knew what it was like to have his career and his reputation in jeopardy, both dependent on the thoroughness of an inquiry board.

On 12 July 1934, the District Court entered an interlocutory decree stating that "the collision mentioned in the pleadings, and the losses resulting therefrom, were caused solely by fault and negligence upon the part of the Motorship "SILVERPALM" … and… that the libelants do have and recover their damages" against *Silverpalm* and "that the claims of the libelants be referred to the United States Commissioner," Ernest E. Williams to "ascertain and report the amount of the damages sustained by the libelants."[390] That same day, Judge Louderback denied Silver Line's petition for a rehearing. Silver Line and *Silverpalm* appealed the 12 July decree on 24 July.[391]

On 25 July 1934, the firm of Lillick, Olson and Graham, acting on behalf of Silver Line and *Silverpalm*, filed an "Assignments of Error" as part of its appeal to the Ninth Circuit Court of Appeals.[392] In that document, they argued that *Silverpalm* was not solely at fault for the collision and was therefore not solely responsible for the physical damage to *Chicago* or for the human suffering inflicted on some of her crew.[393] The "Assignments of Error" also claimed that *Chicago* was liable for damages to *Silverpalm*. There matters would stand until and unless the Ninth Circuit Court of Appeals processed the appeal.

THE DAMAGES HEARING

This chapter has so far focused on which ship was responsible for the collision. But the case of *Silverpalm* vs. *Chicago* included the issues of who was to pay compensation and in what amount or amounts, and so it's important to review briefly the steps regarding damages before, during, and immediately after the district court hearing on negligence. Remember that the lawyers for *Silverpalm* petitioned the district court for "exoneration from or limitation of liability" on 1 November. Soon afterward, the Board of Marine Underwriters of San Francisco surveyed *Silverpalm* and on 9 November assessed her as being worth $275,000 in her damaged condition.[394] On 24 January 1934, the lawyers for the firm whose cargo *Silverpalm* had been carrying at the time of the collision presented their answer to *Silverpalm*'s petition for exoneration from or limitation of liability, and the next day the government attorneys did the same.[395] Both answers rejected the argument by *Silverpalm*'s attorneys that *Silverpalm* should be free from liability or held liable for only a limited set of damages.

On 25 January, Ernest Williams, the afore mentioned U.S. Commissioner, noted that eight damage claims had been filed with his office, totaling $730,772.57.[396] Five days later, the attorneys representing the Silver Line began objecting to the amounts in the damage claims that had been submitted. They had little choice in the matter. If *Silverpalm* were judged fully responsible for the collision, the damage claims, if approved by the Commissioner, would consume *Silverpalm* and a large chunk of the assets of the Silver Line, Ltd. On 6 March, Judge Louderback agreed to accept the damage claims as part of the overall libel case.

Silver Line was eager to get the ship back in the sea lanes. On 25 July, after Attorney Lillick appealed the district court ruling that *Silverpalm* was solely responsible for the collision, the Indemnity Insurance Company of North America produced a "bond on appeal" on behalf of Silver Line, Ltd., and its American agent, Kerr Steamship Company, Inc. The bond legally covered *Silverpalm*'s commercial cruising,[397] meaning she could go on raising revenue for her owners, Silver Line, Ltd.—revenue that they desperately needed.

The claims of the survivors of those killed on *Chicago* and of the severely injured Machinist Oehlers now had to be adjudicated. Accordingly, Federal District Attorney McPike's staff had begun compiling information on the three crewmembers killed and the one seriously injured in the late fall of 1933. The three killed were Lieutenant (jg), Harold A. MacFarlane, USN, Chief Pay Clerk John W. Troy, USN, and Lieutenant Frederick S. Chappelle, USMC. The serious injuries to Machinist Joseph A. Oehlers, USN, have already been described. *Silverpalm's* lawyers already had in hand the damage claims filed with the Commissioner. It's worth some time here to explain where those numbers came from.

The case of Lieutenant (jg) MacFarlane illustrates how the government calculated compensatory damages. MacFarlane had been born on 26 September 1907. Retirement age for an officer of his rank in 1933 would have come in 1971, when he turned 64. He had been commissioned in June 1929, and he would have completed 30 years of service by June 1959, assuming nothing happened to force him from the service. In 1934, retirement pay for an officer with MacFarlane's background and prospects for future service was $4500 annually. His total pay for a career of thirty years, if he didn't marry, including his retirement pay after 1959, was therefore $242,132.[398] A similar computation for Chief Pay Clerk John Troy produced a figure of total pay until age 64 of $122,062. The Navy had used such calculations in making its case to the Commissioner on Claims, Ernest Williams, and Silver Line would respond, before a notary public in Washington, D.C., in November 1934.

But first there had to be a hearing on damages that took into account the ruling by the district court in June. That hearing began on 3 October 1934. The back-and-forth between the attorneys for the Silver Line and the lawyers for the government began again, very much as it had in the district court in March when the two sides sparred over which ship was responsible for the collision. But in this hearing, the issue was determining "fair and just" compensation for the survivors of those killed and for the severely injured. This question would be answered by the court's commissioner in one way for MacFarlane, Troy and Chappelle. But the case of Oehlers was different, as Federal District Attorney McPike recognized.

Because Oehlers was judged by the Navy Department to be "unfit for active duty," he could retire. Yet if he retired before the court's commissioner ruled regarding his compensation, Oehlers might be the victim of what we today would call a "catch 22." McPike put it well:

"If the Navy Department delays its ruling for several months, the Commissioner might think that it intends to keep him on the active list, and therefore give him a smaller judgment than he otherwise would have done. Subsequently the Department, after Mr. Oehlers has received a moderate judgment, might, in fact, place him on the retired list. In this event, Oehlers would not get the benefit either of his full pay, or of a judgment which would make up for the loss of his full pay."[399]

McPike explained that "We do not, for one moment, want the Navy Department to consider this a request on our part to place Mr. Oehlers on the retired list so that we may thereby get a larger judgment for him. Obviously, it is to his advantage to stay on the active list. But we do not want to be in the position of not having him get one thing or the other." McPike asked the Navy to get him off the horns of this dilemma by deciding promptly whether or not to let Oehlers stay on the active list.[400] As the cliché has it, "The wheels of justice turn slowly, but they grind exceedingly fine." In Oehlers' case, it is good that they did. McPike understood Oehlers' dilemma, and then acted to protect him while still observing the law.[401]

More contentious than the claims by Oehlers and the survivors of those killed was the claim of the United States for the damage done to *Chicago*. Just how much had it cost to repair the cruiser? Did the Navy use the excuse of having to repair *Chicago* to justify the installation of new equipment—equipment that would have been installed at government expense during *Chicago*'s next major overhaul at Mare Island? For example, Lieutenant Commander Colton was deposed regarding *Chicago*'s repairs on 24 January 1935. At that time, Attorney Esther Phillips asked him about an entry in *Chicago*'s engineering log that "was read in evidence… when we were on the *Chicago* taking testimony…"[402] The entry referred to the ship's generators. Why did they matter? Colton testified that the generators were a new type, and that they had initially experienced teething problems, and so Colton had used the time spent repairing *Chicago* after the collision to rebuild the generators. Attorney Lillick had already made the point that, if Silver Line lost the case, it would not be responsible for repairs or additions to *Chicago* that did not stem from the collision. The cost of rebuilding those generators would fall on the Navy. Lillick was determined to make sure that they did.

He was on firm legal ground. This issue had been adjudicated before. In *Pan American Petroleum & Transport Co. v. United States* (27 F.2d 684, 1928), appeals court Judge Learned Hand argued that "an owner may not seize the opportunity offered him by a collision to advance his periodic overhaul, and make owner's and collision repairs together…" So what about those generators? Colton explained that the Westinghouse Corporation had developed generators that were lighter than the ones built by the General Electric Company. The Navy's Bureau of Engineering wanted to install them on *Chicago*, hoping that they would produce as much power as the heavier General Electric models but save weight, the weight saved being used to add to the ship's other capabilities.

Colton said that the Westinghouse generators "seemed to be, basically, very good; they looked to be efficient, but their nervous system, if I can call it that, was very erratic. They would stop on us, for no apparent reason, or if we suddenly increased the electric load on the ship, the generators would sometimes stop." Colton actually ran four generators when two would have been enough because he didn't want to run the risk of one of two generators failing without warning. Because of his experience with these generators, he advised the Bureau of Engineering not to install them on any cruisers then under

construction. He also made sure that those on *Chicago* were carefully rebuilt when *Chicago* was repaired after the collision.[403] Lillick did not want Silver Line to be charged for that rebuilding.

McPike and his team gathered information about the costs of repairing *Chicago* through January 1935. On 2 January, Rear Admiral Christian Peoples, head of the Bureau of Supplies and Accounts, sent the following figures of *Chicago*'s cost as of 30 September 1933:

Hull and Machinery: $8,932,820.11
Arms and Armament: $2,903,838.73
Equipage (except ordnance): $608,814.64
Supplies: $515, 298.39
TOTAL: $12,960,771.87

In his letter, Peoples noted "that no allowance has been made in the cost of the hull and machinery… for depreciation" based on the length of her anticipated service life. He suggested that Justice Department lawyers consult the Bureau of Construction and Repair.[404]

On 12 January, the chiefs of the bureaus of Construction and Repair, Ordnance, and Steam Engineering sent a letter to the Judge Advocate General pointing out that between *Chicago*'s commissioning on 9 March 1931 and the collision, her value—over a 20-year life span—had depreciated by $1,460,000. That meant the ship's estimated value was approximately $11,500,000.[405]

WAS THE SILVER LINE LIABLE FOR REPAIRING *CHICAGO*?

In the interlocutory decree against *Silverpalm* on 12 July 1934, the District Court did not go into detail concerning its view of the worth of the evidence presented during the hearing. However, once the two sides had presented their arguments regarding the financial damages owed or not owed by Silver Line, Ltd., the Court, on 28 December 1935, issued an extended explanation of why the petition of Silver Line "for exoneration from or limitation of liability"[406] had been denied.

Judge Louderback began his explanation by noting that "Silverpalm was held solely at fault for the collision." He also acknowledged that Silver Line's petition was based on Title 46, section 183 of the U.S. Code. The law limited the amount of liability of the owner of a vessel that had collided with another if the owner lacked "privity" of knowledge that would—and should—have led the owner to take some action or actions (like replacing an incompetent ship's captain) that would have kept the collision from taking place.[407] Subsection (e) of section 183 stated, "In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity of knowledge of the owner of such vessel."[408] In other words, the owner of a ship like *Silverpalm* was assumed to be responsible for what the ship did because the owner should have known what could happen. As Louderback put it, "The issue before the court is whether the Silver Line, Limited, has shown that the losses complained of have been done, occasioned, or incurred, without the privity or knowledge of Silver Line."[409]

Louderback observed that "The witnesses who testified in this proceeding are in substantial agreement" that when "the ship [was] proceeding at more than six knots per hour," it took longer to stop her and reverse her engines than similar ships with different engines. As he pointed out, in tests, "when the ship was proceeding at 108 revolutions [making a speed of about 13 knots] it

required three minutes and two to four seconds, …, to bring the engines to a stop…"[410] According to Louderback, there was a brake for the Doxford two-cycle diesels—a brake developed by the Doxford company, itself. As Louderback said, however, "The evidence shows that the petitioner had knowledge of this brake, but, on the advice of engineers, did not install the brake on the *Silverpalm*." That meant that "the engine, as installed on the *Silverpalm*, [was] inherently dangerous…" The owners of the Silver Line should have known that. They deliberately chose not to install "a known device—the brake—which would have materially controlled and lessened this inherent dangerous feature, all to the greater safety of property and life."[411]

The owners also knew—or should have known—that captain Cox had a history of proceeding at relatively high speed, even in fog. The logs of the *Silverpalm* showed "several instances between May and October, 1933, when commanded by Captain Cox," of the ship going full speed "in 'thick' fog." Louderback would not let the owners plead ignorance: "The logs of each voyage, as well as the interim reports, …, were regularly sent to the petitioner by each vessel, …, and there examined by responsible officers…" Louderback's inference from his examination of the logs and interim reports was that the Silver Line's directors should have known that Captain Cox was taking a major risk on a routine basis. Cox didn't deceive them.[412]

Indeed, as Lounderback wrote, "All witnesses testifying on both sides are agreed that the ship's captain should know the time required to put the engines astern. Petitioner's witness, Stanley F. Dorey, was the most emphatic in this, and its witness, Captain [Archibald A.] Dunning, went so far as to say that if he was piloting a ship which was unable to put her engines in reverse in two minutes, he thought the captain of such a ship should advise him, the pilot, of that fact." Louderback's judgment on the facts presented to him was clear: "Had the captain [of *Silverpalm*] known the full risks he ran, I can hardly believe that he would have failed to slacken speed to the moderate or slow speed at which the ship was readily controllable. The severity of the collision in question was due not only to the fact that the *Silverpalm* was navigating, prior to the collision, at too great speed in a fog, but also to the fact that the *Silverpalm* was still running at high speed when she struck, after two minutes of effort by the *Silverpalm*'s officers to check her speed."[413]

Louderback wrapped up his explanation by saying, "The petitioner knew, or should have known," that the ship could not be stopped quickly at the speed she normally cruised at—even in fog. Therefore, the directors of Silver Line should have warned Captain Cox of the risk he faced, or they "should have selected a master with known qualifications for command of such engine ships." Louderback then moved from the facts to the law: "From the foregoing findings of fact, I conclude, as a matter of law, the petition for limitation should be denied."[414] In short, Silver Line was on the hook.

Federal District Attorney McPike was more than gratified by this second victory. On 30 December 1935, he wrote to Rear Admiral E. H. Campbell, Commandant of the Twelfth Naval District, "We greatly rejoice to advise that this morning United States District Judge Louderback handed down his opinion reviewing the evidence [in the limitation of liability petition] and finding that the SILVER LINE was personally at fault and not entitled to limit its liability."[415] McPike noted that the limitation of liability case had "involved a great deal of highly technical proof," and he thanked Campbell for the help provided by Navy Captains William P. Gaddis and Ross S. Culp, both of whom were on the Admiral's staff.[416]

On 10 January 1936, James Morris, the Assistant Attorney General, sent a letter to Rear Admiral Claude Bloch, the Navy Judge Advocate General,

along with a copy of the 28 December 1935 opinion of Judge Louderback that denied the petition of Silver Line, Ltd., for a limit to its liability. As Morris pointed out, "This means that if the Court's ruling is upheld, the Government as well as the death claimants will be entitled to a decree against the owner for their full damages." Morris also noted that "Miss Esther B. Phillips, who has handled the entire case from its inception, has secured unusual results and she is to be complimented for her interest and success in the litigation."[417] As both Morris and Bloch knew, however, the district court's decision on liability—that *Silverpalm* was solely liable for the collision—had been appealed at the end of July 1934, and the Ninth Circuit Court of Appeals was still reviewing it.

In the meantime, attorney Lillick, acting on behalf of the Silver Line, had appealed Louderback's 8 January 1936 interlocutory decree denying exoneration and limitation of damages and requiring both the Silver Line and the government to argue their claims before the Commissioner.[418] Lillick, therefore, was waging his legal campaign against the U.S. government on two fronts simultaneously. His first move on the legal chessboard was the appeal to the Ninth Circuit Court of Appeals submitted on 24 July 1934. His second move was his appeal of Louderback's December 1935 decision denying the Silver Line's petition for limitation of damages. The hearing on Silver Line's petition had proceeded on the basis of Louderback's ruling in June 1934. But what if the Ninth Circuit decided to overturn that ruling? The attorneys for both sides had had no choice but to move ahead with the dispute over damages. They had to respond to Lounderback's interlocutory decree of 8 January 1936. And indeed that's what they did through 1936, while they also prepared their briefs for the Ninth Circuit's judges.

Chapter 9: The Case in the Ninth Circuit Court of Appeals

"The law is in another world, but it thinks it's the whole world…"

—John Mortimer, Rumpole of the Bailey

PREPARATIONS FOR THE APPEAL OF THE JUNE 1934 DISTRICT COURT DECISION

As part of the preparations for the Ninth Circuit, both the government attorneys and the lawyers for Silver Line, Ltd., agreed on 7 February 1936 to stipulate that many of the exhibits submitted to the district court did not need to be printed. There were a number of papers, including log books, charts, drawings and plans, that the two sides to the case agreed should be "sent up to the Circuit Court of Appeals for the Ninth Circuit as original exhibits."[419] An "Amended Praecipe for Apostles on Appeal" was filed on 17 February 1936 by Ira Lillick and his colleague Joseph Geary, requesting the clerk of the Circuit Court of Appeals to accept "all of the exhibits introduced in evidence in the taking of depositions and upon the trial of said cause." On 11 March 1936, attorneys McPike and Phillips submitted an amendment to the "Praecipe for Apostles on Appeal," requesting that the deposition of Lieutenant Commander Ernest Colton, *Chicago*'s engineering officer, be included in the transcript of the district court trial given to the appeals court judges.[420] On 13 March, Clerk Walter B. Maling, writing for the District Court, accepted all 1245 pages of the trial transcript and forwarded them to the Ninth Circuit Court of Appeals. The *Apostles on Appeal* were published in May.

There were two Appeals Court cases. Number 8146 was the appeal from Judge Louderback's decision in June 1934 that *Silverpalm* was at fault for the collision. Number 8152 was the appeal from Louderback's December 1935 rejection of Silver Line's petition for exoneration from and limitation of liability. While the two sets of lawyers prepared their briefs for the Appeals Court judges in both cases, Commissioner Williams continued preparing his report on the damage awards anticipated in light of the district court's December 1935 ruling. Lillick and Joseph Geary, the Silver Line's attorneys, had objected to the Commissioner's initial findings, and they had submitted their brief on 16 September 1936. A month later, the government's attorneys had responded.[421]

THE BRIEFS IN CASE 8146 (RESPONSIBILITY FOR THE COLLISION)

American legal practice did not require the Appeals Court judges to treat the district court judge's opinion as binding. Because the lawyers for both sides knew what sorts of evidence Judge Louderback had focused on, attorneys Lillick and Phillips had to take into account his ruling and comments—as well as the briefs of the opposing side—as they crafted their appeals. Lillick's argument, prepared with the assistance of his partner Joseph Geary, was submitted first, in mid-September 1936. In his "Preliminary Statement," Lillick reminded the Ninth Circuit judges that it was "significant that none of the *Silverpalm*'s [sic] officers or the other factual witnesses of the *Silverpalm* were in Court, and all of their testimony was by depositions." Lillick also noted that "No written opinion was rendered by the Court and added to the Minute Order providing:

'This case having been tried and submitted, …, it is ordered that a decree enter for the Libelant [the U.S. government] upon the Libel and for Cross-Respondents [those bringing suit for damages] upon the Cross-Libel upon findings of fact and conclusions of law to be filed.'" Lillick and Geary did not mention Judge Louderback's 28 December 1935 opinion denying Silver Line's petition for limitation of its liability.

About half of the body of Lillick's brief consisted of his and Geary's assessment of the "Statement of Facts" that Judge Louderback had provided as the grounds for his interlocutory decree. They started off by considering the courses steered by the two ships. Their brief asserted that the *Silverpalm*'s course was 156 degrees true. They knew that because her deck officer had been able to sight the sun just after 8:00 am. Soon thereafter, *Silverpalm* sighted *Albion Star*, which was on a course of 335 degrees true. In making this point, Lillick's brief set the stage for what was to come: "The *Albion Star*, although not actually involved in the collision between the *Silverpalm* and the *Chicago*, nevertheless forms an extremely significant feature in this case with relation to the causes leading up to the collision between the *Silverpalm* and the *Chicago*. Later, herein, we shall discuss at more length, the part played by the *Albion Star* in this accident."[422]

Before reaching that part of their brief, Lillick and Geary clearly stated their intent, which was to show that *Chicago*, in increasing "her speed from 12 knots to 18 knots per hour… brought about the circumstances resulting in the collision with the *Silverpalm*."[423] Lillick admitted that when Captain Kays of *Chicago* was apprised of *Albion Star*'s presence to starboard, he first ordered two-thirds speed and then "stop." At about the same time, according to Lillick, *Chicago* sounded several "two-blast" signals. However, whereas the officers on *Chicago* intended to signal "stop" and believed that they had done so, *Albion Star*'s officers interpreted what they heard as a signal that the warship approaching them was going to "swing her course to port."[424] Lillick's point was that the officers on *Chicago* had violated Article 15 of the International Rules of the Road; they had sounded the wrong signal.

Not only that, "we shall prove by the *Chicago*'s own witnesses and records that the cruiser at the time the *Silverpalm* was sighted was violating the applicable Rules of the Road with relation to speed in fog."[425] Lillick then drew on testimony given during the district court trial. He zeroed in on the differences between the testimony of *Chicago*'s officers as to her speed and what the engine room bell sheets showed. His sarcasm showed in his approach to covering that part of the district court testimony: "During the trial, capital was made by the *Chicago*'s officers of the fact that their vessel had been successful in winning the Cruiser Engine Room Efficiency Contest. 'The proof of the pudding' with respect to this collision, however, 'is in the eating.'" And the "eating" was sour: "We believe that we can say without fear of contradiction that in our professional experience we have never observed a more universal indication of erasures or modifications of a log or a document as significant as those containing the bell book entries. These alterations are made in the face of a notation [to make no erasures] which appears in heavy type on the bell sheet."[426]

He and Geary followed this rhetorical flourish by questioning the evidence of the at-sea trial of *Louisville*, the tests done in the University of California swimming pool, and the government's arguments based on the evidence of the photographs of the gash in *Chicago*'s port side. As to the speed trial with *Louisville*, "it definitely serves to support our contention that the *Chicago* was proceeding at an immoderately high rate of speed as she turned toward the fog bank on her port side, from which the *Silverpalm* emerged."[427] Having made that point, Lillick and

Geary were outright dismissive of the swimming pool trials: "Were it not for the seriousness with which these swimming pool tests were advanced by the United States, we would not even dignify their results by mentioning them in this brief."[428] Their language was scathing: "The record contains 150 pages of testimony relating to this ridiculous sort of nonsense."[429] Lillick's explanation for the gash in *Chicago*'s port side was the same as the one he had obtained from his own witnesses during the district court trial: *Chicago* was moving when she was hit, and so her side plating was cut sharply away at the front of the gash while at the after end of the gash plating was piled up "much in the same fashion as an accordion pleated drapery."[430]

Yet the "clincher" was what had occurred to Federal District Attorney McPike back in the fall of 1933. It was the argument that *Chicago* had been deliberately moving too fast while in or adjacent to the fog. As evidence of this, Lillick and Geary cited modifications to three engine bell book sheets at 13 different places. Then they went on to say that "The erasures and alterations concern what the Federal Courts have previously referred to as 'the critical entries' and evidence what was being done immediately prior to the collision."[431]

Lillick added to his presentation an argument that he could not have put forward in the district court trial. It was that the findings of the district court had less weight than they would have had otherwise because "*all* of the evidence pertinent to the navigation of the *Silverpalm* and extremely significant testimony with relation to the navigation of the *Chicago*, and the manner in which her engines were operated, was taken by deposition." As Lillick and Geary put it, "we are fully cognizant of the general rule that relates to the weight given to the findings of the District Court." But then they went on to observe that "the presumption that the findings of the District Court are correct is [therefore] of less weight" because so much testimony was taken by deposition.[432] They were saying that the demeanor of witnesses in a hearing matters, and that therefore they had in a way been penalized because they could not examine witnesses in the District Court judge's presence.

Lillick and Geary emphasized what they had stressed from the first—that the cruiser was going too fast, given the fog and given where she was in the "Pacific Coast steamer track." Lillick disparaged the argument of Captain Kays of *Chicago* that he needed to vitrify the new surface of his ship's boilers: "It is this flimsy excuse which, within the space of a few minutes, caused the *Chicago* to swing away from the *Albion Star* and to increase her speed so as to 'get by' that vessel—which 'getting by' brought her (the *Chicago*) straight into a collision with the *Silverpalm*." Lillick and Geary then added a point that would distinguish their brief from that of the government: "The navigation of the *Chicago* with respect to the *Albion Star* cannot be separated from the navigation of the *Chicago* with respect to the *Silverpalm*. They are inextricably tied together."[433]

As Lillick reviewed several already decided cases that he argued were relevant to *Chicago v. Silverpalm*, he built a legal argument that "There can be no question but that the *Chicago*… is chargeable with a violation of the Rules of the Road relating to speed of a vessel in the fog. The general rule applicable to such a situation is that where, at the time of the collision, a vessel is guilty of violating a statutory provision designed to prevent collisions, it must be proven not only that such violation did not contribute to such collision, but that it *could not possibly have done so*."[434] Moreover, *Chicago*'s ability to apply much of the power of her engines to reversing did not in any way excuse her captain from increasing her speed after slowing to ascertain the location of *Albion Star*. Lillick and Geary cited several

cases in which federal courts had applied this rule to specific incidents.

Lillick proceeded like a fencer deflecting the conclusions of fact—the "thrusts"—directed against him by the district court. For example, the way ahead of *Chicago*, even after she passed *Albion Star*, could not be reasonably assumed to be clear. There were ships always steaming up and down the coast and into and out of San Francisco Bay. Even if the fog wasn't heavy, there was no justification for *Chicago* increasing her speed. As Lillick wrote, "There was a collision!" The collision was itself clear evidence of the deliberate and unnecessary risk taken by *Chicago*.

Lillick's brief also cited other precedents from earlier, previous cases in dismissing several points taken into account by Judge Louderback. Why had Captain Kays acceded to the directive from the Navy's Bureau of Engineering that he anneal or bake the hydrecon coating on her boilers? The law protected Kays if he chose to disregard the direction from the Bureau. The Rules of the Road surely took precedence over a directive from a bureau official in Washington.[435] Why had entries in the engine room bell books been altered by erasures when that was not allowed? In apparent frustration, Lillick wrote that "We do not know the reason for some of the changes in the *Chicago*'s deck logs and engine room bell sheets. To a large extent they are left to conjecture and surmise." That mattered because there was no way of knowing for sure what would have happened if the entries erased had not been changed. As Lillick claimed, "[W]e do not even know accurately what had previously been written in these logs."[436]

Lillick and Geary also stressed that the initial reaction of Captain Kays on sighting *Silverpalm* was to turn hard left. Given Article 18 of the International Rules of the Road, however, he should have ordered a turn to the right, which was in fact what he had done almost immediately after he realized his error. Lillick cited Article 18: "When two steam vessels are meeting end on, *or nearly end on*, so as to involve risk of collision, each shall alter her course to starboard so that each may pass on the port side of the other." As Lillick declared, "This rule is almost axiomatic."[437]

So what lay behind the actions of Captain Kays? What really led to the collision? Lillick argued that it was the arrogance of the Navy. As he stressed, "a naval vessel is not to be excused for violation of the Rules of the Road. There is no superior privilege… over merchants[sic] vessels regardless as to whether those merchant vessels are American or foreign ships." *Chicago*'s captain had no legal right "to impose on the *Silverpalm*'s captain the expectancy of a curved and uncertain course on the *Chicago*'s part because it might be slightly easier for the *Chicago* to take the improper course in view of her previous helm maneuver and her existing speed." Lillick capped this argument by saying "It is true there is a certain arrogance in a vessel such as the cruiser *Chicago* as you look at her. We take it that such arrogance of appearance, however, is not converted into a right in the United States Court…" At the same time, however Lillick and Geary did not want the Appeals Court judges to think that they were accusing *Chicago*'s officers of perjury. Those individuals had not perjured themselves "in seeking to minimize the effect of Captain Kays' mistaken helm order," but experience in such cases had shown that witnesses tended to defend their own ships.[438]

Finally, Lillick and Geary cited "the settled law of the United States that if both ships are in fault the damages are equally divided irrespective of the degree of fault." In the law, it didn't matter if *Silverpalm*'s fault was greater than *Chicago*'s. If a court decided that both ships were partly at fault, then it was automatic "that a divided-damage decree is proper." Because, as the two

attorneys argued, the record showed that *Chicago* had been at fault, the "conclusions reached by the District Court are erroneous."[439]

THE OPPOSING BRIEFS: UNITED STATES

If the attorneys for *Silverpalm* walked into the federal district court at a disadvantage because of the amount of time it took for *Silverpalm*'s diesels to be stopped and then reversed, the government's lawyers—McPike and Phillips—were at a disadvantage once the case was appealed. Lillick and Geary had built their brief to the Ninth Circuit not on defending *Silverpalm* but on arguing that *Chicago* was partly at fault. If they could prove through their brief that *Chicago* had been at fault, *even in a way that was not as serious as the fault born by Silverpalm*, then the judges of the Ninth Circuit would have to issue a divided-damage decree. For Lillick and Geary, a ruling from the Appeals Court of shared responsibility for the collision was a victory. By contrast, McPike and Phillips had to convince the judges of the Ninth Circuit Court of Appeals that no responsibility at all attached to *Chicago*. It was like the difference between being able to win a baseball game with a sacrifice fly versus having to win it with a "walk off" home run.

After their "Statement of the Case," McPike and Phillips acknowledged in their brief that "the appeal in an admiralty cause [sic] is technically a trial *de novo*"—a brand new hearing. But they also claimed that "the findings of fact made by the trial Court upon disputed issues are entitled to great weight."[440] They did not, however, want to lecture the Ninth Circuit's judges, and so they cited supporting cases on appeal and others that had been dealt with by the Supreme Court.[441]

In their brief submitted on 14 October 1936, they reviewed at length the findings of fact and conclusions of law of District Court Judge Louderback. As they admitted, "The record is a voluminous one." Yet they felt that they had "to review it fully, even though by so doing [their] brief [was] made more lengthy than the ideal brief should be."[442] McPike and Phillips said that they believed that the Ninth Circuit Court of Appeals would "find that the great weight of the evidence, both in amount and quality, supports the conclusions of the trial Court." Hence they also claimed that "we can be of no real assistance to this Court if we do not direct attention to all of the material evidence." In a swipe at Lillick and his colleague Joseph Geary, McPike and Phillips asserted that "We believe this to be a duty resting on both sides to the controversy."[443] As far as any alleged bias on the part of *Chicago*'s crew was concerned, the government attorneys dismissed it by noting that the Navy Board of Inquiry had discovered nothing of the sort.[444]

Phillips and McPike then turned to the issue of who saw whom and when. It was a matter of dispute between the officers of the two ships. First the government attorneys reviewed the testimony of Captain Cox, and they concluded that "the angles and distances testified to by Captain Cox involve mathematical impossibilities." Vice Admiral Laning had made the same point, though with more subtlety: "…I do not believe it possible for the collision to have occurred without the Captain of the *Silverpalm* using a good deal of ingenuity and skill to bring it about."[445] As far as the relative positions of the two ships were concerned, the government attorneys claimed that "A brief study of the testimony shows that none of the witnesses who saw the collision testified as to the relative positions of the two vessels described in Silver Line's pleadings." Instead, "the testimony of the *Silverpalm*'s officers as to the positions of the two

ships substantially corroborated the testimony of the *Chicago*'s witnesses."[446]

The government attorneys stressed the role of *Silverpalm*'s engines in setting up the collision. The big Doxford diesels could not be shut down quickly and then reversed, as multiple trials with *Silverpalm* had shown on 20 December 1933. In one of those trials, *Silverpalm*'s ability to steer while she was trying to slow down was tested as her helm was put over; she swung to the right twelve degrees in 30 seconds. Why hadn't she done roughly the same thing the day of the collision? As Phillips and McPike argued, "If the order 'hard-a-starboard' was given 75 seconds before the collision, the ship would have swung 30 degrees. … But Captain Cox testified that the *Silverpalm* only swung 10 or 15 degrees under the 'hard-a-starboard' order." As McPike and Phillips informed the Appeals Court judges, the Silver Line admitted that *Silverpalm* "proceeded until shortly before the collision without changing her course."[447] The government attorneys concluded that the judges—"your Honors"—"will agree with the trial Court's finding that a 'prompt and effective use of the rudder was not made' by the *Silverpalm*."[448]

Attorneys Phillips and McPike finished the first section of their brief with the following statement of the dilemma facing Captain Kays when the collision occurred:

> "[H]e saw on his port bow a merchant vessel, of considerable size, proceeding at what was probably the full speed of a vessel of her type. Her course crossed his own, and there was risk of collision. He saw her coming, without making an apparent change of course, save to cross ahead of him. On his starboard was another merchant vessel as to whom he had been an over-taking and burdened vessel, and to whom he had previously signaled. His own vessel was more than 200 yards long, her engines amidships, highly powered, with tremendous steam available both to serve and to destroy. In the after part of his ship hundreds of men were then at breakfast. What should he have done?"[449]

McPike and Phillips proceeded to review what Captain Kays had done. They first countered the argument of Lillick and Geary that *Chicago* was to blame because she had been going too fast before sighting *Albion Star*. As they stated, "Since 1895 the rule has been established in the Supreme Court that if a vessel is running at a moderate speed when she sights or hears the other vessel in a fog, fault will not be imputed to her because of a full speed in the fog a few minutes earlier."[450]

Having made that point, they then challenged the Appellant's sketch of the situation as it existed when *Chicago* was approaching *Albion Star*. The brief by Lillick and Geary put the three ships (*Chicago*, *Silverpalm*, and *Albion Star*) together as if on a stage. Their argument was that basically *Chicago* had not acted safely when passing *Albion Star*. Instead, the cruiser had moved too quickly and had therefore been unable to stop or maneuver swiftly when that was called for.

It was as though three cars had come together almost simultaneously at a 4-way stop. *Chicago* was like the car at the center, wanting to proceed ahead. However, there was a car on the right, represented by *Albion Star*. The car in the center needed to wait briefly while the car on its right hand turned right. Then the car in the center would cross the intersection and move ahead. But there was another car—represented by *Silverpalm*—on the left. This car meant to cross ahead of the car in the center. The automobile "rules of the road" sort out this situation with a rule that when two cars meet simultaneously at a 4-way stop, the one on the right goes first. So the car representing *Albion Star* would go first,

followed by the car representing *Chicago*, and then by the car representing *Silverpalm*.

But now cover much of the intersection with fog. Deciding who goes first depends not only on the rule of the road that the car to the right has the right-of-way, but also on whether all three cars can see one another, and on whether they can see one another at the same time. In effect, Lillick and Geary had put the three ships together almost simultaneously and within and between the fog banks. *Chicago* avoided *Albion Star* but then accelerated into *Silverpalm* which, according to Lillick and Geary, she should have seen. Metaphorically, *Chicago* put on the brakes and swerved; *Silverpalm* also tried to swerve and brake, but it was too late. Phillips and McPike did not accept this scenario. Instead, they had the car played by *Chicago* pull up to the intersection where the car represented by *Albion Star* was already turning right. The car standing in for *Silverpalm* had not yet reached the intersection. She came into the intersection as the car representing *Chicago* was entering it on her right. But because of the fog, *Silverpalm* could not avoid hitting the car that was *Chicago*. Indeed, the car that was *Silverpalm* did not attempt to stop soon enough, and her "brakes" were faulty, and so there was a collision.

Phillips and McPike put it this way:

> "As hearing and seeing the *Albion Star* was several minutes in advance of seeing or hearing the *Silverpalm*, and as the *Chicago* and *Albion Star* were never in a collision emergency… and did not collide, it would seem to us that even if the *Chicago* did not stop her engines promptly on hearing the *Albion Star*, that would be a fault which was of no consequence so far as the emergency which arose later in connection with the *Silverpalm*."[451]

Put another way, the three ships did not simultaneously enter what might be called the "intersecting zone." Instead, they appeared sequentially. *Chicago* dealt first with *Albion Star* and then, continuing on, confronted *Silverpalm*. Because the latter was moving too fast, and maneuvered too late, there was a collision.

If the Appeals Court judges accepted this interpretation of what occurred, then, according to McPike and Phillips, they would find "without difficulty that the *Chicago* was not guilty of a violation of the rules in failing to stop her engines promptly when she heard the *Albion Star* ahead on her right."[452] The government attorneys could not, at this point in their brief, pass up the chance to poke a rhetorical stick at their legal opponents: "[W]e confess that it is with some amusement that we read the Silver Line's criticism of this part of the *Chicago*'s navigation, in view of the fact that Captain Cox's testimony that when *he* heard the *Albion Star*'s whistles ahead of him, on his port, he did not stop his engines at all, but kept right on going at full speed!"[453]

Covering detail after detail, McPike and Phillips reviewed the evidence. *Chicago* had sounded the proper signals; unfortunately, they had not always been heard. In addition, *Chicago* was not going too fast when she sighted *Silverpalm*. How did the government know that? Phillips and Lillick had the answer: "The *Albion Star*'s original speed of 10 knots was reduced to 6 knots" when she spotted *Chicago* a half mile away on her port quarter. *Chicago* was "still a half mile on the quarter at the time of the collision several minutes later; whereas the *Silverpalm*, first sighted approximately a half mile ahead of [*Albion Star*], passes the *Albion Star*, and arrives at the collision point. Clearly, the average of the *Chicago*'s speed was not greater than the average of the *Albion Star*'s speed. Otherwise, the *Chicago* would not have maintained the same distance aft of the *Albion Star*."[454]

McPike and Phillips also defended the trials conducted using the *Louisville*, arguing that all the evidence regarding *Chicago*'s speed "clearly sustains the finding that the *Chicago*'s speed when she sighted the *Silverpalm* was between 8 and 9 knots."[455] The government attorneys also defended the performance of *Chicago*'s engine room staff at length. They particularly referenced the testimony of Lieutenant Commander Ernest Colton, *Chicago*'s engineering officer. As they said, Colton was "present in court. The trial court had the opportunity to see and observe his demeanor and to judge of his competency and character."[456]

Phillips and McPike also defended the ship model tests. They did not count the criticisms of those tests by David Dickie, the witness for the other side, as having any weight. As they said in their brief, "His only experience in observing ship model tests occurred over thirty years before the trial when he was a student watching others. He had never performed model tests of any kind. None of the criticisms which he made was valid."[457] McPike and Phillips also criticized the argument of Lillick and Geary that Captain Kays had given the wrong order to *Chicago*'s helmsman when he and others on the bridge of the cruiser sighted *Silverpalm.*

Furthermore, the government attorneys accused their opponents of changing their argument mid-stream, so to speak. Initially the Silver Line had argued that *Chicago* "should have given a 'left rudder' in order to effect a starboard to starboard passage." But later Lillick and Geary switched their position, arguing that "the maneuver required of the *Chicago* was to turn to the right, and that a port to port passage was correct, because the vessels sighted each other within the meaning of Article 18 of the International Rules…"[458] In effect, the switch by Lillick and Geary supported the thinking and decision-making by Captain Kays of *Chicago*, confronted as he was by the need for an almost instant decision. Given what they did—their switch in argument, how could they now claim that Captain Kays gave the wrong order?

McPike and Phillips also took up the matter of the erasures in the engine room bell books. They claimed that "many of the so-called erasures were not erasures." As they said, "if the *Chicago*'s crew members were making erasures and falsifying records, they were apparently doing so for the sake of amusing themselves. Certainly it was not to make them identical with each other, or with the deck records."[459] The government attorneys declared that the so-called "fabricated" records were not evidence of collusion. As they explained to the Appeals Court judges, the members of the Navy Board of Inquiry "had all the records locked up by noon of the collision day."[460] The engine room bell book sheets had been gathered up even before the men then on watch left their posts.

Finally, at the end of their brief, Phillips and McPike turned to "The Applicable Principles of Law." Their brief's basic argument was that "the decision of this case turns on questions of fact. The principles of law which are applicable and the decisions thereon are not indefinite or unsettled. Our problem is one of selection from many decisions which illustrate the applicable principles of law."[461] They then reviewed previous court decisions that concerned the interpretation of the "applicable principles of law."

First, ships were not to exceed "moderate speed" in a fog. However, Phillips and McPike argued that "The term 'moderate speed in a fog' is relative and depends on the circumstances of the case."[462] To support this claim, they quoted the highly respected Judge Learned Hand, who had ruled in another case that a ship could proceed at a moderate speed if she could clearly see an approaching ship. Of course, that depended on

the duty of the approaching ship to act in the same way. As Hand had said, "The rule is not theoretically adequate in all cases; though each vessel be in such reserve that she can check her way before she reaches the place at which the other appears, it does not follow that they cannot collide. The point of meeting may be such that they will both reach it, though each could have stopped before reaching the place where she could first have sighted the other. However, it is the only practical rule, and it is the law."[463]

Phillips also dealt with the second principle, "The ability to stop within the limits of visibility," and she and McPike affirmed that *Chicago* had acted properly in satisfying the third principle, which was that ships needed, in foggy weather, to avoid steaming into the fog. They also argued that the speed of the cruiser before 8:00 am was "immaterial save as a basis in computing her later speeds." Their assessment of what *Silverpalm* did before the collision focused on—again—the Doxford diesel engines. As they said, "we doubt whether there is a single reported case where the master of a vessel learned for the first time in a collision emergency that his engineers were unable to obey his order 'engines astern' for more than two minutes. The *Silverpalm*'s captain ordered engines 'full astern' and his ship proceeded for two minutes in the very jaws of the collision."[464]

McPike and Phillips concluded their brief by explaining that "It was the charge that some witnesses from the *Chicago* disgraced themselves and their service by willful fabrication of records which obliged us to present the case in fullest detail. If the whole case is examined, appellant's accusation is seen to be baseless."[465]

APPELLANTS' REPLY BRIEF

Ten days after the government's attorneys submitted their brief to the Appeals Court, Lillick and Geary responded. There was no backing down. They began by reminding the judges of the Ninth Circuit that "The chain of circumstances leading towards the collision" began at "approximately 8 o'clock" and ended at "approximately 8:07 o'clock on the morning of October 24, 1933." Then Lillick and Geary claimed that "Every action taken by the *Chicago*'s officers in that brief space of time unmistakably pointed directly to the collision with *Silverpalm*."[466] In the first place, they argued, *Chicago* did not have to veer to port, toward the fog bank on that side. The cruiser could have gone straight ahead. They disputed the claim by the government that *Chicago* had changed course *only* to avoid *Albion Star*, but they acknowledged that the attention of the officers of *Chicago* "was riveted on the *Albion Star* at the time the *Silverpalm* appeared."[467]

Lillick and Geary also emphasized that *Chicago*'s captain continued to increase power to his ship's engines "AFTER [emphasis in the original] the *Silverpalm* appeared out of the fog bank. It was only when there was less than a minute left before these two vessels collided that the officers of the *Chicago* finally awoke to the seriousness of the situation and sought to overcome their neglect by ordering the vaunted reversing power of that vessel into play. It was then too late."[468] After reviewing what they considered relevant prior cases, Lillick and Geary argued that *Chicago* "was negligent—was improperly navigated—and that the collision with the *Silverpalm* is directly attributable to these conditions."[469] In short, *Chicago* was liable.

What about *Silverpalm*'s errors? Lillick and Geary cited several previous court rulings that the fault of one ship did not cancel the responsibility of the other, approaching ship to act to avoid a collision.[470] They particularly focused on

Chicago's acceleration to 18 knots prior to the collision. Their argument was that this acceleration "was a condition which brought about the excessive speed of the *Chicago* at the time the *Silverpalm* was observed."[471] What about the argument of the government that *Chicago* needed to accelerate in order to satisfy a directive from the Navy's Bureau of Engineering that she anneal a coat of hydrecon to her boilers? Lillick and Geary quoted from the government's brief that "We think that the naval officers know more about hydrecon and the desirability of testing it at high speeds than the appellants and consider it unnecessary to argue such a contention." Lillick and Geary replied to that assertion by saying that "Perhaps the naval officers do know more than we about hydrecon. Perhaps it is desirable to test it at high speeds. But that does not justify an immoderate rate of speed in a fog."[472]

Lillick and Geary also repeated what they had already said in their brief about the correct inferences to be drawn from the physical damage to the two ships as shown in the photographs taken of both after the collision. The attorneys for the Silver Line also repeated their concerns about the changes in the engine room bell books of *Chicago*. They didn't charge "the Navy and its officers with deliberate falsification of their testimony," but they did make the point that even trained sailors were fallible.[473] They finished their "Reply Brief" by repeating their main arguments: first, that *Chicago*'s officers were negligent, and second, that the "criticism leveled at the *Silverpalm* will not abrogate the negligence or the faults of the *Chicago*."[474]

APPELLEES' REPLY MEMORANDUM

McPike and Phillips had points they wanted to repeat for the benefit of the Appeals Court judges. However, in their 4 December 1936 "Memorandum," they also noted that Lillick and Geary had introduced some new claims as part of their "Appellants' Reply Brief." For example, the government attorneys disputed the argument of Lillick and Geary that "*Chicago could and should* have continued straight ahead without making a change of course to avoid the *Albion Star*."[475] Phillips and McPike pointed out that their claim disregarded "the testimony of the witnesses that the courses of the *Albion Star* and the *Chicago* were 335 [deg.] true and 350 [deg.] true, respectively, and that the course of the *Chicago*, when first seen, converged on the *Albion Star*'s course." Therefore, "it was the *Chicago*'s obligation not to proceed straight ahead and not to crowd the *Albion Star* on her course."

According to McPike and Phillips, Lillick and Geary introduced a new twist to their claim when they said that *Chicago* actually "began her turn to the left *before* she sighted the *Albion Star*." As Phillips and McPike put it, Lillick and Geary "would have your Honors believe that the *Chicago*, hearing a whistle ahead on her starboard, changed her course without waiting to see whether such change of course would bring her on to the vessel ahead of her." Lillick and Geary had relied on Vice Admiral Laning's testimony to substantiate this point. Phillips and McPike tried to show that Lillick and Geary were wrong by using the testimony of other witnesses.[476]

The government attorneys also disputed another claim by Lillick and Geary—that the attention of *Chicago*'s witnesses was "riveted" on *Albion Star*. As McPike and Phillips stressed, that claim was "purely argumentative; not a word of testimony in the record justifies it. On the contrary, it stands to reason that alertness in listening for sounds on the starboard side means

alertness in listening for sounds on the port side as well."[477] Phillips and McPike also challenged an "afterthought" on the part of Lillick and Geary that *Chicago*'s captain failed to order her engines full speed astern soon enough once *Silverpalm* was sighted. As Phillips and McPike observed, "No such argument was made in appellant's opening brief, nor was it even hinted." It was also incorrect.[478]

McPike and Phillips also criticized the way that Lillick and Geary had used the testimony concerning the engineering capabilities of both *Chicago* and *Louisville*. The government attorneys suggested that their legal opponents misunderstood how a "sal log" worked and what the relationship was between an engine's revolutions and a ship's speed. McPike and Phillips were, in effect, accusing Lillick and Geary of relying on an automobile analogy to the cruiser when it suited them and of abandoning that analogy when it didn't. *Chicago* was not like a car. Her engines might be stopped while she coasted through the water at some real speed. Conversely, increasing the engine revolutions did not lead immediately to an increase in speed, and the sal log did not and could not register a ship's actual speed when the ship was accelerating and decelerating.[479] Lillick and Geary seemed to deliberately misunderstand how ships worked.

Phillips and McPike also returned to the issue that had so puzzled Esther Phillips all along. Why couldn't the witnesses to the collision agree as to the courses of the two ships? As she and McPike told the Appeals Court judges, "the testimony as to the courses of the two vessels was irreconcilable." After all, if "the *Silverpalm* were on course 156 [deg.] true, with the *Chicago* bearing a point to two points on her right, then the *Chicago* on 330 [deg.] true would have seen the *Silverpalm* on her right and there would not have been the slightest risk of collision."[480] Hence one of the ships had to not be on the course she said she was. "We repeat," wrote McPike and Phillips, "our statement in our opening brief, we do not pretend to be able to reconcile the discrepancies in the testimony of the *Silverpalm*'s witnesses. They are irreconcilable, not only with the *Chicago*'s witnesses, but as between the *Silverpalm*'s witnesses themselves."[481]

That conundrum did not stop McPike and Phillips from telling the judges on the Appeals Court "that all of the appellant's charges of fault against the *Chicago* depend on its contention that the *Chicago* was maintaining a speed of 13 or 14 knots at the moment of sighting the *Silverpalm*." They continued, "If the trial Court's finding of the speed of the *Chicago* is found to be sustained by the evidence, all the other contentions of appellant will be found to vanish."[482] Citing "six independent lines of truth, which were consistent with each other," McPike and Phillips reached the conclusion that *Chicago* was moving at a moderate speed when *Silverpalm* hove into view and that the cruiser "adopted promptly the only maneuver which could minimize the damages of a vessel in her situation."[483]

They also asserted that *Silverpalm*'s faults led to the collision. Perhaps the most important of those faults was her inability to reverse her engines until she stopped—or nearly stopped—them. Even with that weakness, *Silverpalm*, proceeding at between 13 and 14 knots, could have swung to the right, and that would have allowed her to avoid *Chicago*. Unfortunately, as Phillips and McPike pointed out, "This she did not do until it was too late to avoid collision." Under the circumstances, *Chicago* could only turn to the right and try to stop. The government attorneys stated that "The trial Court found that this was done."

The matter was now in the hands of the judges of the Ninth Circuit Court of Appeals.

Chapter 10: The Ninth Circuit Decides

"There were few things more annoying than a visibly principled person. Or more troublesome."
—Robert B. Parker, *Hush Money*.

The 2 November 1933 letter to Attorney General Homer S. Cummings from Federal District Attorney Henry McPike had cautioned, "You know, as well as I, what the courts hold in regard to speed of vessels in a fog." That warning was more than amply justified when the judges of the Ninth Circuit Court of Appeals (hereafter "the Ninth Circuit") issued their slip (first typed) opinion regarding case number 8146 on 28 October 1937. McPike and Esther Phillips were shocked by the wording of the Ninth Circuit's ruling, but not so much because it went against them but because of the way that the Ninth Circuit phrased the justification for deciding against the government and thereby ruling that *Chicago* was also at fault for the collision with *Silverpalm*.

THE NINTH CIRCUIT'S DECISION IN CASE 8146

The Ninth Circuit had responded to an appeal by the owners of *Silverpalm* against the ruling by the district court that *Silverpalm* was solely responsible for the collision of 24 October 1933. As the Ninth Circuit's formal opinion carefully stated, "The appeal concerns the responsibility for the collision, the amount of damages to be awarded not having been considered. … The sole question here is the validity of the *Silverpalm*'s claim of fault on the part of cruiser *Chicago*, in proceeding between the two fog banks at so much in excess of the moderate speed required by article 16 of the International Rules…, that on sighting the *Silverpalm* emerging from the fog bank ahead on her port and being blown across her course, she could not have stopped dead in the water in the *Chicago*'s share of the distance between the two vessels."[484]

The Ninth Circuit observed at the beginning of its ruling that "the trial court has not favored us with the opinion customarily given in admiralty cases," even though that was "particularly desirable in a case involving complicated maneuvers, as here."[485] This was a warning—a tip-off to the government attorneys that the ruling would go against them. As the Ninth Circuit affirmed, such an "admiralty appeal is a trial de novo," and that meant the judges had a hunting license when it came to the testimony and exhibits submitted to it as part of the district court's record. They did not have to confront a detailed summary of Judge Louderback's view of the case because it didn't exist. At the same time, they acknowledged that *Silverpalm*'s charges against "a United States naval vessel and its personnel" were serious and therefore deserved careful consideration, if only because of the deaths of the three members of *Chicago*'s crew.[486]

The Ninth Circuit also laid out a key element of its reasoning, saying "we are agreed that, in evaluating the conduct of those in charge of the navigation of a vessel accused of fault, the state of mind in which they enter into and conduct a maneuver resulting in the loss of life and heavy damage here incurred may be vitally material…"[487] Where this line of reasoning had taken the judges had been understood by someone—it's not clear who—in McPike's office who wrote a brief but trenchant review of the slip opinion. That individual argued that the only issue that the Ninth Circuit should have taken as critical in the case was the speed of *Silverpalm*.[488] Any alleged "state of mind"

among *Chicago*'s officers was irrelevant. Not so, however, for the Ninth Circuit.

Its ruling held that "One of the very long-established principles of law in maritime navigation is that a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her." The Ninth Circuit then argued that "This principle would require them [i.e., *Chicago*'s captain] to proceed at a speed enabling the *Chicago* at least to stop in 25 yards," given the way that fog impeded visibility. Yet the Ninth Circuit observed that, at 12 knots, it would not be possible to stop *Chicago* in less than 475 yards. Hence the only explanation for this dangerous action on the part of *Chicago* was "gross negligence." Indeed, the fact that four cruisers were steaming north in line at 12 knots in a shipping lane in a situation of reduced visibility before *Chicago* was detached to steam at 18 knots was clear proof, for the judges, that the Navy routinely allowed its ships to ignore the International Rules.[489]

This really was a criticism of Vice Admiral Laning. The Ninth Circuit ruled that *Chicago* should have completely stopped when she heard the fog whistle of *Albion Star*. But the judges also argued that if *Chicago* had so halted, then she would have been in danger of being rammed by the three cruisers following her. If they had been apprised of her stopping, then they would have maneuvered to avoid her, thereby—in the minds of the Ninth Circuit's judges—endangering even more ships using the steaming lane. As their opinion put it, "What might well happen to a passenger ship or freighter approaching the quadruple menace of the four war vessels, with their 475 yards stopping distance, shocks the imagination."[490] The anonymous reviewer of the Ninth Circuit's slip opinion said that Laning was the proper object of this criticism, and he or she also noted that the four cruisers were to the west of the shipping lane. In fact, "[a]t the time of the collision [*Chicago*] was seventeen miles west of the recommended San Francisco-Los Angeles route."[491] The judges took a different view. They could not see why the cruisers did not stay 100 miles away from the coast.[492]

The Ninth Circuit's opinion did focus on Captain Kays. Why didn't he turn *Chicago* west when he ordered the engines to accelerate *Chicago* to 18 knots? Why did he turn "25 degrees more to the easterly and [therefore] further into the traffic lane…?" As the Ninth Circuit put it, "Here continued the reckless spirit which had prevailed throughout the night." It "continued to dominate the cruiser until the collision…" Even worse, "the menace of the cruiser to merchant shipping was not confined to this recklessness as to speed in the fog." The Navy "has and uses fog signals entirely differently from those of the merchant marine and in violation of the International Rules."[493]

The Ninth Circuit's ruling summed up the Court's assessment of the causes of the collision this way:

> "When the *Chicago*, proceeding at 18 knots between the two fog banks, heard the fog whistle of the *Albion Star* forward of her beam, she immediately committed two violations of the International Rules. First, she did not stop her engines, as commanded by article 16, but, instead, put them at 12 knots speed, … While proceeding with the 18-knot starting momentum under the two-thirds order with 12 knots speed on her engines, she blew two blasts of her whistle to the invisible *Albion Star*, thus deceitfully indicating to the merchant ship that she was dead in the water."

In response, the anonymous reviewer for the government could only ask, "Why didn't *Silver Palm* slow or stop?" If *Silverpalm* didn't hear the two-blast signal from *Chicago*, then how could

the Ninth Circuit say that her captain was deceived?[494] After all, under the circumstances it really didn't matter if *Albion Star*'s captain was misled. Realizing that *Chicago* was no threat to his ship, he proceeded ahead on his original course. The Ninth Circuit stressed adherence to article 16 of the International Rules: "A steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." Captain Kays claimed that he obeyed this rule. The Ninth Circuit argued against Kays, asserting that the collision with *Silverpalm* happened because he did not stop long enough; he accelerated too soon after seeing *Albion Star*.

To substantiate their point, the Ninth Circuit's judges reviewed in depth the evidence provided by *Chicago*'s engine room bell books and by the ship's "deck log." As they affirmed, the importance of logbook entries had "always been recognized by courts of admiralty," and altering "logbooks by erasure and substitution… has long been condemned in courts of admiralty." Navy regulations also required a ship's navigator to see to it that the ship's log was accurate.[495] The Ninth Circuit's ruling cited a number of erasures in both the bell books and the records kept by those on *Chicago*'s bridge to support its claim that *Chicago* was traveling at an unsafe speed just as she sighted *Silverpalm*. The Ninth Circuit also acknowledged that *Chicago* might have escaped liability if she had been traveling at a truly moderate speed, but the bell books and log showed that she did not travel at the speed required in foggy weather.[496]

The unnamed critic of the Ninth Circuit's slip ruling commented that "a cursory examination of the first bellbook sheet in evidence …, which had nothing to do with this collision over two months later, shows twenty-two erasures and alterations. To anyone familiar with the way a throttleman has to make the entries in the bellbook, as is clearly told by testimony in the record of this case, a bellbook sheet with no corrections would be regarded with very great suspicion."[497] The Ninth Circuit official ruling dwelt at length with erasures and changes to written records of *Chicago*'s speed in an effort to sustain its belief that *Chicago* was moving too fast in the minute before she was rammed by *Silverpalm*. The anonymous critic ridiculed this belief, arguing that had *Chicago* been going as fast as the judges thought, "the *Silver Palm*'s bow would have been torn off."[498]

The Ninth Circuit also claimed that the law required *Chicago* to reduce her speed substantially even when she was in the open and proceeding between two fog banks, citing the case of "The Papoose (C.C.A. 2) 85 F.92d) 54, 55" decided in July 1936. That case stemmed from a collision between Navy seaplane tender U.S.S. *Wright* (AV-1) and the civilian tanker *Papoose* at sea off Cape Henry, Virginia, on 2 May 1931. The seaplane tender was steaming slowly along a fog bank "lying about 300 yards to her starboard" at about four knots, but she wasn't sounding any fog signals. *Papoose* "suddenly broke out of the fog bank abaft her beam about 300 yards away on her starboard quarter… converging on" *Wright*. Both ships reacted quickly. *Papoose* "almost immediately sounded an alarm, put her helm hard aport, and reversed at full speed. The *Wright* at once reversed full speed under a hard left rudder… and sounded two blasts, but the collision could not be avoided."[499] Fortunately, the damage to *Wright* was much less than that suffered by *Chicago*, and no one was killed.

The trial judge ruled against *Papoose* on the ground that she had seen *Wright*'s two masthead lights but assumed erroneously that the ship she saw was anchored, "and no attempt was made to determine by taking accurate bearings whether this assumption was right or wrong." The

question raised at the trial was whether *Wright* was also liable because she did not sound fog signals. The appeals court ruled that she was, arguing that both the Inland Rules and the International Rules "provide that ships must sound signals … 'In fog, mist, falling snow, or heavy rainstorms, whether by day or night' Compliance requires the sounding of the signals by a vessel not only when she is herself in the fog, but is so close to it that her position should be made known to a vessel which the fog might be hiding." As the Second Circuit Court of Appeals explained, "*Wright* was bound to show, if she would be exonerated, not only that her positive breach of the statute in failing to sound fog signals did not probably contribute to cause the collision, but that it could not have contributed."[500]

Using this standard, the Ninth Circuit ruled that *Chicago*'s acceleration to pass by *Albion Star* rendered her unable to stop once she perceived the approach of *Silverpalm*: *Chicago* "violated the first paragraph of article 16 and the violation proximately contributed to the collision." The ruling ended as follows: "The decree [of the district court] is affirmed in so far as it concerns the uncontested liability of the *Silver Palm*. Since the *Chicago* was equally at fault, the decree, in so far as it holds her not liable, is reversed."[501]

THE RESPONSE TO THE NINTH CIRCUIT'S RULING

The day after the Court handed down its ruling, both the Silver Line and the government appealed, petitioning the Court for rehearings in both liability cases (8146 and 8152). The government wanted another crack at the Court's ruling that *Chicago* was equally at fault for the collision. Silver Line wanted to contest the ruling that it was not financially liable in only a limited way for the damages resulting from the collision. As the Ninth Circuit explained in its ruling regarding damages, "We therefore hold that the Silver Line was the operator of the *Silverpalm* at the time that the captain's ignorance of the extraordinary long period between full ahead and reverse proximately contributed to the collision with *Chicago*. It has not maintained its burden of proof that it had no knowledge of and no privity in the cause of the damage for which it seeks to limit its liability."[502] Facing major liability costs, Silver Line wanted to reargue its cause.

In the meantime, there was a flurry of correspondence between the Federal District Attorney's office and elements of the Navy Department. On 9 November 1937, Assistant Attorney General Sam Whitaker wrote to Rear Admiral Gilbert Rowcliff, the Navy's Judge Advocate General, confirming that the Justice Department would make sure that Rowcliff's office had copies of both Ninth Circuit decisions—the one that said *Chicago* was partially at fault for the collision and the one that denied the Silver Line the limitation of liability that it had sued to obtain.[503] On 13 November, Rear Admiral Rowcliff wrote to Rear Admiral Arthur Smith, the Commandant of the 12th Naval District, about the Ninth Circuit's decision regarding responsibility for the collision. Rowcliff stated that, in his view, the decision "was, to say the least, astounding." Rowcliff added that the Ninth's decision seemed "an extraordinary piece of work in that it appears to go beyond the situation under consideration and beyond the needs of the case to criticize unduly everything done at sea by naval officers, and as such is destructive of reputation and standing in court or at sea." He asked, "What possible reason can there be and what can be done about it?"[504]

Here was a consequence of the Ninth Circuit's language in its ruling against *Chicago*. In using language like "reckless menace," "gross recklessness," a "quadruple menace" that "shocks the imagination," "sheer reckless disregard for

the rules," and "the reckless spirit which had prevailed through the night," the judges had impugned the Navy in a way which many officers took personally. However, Navy officers weren't the only ones who felt assailed. On 22 November 1937, Assistant U.S. Attorney Esther Phillips, the winner at the district court level, wrote to Commander Thomas Gatch in the Judge Advocate General's office in Washington. She told Gatch that she was "glad to hear that the Navy Department will leave no stone unturned to get [the Ninth's] decision with drawn or overturned." As she put it, "the intemperate language of the court, combined with the disregard of relevant evidence and the dragging in of irrelevant evidence, make me quite hopeful." In describing Judge Denman, Phillips said he was like a "bad boy at a picnic" who was slinging mud with both hands."

Gatch, a senior assistant to the Navy's Judge Advocate General, had served in destroyers, taught at the Naval Academy and at the Naval War College, and had served as the aide and flag secretary to the commander of Battleship Division 3. He had also served on the panel that had investigated the crash of Navy airship *Macon* in 1935. He had sent Phillips a draft of a "petition for rehearing" after reading the Ninth Circuit's decision. In her letter of 22 November 1937, Phillips told Gatch that his draft could not be used. It must have contained very strong—even intemperate—language because she wrote that "Had we filed that [i.e., Gatch's] petition, I believe that the action of the court would have been to strike the Petition from the files of the case as impertinent and scandalous, with an order for Mr. Hennessy [McPike's replacement as Federal Attorney] and me to show cause why we should not be punished for contempt of court. This would do no good to anybody. It would only harm the case."

However, she agreed with Gatch that it was difficult if not impossible to plot the courses of the ships "according to the Circuit Court of Appeals' findings of fact." The evidence given in the district court case had strongly suggested that just two minutes went by between the time the two ships were visible to each other and the collision. The Ninth Circuit judges had not, in Attorney Phillips's opinion, taken this fact properly into account. However, Phillips knew that if they had they would have discovered what she had—that it was "impossible to plot the maneuvers of the two vessels, with a visibility of 700 yards, and the initial speeds as fixed by the court…" To Phillips, that could only mean that *Chicago* could not have been moving at 15 knots at the time the two ships jammed together. Did Gatch agree? Would he telegraph her to that effect? The petition for a rehearing would not be printed until the afternoon of 24 November. She wanted his response before then if that were possible.

In concluding her letter, Phillips wrote that "sometime I shall hope to tell you more about the oral argument. *I cannot put it on paper*." [italics added] [505]

Gatch immediately responded to Phillips via air mail with a memorandum listing what he thought were errors of the interpretation of testimony in the Ninth Circuit's opinion. As soon as she received it, she wrote back, as follows:

"The question naturally arises, to what extent should one direct the Court's attention to numerous misstatements of the record? Will it help or hinder? My own conclusion is that it is wiser to hammer at the two things most likely to make an impression on Judges Healy and Stephens: (1) That they have accused witnesses of spoliation and fabrication of evidence from corrupt and base motives, who have been given no chance to defend themselves; (2) That the opinion rejects as untrue the testimony of over a dozen Navy personnel (officers and enlisted men)

given in respect to things actually done or seen by them."

As she told Gatch, if that approach didn't work, then compiling a long list of errors in the Ninth Circuit's opinion wouldn't persuade the colleagues of Judge Denman to approve the petition for a rehearing. However, "if a rehearing is granted, and the case is re-argued, then every error of fact in the opinion can be discussed in a supplementary brief. If the petition is denied, then, in the application to the Supreme Court for a writ of certiorari, and thereafter (if the writ is granted) all these errors can be discussed."

She finished her 23 November letter by admitting that the petition for a rehearing would probably be turned down, but she repeated the warning she'd given Gatch the day before—that "it would be most dangerous to attack the problem as you did, sound though your attack might be from every other point of view. I have tried to work out a composite petition…"[506]

Gatch replied immediately. His air mail letter to Phillips was dated 24 November. He admitted that his draft of a petition for a rehearing was "somewhat too strongly worded." He added that "We sit here safe in Washington away from the power of certain judges in the Ninth Circuit and thus can express our feelings much more freely than would be advisable for you." He told Phillips that he was familiar with Judge Denman's way of expressing himself towards the Navy from his study of Denman's opinion in the case of "O'Donnell et al v. United States" [91 F.2d 14 (1937)]. Gatch said he had "felt from the beginning that the petition for rehearing in the SILVERPALM – CHICAGO case is going to be denied. When a court worked itself up to the state evidenced by pages of intemperate language, nothing more can be gained from that court."

Yet there was still a serious legal issue that needed to be dealt with. Gatch believed that the Supreme Court would grant a writ of certiorari in order to hear the case because "we have a very serious conflict between the Second Circuit and the Ninth Circuit…" He went on to say that "When, on top of this, we refer to the court's non-judicial language in much the same way as was done in the O'Donnell case I think certiorari will be granted almost as a matter of course."[507]

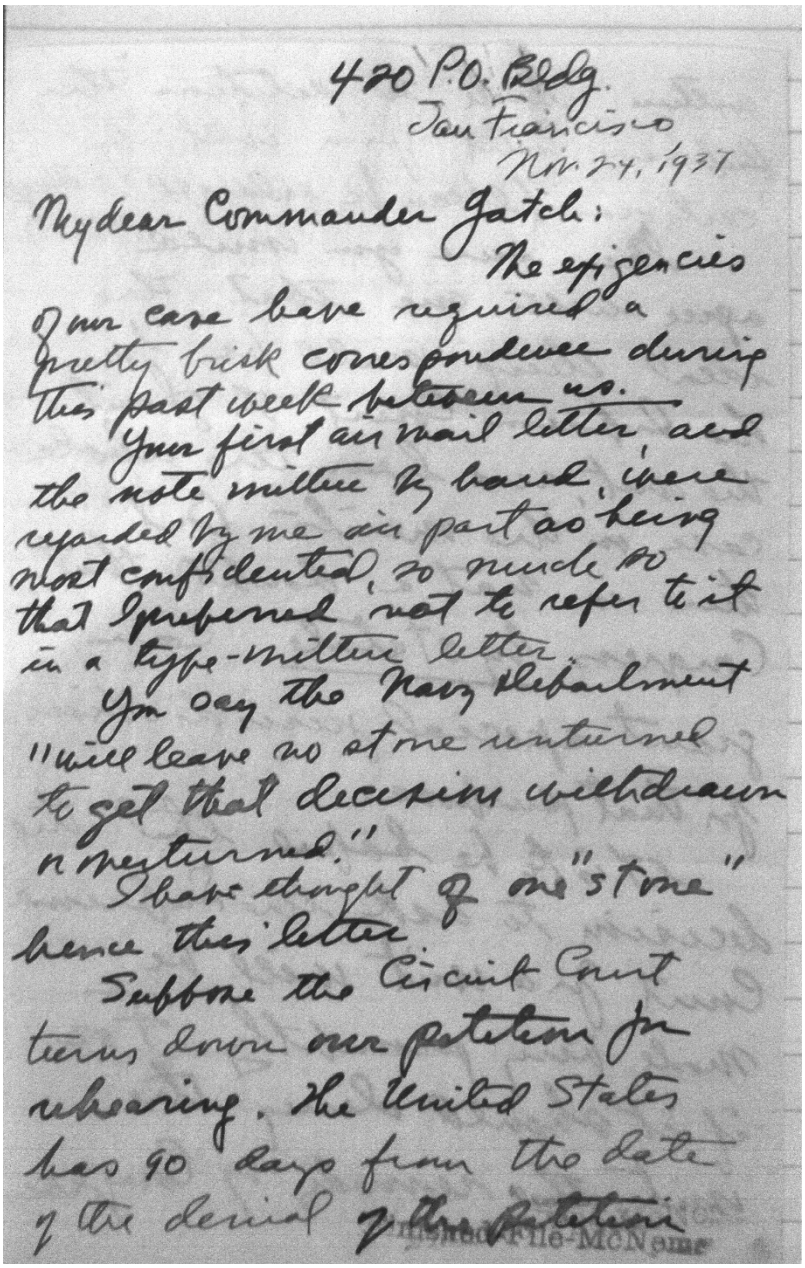
Phillips immediately wrote a response in her own hand, dated 24 November. She began by saying that "the exigencies of our case have required a pretty brisk correspondence during this past week between us." Her next words were revealing: "Your first air mail letter, and the note written by hand, were regarded by me in part as being most confidential, so much so that I preferred not to refer to it in a type-written [i.e., official] letter." Then she proceeded to lay out a somewhat unorthodox strategy to deal with the Ninth Circuit's decision. It was to ask the Supreme Court for a writ of certiorari. If the Supreme Court said no, then why not ask Congress to enlarge—by statute—the jurisdiction of the Supreme Court "in admiralty cases generally where the United States is involved and is the party appealing to the Supreme Court"?

Phillips argued that "Such a statute would be a form of insurance for the "Chicago" case." To the objection that such a law would be both unusual and unfair, she answered that "for the government to have special rules applying to it is usual, not unusual. There are special rules about costs, about statutes of limitation, etc. Indeed, while 90 days is the usual time for applying to the Supreme Court for certiorari, the United States can ask for an additional 30, and is the only one who can do so." She went on, "I wish you'd think this over. Hasn't the Secretary [of the Navy] some old friends in the Senate, who will not fancy the idea of the American Navy being held up to scorn as liars and fabricators?"

As she pointed out, the Silver Line's brief had made much of Captain Cox's service in the Royal Navy. Then she added, "So, apparently, it's just the American Navy that's to be held in low estate."

Phillips also told Gatch that she had been told that Judge Denman, "during many years of practice as an admiralty lawyer, … was always sniffing at log books, and hinting at fabrication, erasures, and the like (A psychologist would have a definite explanation of such a psychosis.)" She went on, "Now, I blame myself for not calling before the District Court handwriting experts to have enlarged photographs made of all the pages. I am told that there is a species of photography which will reveal what has been erased. But such a course of conduct would have dignified the trivial erasures, which had been explained quite reasonably. To an honest mind, there was a complete absence of collusion or deceit. So the trial judge thought."

There was more: "I wonder sometimes what is the background of family history and tradition which has no more appreciation of the traditions of military service. I had a grandfather who, though a lawyer, managed to fight in three wars (Mexican, Civil, and Cuban) before he died at the age of 98. I suppose it depends on the individual…" Phillips finished by asking Gatch to excuse her "hasty letter," and she urged him to "think of what Congress can do."[508]



420 P.O. Bldg.
San Francisco
Nov. 24, 1937

My dear Commander Gatch:

The exigencies of our case have required a pretty brisk correspondence during this past week between us.

Your first air mail letter, and the note written by hand, were regarded by me as in part as being most confidential, so much so that I preferred not to refer to it in a type-written letter.

You say the Navy Department will leave no stone unturned to get that deceiving witness returned."

I have thought of one "stone" hence this letter.

Suppose the Circuit Court turns down our petition for rehearing. The United States has 90 days from the date of the denial of the petition

The first page of Esther Phillips' handwritten letter to Commander Gatch, 24 November 1937. *Source:* NARA.

After writing this extraordinarily candid letter, Phillips was back in form as an assistant federal district attorney in her next—formal—letter to Commander Gatch, dated 26 November 1937. She informed him that she had submitted the petition for a rehearing that day but agreed with Gatch that the "Petition for Rehearing is not likely to meet an open mind. However, there is a chance that the two Associate Judges may read the petition carefully and reach the conclusion that they were too hasty." She also agreed that there was a meaningful legal difference between

the opinions rendered in cases heard by the Second and Ninth courts of appeal.

In discussing the testimony of several witnesses, Phillips compared the personalities of *Albion Star*'s first mate, James Harding, and her captain, Selwyn Capon. Phillips described Harding as "a most straightforward, conscientious witness." Captain Capon, by contrast, "distinctly conveyed the impression of bias. Captain Ralph West, the Marine Corps Officer who represented Captain Kays, and who was present at Captain Capon's deposition, wrote me two years later that he still resented Captain Capon's attitude."

Capon's attitude was clear enough when he was being questioned by Attorney Phillips as his deposition was taken. When she asked him what he thought *Chicago*'s course was when he first saw the cruiser, he said his ship and *Chicago* were "approximately parallel." He was not more specific. When Phillips said she understood that Capon could not testify to *Chicago*'s exact heading, he responded, "Oh, no, the facts to a lady's mind are rather hazy," to which she replied, "And in fact, to the minds of others besides a lady, too?"[509] Capon was wary of Phillips after that.

Phillips closed her formal, typed letter by referring to her handwritten letter of 24 November. She declared that "the most desirable course" would be the one she had proposed in that missive.[510]

On 8 December, Attorney General Homer S. Cummings sent a letter to Navy Secretary Claude A. Swanson in response to Swanson's letter of 3 December asking about the *O'Donnell* and *Silver Line* cases. Cummings assured Swanson that the Justice Department "will spare no effort in the endeavor to obtain a reversal of the judgment rendered by the Circuit Court of Appeals for the Ninth Circuit in the *O'Donnell* case, and that the advisability of filing a petition for a writ of certiorari in the *Silver Palm* case will be considered carefully in the event that the court denies the petition for rehearing now pending before it."[511]

On 9 December, Rear Admiral Clarence Kempff, Commandant of the Twelfth Naval District and formerly Commander, Battleships, Battle Force, wrote to the Navy's Judge Advocate General, Rear Admiral Rowcliff, regarding "Your letter… of November 13, 1937."[512] Kempff informed Rowcliff that the Ninth Circuit's ruling that *Chicago* shared liability for the collision with *Silverpalm* had "been studied with considerably more than interest" and that the petition for a rehearing had also been given attention. In addition, "Miss Philips, the Assistant United States Attorney, directly in charge of the case, has been interviewed at length."

According to Kempff, Phillips had told him that "Judges Stephens and Healy never before sat on an admiralty case and admitted to her that they were completely at sea in this instance. It can therefore be assumed that Judge Denman himself wrote the opinion and Judges Stephens and Healy concurred therein primarily because of their own feeling of incompetence to criticize it. Judge Denman also wrote the opinion of the Mare Island case, which has since been appealed… The language in the latter finding is fully as intemperate and unwarrantedly searching for any excuses for accusations and insinuations against the integrity and honesty of the Navy and its officers. These two opinions present a strong presumption of Judge Denman being incapable of the calm judicial attitude to which the parties in litigation are entitled and which is absolutely necessary to meet the ends of justice in cases where the Navy is concerned."

Kempff was ready to go—metaphorically—to the legal barricades: "It would appear that the defense of the Navy's reputation for good seamanship with all law abiding practices, and for integrity

required, [sic] that this opinion be overruled in every particular and that Judge Denman be rebuked for the language he used." But then he stepped back: "But whether or not this case would warrant further proceedings can best be determined by the Department."[513]

But what of this devil—Ninth Circuit Judge William Denman? He was admitted to the bar in California in 1898 after graduating from Harvard Law School the previous year. From 1902 to 1906, he taught at Hastings College of Law and the University of California at Berkeley while practicing law in San Francisco. A Democrat, he plunged with energy into San Francisco politics, chairing a committee that investigated municipal corruption after 1908. Also in 1908, he headed an effort to enlist support in the state legislature for the nonpartisan election of state judges, and that proposed reform was made law in 1911. He also championed an eight-hour work day for women and workmen's compensation for individuals injured on the job. In 1917, President Woodrow Wilson appointed Denman to the United States Shipping Board in Washington, and the San Francisco attorney served as the Board's first chairman. After the war, he successfully defended California's 8-hour working day statute in state courts and the U.S. Supreme Court.[514]

Denman strenuously campaigned for a seat on the Ninth Circuit. He wanted very much to serve as an appeals court judge, though trying to gain that seat hurt him with his clients. As he said in November 1934, "my clientele seems persuaded that I am to receive the appointment and hence for a year and a half have avoided employing me in litigation of any long character. The failure to be appointed would not be a helpful way of advertising for their return." With the help of California Senator Hiram Johnson, a liberal Republican, and other politicians, Denman gained the support of President Franklin Roosevelt in December 1934 and was confirmed by the Senate in January 1935. Though a hard-working and intense champion of efficient and effective government, Denman had—as Attorney Esther Phillips and Commander Gatch well knew—a rough side. Author and lawyer David Frederick cited the recollection of Denman's former secretary that the Judge "was not a warm man, and he earned the most devoted of enemies, but he had a social conscience, an abstract one, perhaps, which may have been the most useful kind in a man of his position." She added, "I wish there were tenderer memories of him around."[515]

As already noted, the government filed for a rehearing with the Ninth Circuit. So did the Silver Line's attorneys. Their petitions were denied. In the case of the responsibility for the collision, the government's position was that the trials done with cruiser *Louisville* showed that *Chicago*, her sister ship, could have avoided the collision if, as the district court had held, the ships when they sighted each other were 1000 yards apart. In that case, *Chicago* was not moving too fast to avoid hitting or being hit by *Silverpalm*. The Court refused to accept the government's argument on the grounds that only the "contemporaneous entries of the four turbine bell sheets were the proper basis for determining the *Chicago*'s maneuvers for the test run of the *Louisville*."[516] The court repeated its ruling that "the *Chicago* was proceeding at excessive speed in the fog banks when the *Silverpalm* was sighted and was acting under an intent to reach a speed grossly in excess of moderate."[517] There matters stood at the end of 1937 as far as case 8146 was concerned.

THE NINTH CIRCUIT'S DECISION IN CASE 8152

The rulings of the Ninth Circuit on cases 8146 and 8152 were handed down on the same day—28 October 1937. Judge Denman drafted both decisions. In his decision on case 8152 (for damages), he asserted that *Silverpalm* had "exceeded moderate speed. The excess causatively contributed to the collision, and she was held liable." When Silver Line's petition for exoneration from liability was denied, the firm argued that it was "without privity or knowledge" of the risks involved with urging a ship's captain to keep to his schedule while burdening him with an engine that could not be quickly reversed.[518]

After reviewing the relevant evidence, the Court accepted the finding of the District Court that Silver Line did indeed have privity and that therefore it could not justify its claim for the limitation of damages. As the Court's ruling declared, "There can be no doubt that [the] inherent quality of the propelling power of the motorship, combined with the captain's ignorance, was a proximate cause of the collision."[519] The Ninth Circuit's ruling went on to note that "In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise."[520] The Court finished by asserting that the Silver Line had "not maintained its burden of proof that it had no knowledge of and no privity in the cause of the damage for which it seeks to limit its liability." Hence the "decree denying the petition for limitation of liability is affirmed."[521] The Court also allowed claims for personal damages filed by the survivors of the dead and by those injured to continue.

In practical terms, what did this mean? It meant that the payments already made in March 1937 by the Silver Line to the claimants who had filed their papers with the Commissioner were sufficient to settle the claims against the Line. As the attorneys for the government and for the Silver Line acknowledged on 18 December 1937, the Appeals Court's finding of "mutual fault" might change the amounts of the payments, but that would have to be adjusted and the adjusted payments would not likely be very different than those already made.[522]

Compensation included $25,000 to the estate of Lt. Frederick S. Chappelle, USMC, $8,000 to the estate of Lt.(jg) Harold A. MacFarlane, USN, and $25,000 to the estate of Chief Pay Clerk John W. Troy, USN. Machinist Joseph A. Oehlers was awarded two payments—one for $8,500 and a second for $1,100. There were a number of smaller payments to individuals, ranging from almost $2000 to Electrician Louis G. Giard to $8.90 to Mess Attendant (3rd class) Justino Pletado. The total of all the personal claims came to $77,773.36.[523]

The U.S. government, however, was not yet finished with case 8146, as the next chapter will show.

Chapter 11: The Quest for the Writ of Certiorari

"The U.S. Court of Appeals for the 9th Circuit, which is often in error but never in doubt…"
—George F. Will, *The Washington Post*, 10 Nov. 2019 (p. A-27)

THE GOVERNMENT BEGINS THE PROCESS OF REQUESTING A WRIT

On 13 January 1938, Federal District Attorney Frank Hennessy sent a letter to Attorney General Cummings explaining that the government's request for a rehearing by the Ninth Circuit Court of Appeals was denied on 31 December 1937. As Hennessy noted, "the time to petition the Supreme Court for a Writ of Certiorari has begun to run." He then summarized the reasons for petitioning the Supreme Court, as follows:

(1) "The opinion [of the Appeals Court] is grossly unfair in that it disregards completely evidence of a most substantial and trustworthy kind which supported the findings of the trial court, and misstates other evidence in its opinion to which great weight is given."

(2) "The Court goes out of its way to cast as many reflections as it can, not only upon the particular Naval officers on board this vessel, but upon Naval officers generally. A complete absence of judicial poise is demonstrated on every page of the opinion."

(3) "The opinion magnifies and exaggerates erasures and corrections of trifling importance, creating the impression that all the "CHICAGO'S" [sic] records were erased and fabricated. In particular, the reflections upon the officer who kept the deck log, were created by the court. They did not appear in counsel's brief. They accused this officer inferentially of perjury, a charge never made to him and which he has never had the opportunity to contradict."

(4) "The Court has made numerous errors of law." Hennessy was, like Phillips, very critical of the argument that the movement of *Chicago* and the other cruisers in the hours before the collision was legally relevant.

(5) Hennessy believed that the Appeals Court had grounds for criticizing *Chicago* for not obeying article 16 of the International Rules when the cruiser's captain heard the signal from *Albion Star*. That was a fair criticism of *Chicago*'s actions. But then the Court also criticized *Chicago* for not obeying that same article with regard to *Silverpalm*, "from whom no signal had been heard." That was going too far, in Hennessy's opinion.

(6) "The opinion in fixing a hard and fast rule that vessels must be able to stop within half the visibility, seems to us to be in conflict with the rule of the Second Circuit… in.. *Steffens v. U.S.*, supra (at 206, 207)." In that case, the Second Circuit ruled that "when the direction [of a fog signal] is uncertain, navigation is left… to the master's judgment, except that the speed must in all cases be 'moderate.'"[524]

Hennessy finished his letter by saying, "We believe that the decision to apply for a writ of certiorari should be made as promptly as possible. Substantial costs are accruing. The Government is liable to the SILVER LINE for 4 per cent interest on its damages. The SILVER LINE'S [sic] annual premium for its release bond is large. The sooner the decision can be made to apply for a writ, the better for every one [sic] concerned."[525]

On 14 January, Rear Admiral Kempff, Commandant of the Twelfth Naval District, wrote again to Rear Admiral Gilbert Rowcliff, the Navy's Judge Advocate General, to criticize

Judge Denman's decision. Kempff claimed that "A careful and searching investigation has been conducted at the expense of valuable time, which may be mitigated by the lag of the law, and certain information has been obtained which the Commandant considers would be impractical for him to voice in a legal manner as to the background and activities of a federal or other judge." What was this "certain information"? Kempff didn't say—not on paper, anyway. But he did argue that there was a connection in Judge Denman's mind between the O'Donnell case (concerning Mare Island) and the case of *Silverpalm* v. *Chicago*.

Kempff stated that he "might be willing to accept the opinions of a federal judge in the O'Donnell case relative to the integrity of naval officers defending the rights of the United States Government ashore, on the supposition that the law of averages and the superior thought of the judge would give him the preponderance in evidence. However, when the CHICAGO—SILVERPALM case is introduced into the picture the inference is that naval officers either ashore or at sea are equally culpable of a lack of moral integrity that would be shocking to any class of men desiring to be at least decently honest."

As Kempff continued with his letter, his language became harsher: "… as a seaman and a naval officer the Commandant considers that certain manifest absurdities, too preposterous for credence, have been omitted from this brief, possibly from a sense of propriety and a respect for the feelings of the Court." There was more along this line, as Kempff reviewed elements of Judge Denman's ruling. At the end of his letter, Kempff capped his strenuous objections to the Judge's ruling with the following:

> "The Commandant regrets that the manifest absurdities (of which there are many more in the decision on the CHICAGO—SILVERPALM case) may have given an air of levity or frivolity to such a serious matter as is under discussion but he deems it improbable that such positive adverse opinions in regard to the actions of the naval personnel… would be reversed on a petition for a rehearing, and it is the opinion of the Commandant that the case will have to be tried in an atmosphere where the weight of evidence will be a predominant factor."[526]

The Ninth Circuit judges thought their work was done when they published their decision to not rehear the appeal from Silver Line, Ltd., on 31 January 1938. As they said, "[A]ll our findings regarding the continuous menace to navigation of the 'Chicago' and her following fleet of cruisers are based upon the testimony of her Admiral, offered by the 'Chicago' and the log entries offered by the 'Chicago.' These show that at the time of the collision the 'Chicago' was 'possessed' by a spirit of reckless disregard of other vessels in the steaming lane between San Francisco and San Pedro. The prior *maneuvers* (italics in the original), while in this 'possession', [sic] in themselves did not causatively contribute to the collision. The spirit they evidence, still controlling the Cruiser as she steamed through the fog banks, was, in a true sense of seamen's psychology, its *cause causans*."[527]

On 2 February, Federal District Hennessy in San Francisco sent a radiogram to Rear Admiral Rowcliff informing him of the Ninth Circuit's denial of the petition for a rehearing. Hennessy also sent Rowcliff and Attorney General Cummings an air mail copy of the Court's opinion. In his cover letter to Cummings, Hennessy acknowledged that "It seemed highly probable that a Court, which could originally disregard so much of the evidence, and reject the sworn testimony of officers in court, would not hold an open mind as to the possibility of its own error." He also repeated that "We have already

given our recommendation that an effort should be made to have this case reviewed by the Supreme Court."[528]

THE "SWANSON BRIEF": THE NAVY'S REPLY TO THE NINTH CIRCUIT

On 1 March, Secretary of the Navy Claude Swanson sent a very long—55 pages—paper to Attorney General Cummings asking the Justice Department to apply to the Supreme Court for a writ of certiorari. This paper—this long brief—gave no quarter to the Ninth Circuit. It contained seven major arguments, most of which should be familiar to readers who've stayed with the legal dispute this far. The first argument was that the Ninth Circuit's stress on how *Chicago* performed the night before the collision was contrary to established law. The second argument was that the Ninth Circuit's ruling did not conform to the law regarding the finding of fault in admiralty cases. The third argument was that the Ninth Circuit had acted as though an important question of law had been settled by the Supreme Court when in fact it had not. The fourth was that the Ninth Circuit's decision was in conflict with those of the Supreme Court. The fifth was that the Ninth Circuit's decision "so far departs from the accepted and usual course of judicial procedure in admiralty cases as to call for a de novo exercise of the power of supervision by the Supreme Court…" The sixth was that the Ninth Circuit's decision "denies to the President of the United States as Commander-in-Chief the power to direct and train the United States Navy…" The seventh was that the Ninth Circuit's decision "contains numerous superfluous statements, references, and deductions so derogatory to the United States Navy as to indicate a judicial bias of a character which renders the findings and conclusions… unacceptable as a fair and reasonable determination of the real issues involved in this case."[529]

The brief signed by Swanson also challenged the Ninth Circuit Court's portrayal of the fog encountered by the ships on the day of the collision. According to the brief, "the visibility between midnight and 7:00 o'clock on the morning of October 24, 1933, was not zero but between 350 and 500 yards, becoming practically unlimited as 7:00 o'clock approached." Moreover, all four cruisers were "separated at all times by a distance of at least 600 yards," and they didn't have "difficulty, due to the fog, in maintaining their positions in column."[530] More generally, the Swanson brief argued again and again "an inexcusable lack of knowledge as to the manner in which the naval service is administered at any time."[531] And not just how the Navy was administered, but also how a ship's combination of men and machines functioned. This hard-hitting document—what might be best called "the Swanson brief"—may well have been drafted by Commander Gatch.

This brief also argued that there was an important question of law that had to be settled. Before the collision, *Chicago* slowed and then stopped her engines when *Chicago*'s captain heard *Albion Star*'s fog signal forward of *Chicago*'s beam. But when *Chicago* started up again, was she in violation of article 16 of the International Rules of the Road? The obligation of a ship overtaking another to stop when the latter had sounded a fog signal was clear enough, but what should the overtaking ship do once she had ascertained that there was no danger ahead? Should *Chicago* have continued to coast to a stop and then remained stopped? What was the correct next step for a ship like *Chicago* to take? What did the law require?

The Swanson brief argued that it was up to the Supreme Court to address that issue.[532]

However, the Swanson brief did not just appeal to the Supreme Court to make a point of law. It attacked the Ninth Circuit's decision as having departed so far "from the accepted and usual course of judicial procedure in admiralty cases as to call for a de novo exercise of the power of supervision by the Supreme Court of the United States…" The Ninth Circuit judges had ignored the facts of the case, especially the "established fact" that the *Chicago* could have stopped in time but didn't because of the speed and maneuvering of *Silverpalm*.[533]

After arguing about the specifics of the case, the Swanson brief shifted its focus and addressed the relationship between the executive and judicial branches of government. The brief argued that at issue in this particular case was the authority of the President and the Secretary of the Navy over the Navy Department. Put simply, the President's command of the Navy was based on his winning the election and taking the oath of office to protect and preserve the Constitution. The Secretary of the Navy, as a presidential (i.e. political) appointee, derived his authority from the grant of authority given to the President in Article II of the Constitution. As the President was not subject to the federal courts when he was engaged in making legitimate political decisions, so also was the Secretary of the Navy not subject to the authority of the federal courts when he was "performing the duties imposed upon him by the President as Commander-in-Chief of the Navy…" As the Swanson brief explained, "there are certain political duties imposed upon many officers in the executive departments, the discharge of which is under the direction of the President. In such cases the performance of these duties are [sic] not subject to examination by the courts."[534]

Indeed, citing the case of Kendall v. Stokes (1845), the brief's author went even further: The Supreme Court "held that a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one but is one in relation to which it is his duty to exercise judgement and discretion, even although an individual may suffer by his mistake."[535] As the Swanson brief put it, "The criticism by the Federal Court of Appeals in this case of the operation of naval vessels by naval personnel is in fact a criticism of another coordinate branch of the Federal Government… concerning matters not under the court's jurisdiction and entirely uncalled for."[536] The Swanson brief also took the Ninth Circuit to task for alleging that the tests with cruiser *Louisville* were "engineered by the naval service to deceive the Court" when in fact the tests were "made under the direction of the United States Attorney in charge of this case and according to his instructions…"[537]

The language in the Swanson brief was just as intemperate as that used by the Ninth Circuit in its ruling. Examples included the following:

> "This is not the first case in which the fog created by this Court was far more dense than warranted by the facts." (page 44)
>
> "It is respectfully submitted that such flights of fancy are not conducive to the exercise of cool and unbiased judgment." (page 46)
>
> "That this statement of the Court is groundless and intended to injure the naval service is obvious." (page 47)

The brief rounded out its criticisms of the Ninth Circuit's opinion by saying, "Believing strongly in the doctrine of condemnation by reiteration the Court refers again and again and yet again to…

matters which happened prior to the time that the CHICAGO sighted the SILVERPALM and the maneuvers to prevent a collision between these two vessels began."[538] The Navy's position was thus made clear: The Justice Department had no choice but to apply for a writ of certiorari.

Nevertheless, no application had been filed by 23 March, as Attorney Phillips wrote to Commander Gatch, telling Gatch that she had received a radiogram informing her that the "Question of certiorari application [was] not yet definitely settled," and that therefore she was "somewhat disturbed to think that it [was] unsettled at all." Phillips was blunt about it: "I cannot get over the feeling that if the Government fails to ask for certiorari, it will be conceding the correctness of the slurs and aspersions of the Circuit Court upon the character of the men involved. Likewise, with an opinion of such general tenor I cannot conceive that the Supreme Court would refuse to hear the case." In her own hand at the bottom of this letter, she added, "I enclose a copy of my letter to the Attorney General just sent."[539]

On 29 March, Robert H. Jackson, the Acting Attorney General, wrote to the Secretary of the Navy Swanson, acknowledging Swanson's letter of 23 March in which the Navy Secretary requested the Justice Department to draw up an application for certiorari and stating that Justice was in the process of doing so.[540]

THE PETITION FOR CERTIORARI AND THE COUNTER RESPONSE

The government's petition for certiorari was finally filed by Solicitor General Robert H. Jackson on 14 April 1938, the last day when that could be done. The petition made two arguments. First, that the Appeals Court's decision was "such a departure from the accepted principles governing the attribution of fault in collision cases as to call for review" by the Supreme Court. Second, that the statements made by Judge Denman on behalf of his colleagues in the Ninth Circuit reflected "gravely upon the operations and integrity of naval personnel" and were "so misfounded and detrimental as to call for review" by the Supreme Court.[541]

The Petition reviewed the circumstances under which the collision occurred, drawing on the testimony and findings of the district court. The Petition also drew the attention of the justices of the Supreme Court to the "fact" that the Ninth Circuit's review of the circumstances failed to state clearly that *Silverpalm* had navigated recklessly "in an extreme degree." The Petition also listed the following errors made by the Ninth Circuit's judges:

1. "… holding that the *Chicago* was proceeding at an immoderate rate of speed which proximately contributed to the collision."

2. "… failing to hold that the *Chicago* was proceeding at a moderate rate of speed and that the collision resulted through the sole fault of the *Silverpalm*…" because she could not reverse her engines quickly.

3. "… holding that the navigation of the *Chicago* during the previous eight hour period under different conditions was a determinative factor in fixing responsibility for the collision."

4. "… holding that a signal of two blasts given by the *Chicago* to the *Albion Star* but not heard by the *Silverpalm* was a factor to be considered in determining the responsibility of the *Chicago*."

5. "… holding that the intervening distance between the *Chicago* and the

Silverpalm when they sighted each other was 700 yards."

6. "… failing to consider as controlling when determining distances" that, given the gap between sighting each other and colliding, the two ships must have been "a considerable distance beyond 700 yards apart."

7. "… failing to hold that at the time of the collision the *Chicago* was almost dead in the water…"

8. "… its conclusion reached as to alleged erasures in the logs and the conclusions to be drawn or applied therefrom."

9. "… the findings made with the respect to the test run of the *Louisville* and in failing to give proper weight thereto with the model tests made and other controlling facts."[542]

Then the Petition gave the reasons why the Supreme Court should grant the writ:

(a). The Ninth Circuit adopted an "erroneous rule" that "navigational animus" could be "deduced from circumstances occurring long before the relevant collision period…" The Petition stressed this point, stating that "references to the *Chicago*'s conduct long prior to the maneuver relating to the collision leave little doubt that such considerations were given controlling weight in determining fault upon the part of the *Chicago*," and that giving "any weight to such considerations violates the rule" made by the Supreme Court in the case of "The Ludvig Holberg," 157 U.S. 60…"

(b). "The *Silverpalm* admitted its fault upon appeal," and therefore it was up to *Silverpalm* "to show fault beyond reasonable doubt upon the part of the *Chicago*." Unfortunately, the Ninth Circuit had failed to "consider the fault and conduct of the *Silverpalm*."

(c). The Ninth Circuit had misinterpreted or disregarded "significant evidence" regarding the true speed of *Chicago*, and that was a critical error because "the speed of *Chicago* at the time of sighting the *Silverpalm* controls the real question in the case…" The Petition argued that the Ninth Circuit had confused *Chicago*'s speed when she was first sighted by *Albion Star* with her speed when Captain Kays sighted *Silverpalm*.

(d). "A similar treatment of the evidence marks the determination of the distance between the *Chicago* and the *Silverpalm* on sighting." This mattered because the Ninth Circuit's estimate of the distance "was a controlling element of its decision…"

(e). "The main opinion and that on rehearing magnify and exaggerate the omissions, erasures, and corrections in the *Chicago*'s log books or records which for the most part are inconsequential and ought not to be determinative of the collision facts." Petitioner noted that "We are filing with the Clark of this Court [a] folder of exhibits, including photostatic copy of the logs upon which" the Ninth Circuit "for the most part rested [its] criticisms. We are unable to find many of the changes or erasures to which the [Ninth Circuit's] opinion refers, and we are satisfied, …, that there has been no concealment of any facts."

> (f). Finally, "In the light of the circumstances it would seem that there should be an opportunity, by review of the decision, to remove the cloud cast by the opinions [of the Ninth Circuit] on the integrity of officers with many years of honorable service in the Navy."[543]

In their 9 May 1938 brief opposing the granting of a writ of certiorari, attorneys Lillick and Geary focused on three issues. The first was *Chicago*'s speed at the time of the collision. Their argument was that *Chicago* was steaming at a speed that wasn't moderate before she sighted *Silverpalm* and that the reason she collided with *Silverpalm* was because she was actually accelerating once she saw she could pass the *Albion Star*. As they put it, "the circumstances relating to the effort to 'get by' the 'Albion Star' cannot be logically separated from the circumstances which lead directly to the collision with the 'Silverpalm.'"[544] The second issue was whether the government had been given an adequate hearing. Lillick and Geary argued that the government had. Specifically, "the case was briefed and argued exhaustively" before the Ninth Circuit, and that court, "after carefully reviewing the facts in the record, held that the decree exonerating the 'Chicago' should be reversed," and that both ships were liable for the collision. The government asked for a rehearing, but it was denied. However, in denying a rehearing, the Ninth Circuit again carefully reviewed the record.[545] The third issue was whether the Ninth Circuit's decision was not in conformity with "accepted principles governing collision cases." Lillick and Geary said that it "very definitely follows them."[546]

The two attorneys also focused—as they had in earlier hearings—on the bridge logs and engine room records of *Chicago*. The Ninth Circuit judges had carefully examined those records and then compared the written records "with the conflicting statements made by some of the officers and crew of the 'Chicago.' This comparison disclosed glaring departures from and unexplained discrepancies between the 'wishful thinking' of the 'Chicago's' crew, and the contemporaneously maintained 'vital records' of her bridge and engine room."[547]

Lillick and Geary listed other reasons why the Supreme Court should deny the writ. First, the Navy's explanation that *Chicago* needed to anneal her hydrecon boiler coating was "extremely fallacious." Second, *Chicago*'s officers knew their ship was in the regular sea lane. Third—and so very important—*Chicago* failed to stop her engines completely when she heard the fog signal from *Albion Star*. Fourth, *Chicago*'s captain was not sensitive enough to the hazard created by the fog. Taken together, these four "violations" of the rules governing steamships at sea "brought" *Chicago* "directly into the 'jaws of a collision.'" Moreover, these violations were "in a direct line of causal relationship to the collision with the 'Silverpalm.'"[548] What did that show? According to Lillick and Geary, it indicated "the psychology of the officers who were navigating this rapidly moving cruiser in the steamer lane customarily traversed by merchant ships."[549]

The attorneys for *Silverpalm* also repeated a point they had made to the Ninth Circuit: "It is absolutely impossible to separate the navigation and maneuvers of the 'Chicago' with respect to the 'Albion Star' from the action by the 'Chicago' with respect to the 'Silverpalm.' They are inextricably intertwined."[550]

Lillick and Geary spent a great deal of the energy they invested in their brief on the issue of the difference between *Chicago*'s "vital records" and the testimony of her officers and crew. As the two attorneys said, "[I]t is fortunate that in the trial *de novo* the 'vital' records of the 'Chicago' were analyzed. These 'vital records' unmistakably

refute the 'wishful thinking' of some of the 'Chicago's' personnel with respect to the speed of the 'Chicago' at the time the 'Silverpalm' was sighted, and these records likewise unqualifiedly contradict the *viva voce* statements relative to the maneuvers of the 'Chicago's' engines." Lillick and Geary repeated again what they had said before—that *Chicago*'s speed was anything but moderate when *Silverpalm* was sighted, and that it had not been reduced as claimed by the government's attorneys.

However, Lillick and Geary gave a new twist to their argument. As they asked, "What credence did the high ranking officers of the Navy give to [the] engine bell sheet records?" Lieutenant Commander Gray, *Chicago*'s navigator, was required by the Navy Board of Inquiry to prepare a chart showing changes in engine bell signals plotted against *Chicago*'s speed. According to Lillick and Geary, citing the district court record, this chart showed that *Chicago* "was going ahead at the rate of 4 knots per hour" when the ships collided.[551] Yet *Louisville* was able to stop within an acknowledged safe distance when she was tested as a substitute for *Chicago*.

Why didn't the records of the test done with *Louisville* agree with Lieutenant Gray's chart? This mattered because the government argued that the stopping test with *Louisville* was the "measuring rod" used to estimate *Chicago*'s speed in the minutes before the collision. There was therefore something odd about the discrepancy between Lieutenant Gray's chart and the data from the tests with *Louisville*. The inference to be drawn from that discrepancy, according to Lillick and Geary, was that *Chicago* was going too fast when she sighted *Silverpalm*. Why didn't the order by Captain Kays to reverse Chicago's engines stop his ship in time to avoid a collision? Because *Chicago* was going too fast to begin with. Lillick and Geary stressed that "no one can review the log books of the 'Chicago', and fail to be impressed by the wide disparity shown between the entries on the deck logs in comparison with those made in the engine room records."[552]

In conclusion, Lillick and Geary argued that, "In the final analysis, the petition presents nothing for the consideration of [the Supreme] Court but questions of fact."[553] This was the clincher. Because the only real issues were of fact, and because those issues had been thoroughly addressed in the lower courts, there was no issue of law for the Supreme Court to consider. Did the Ninth Circuit's ruling depart from accepted legal principles, as the government's brief had averred? No. Did the Ninth Circuit's words that impugned Navy personnel require a review by the Supreme Court? Had the use of those words by Judge Denman raised a constitutional issue? Lillick and Geary said no.

The petitioners didn't have long to wait for the Supreme Court's decision regarding certiorari. The government's application was denied on 23 May 1938. The long legal struggle to assign responsibility for the collision was over. The Ninth Circuit's ruling stood.

Chapter 12: Conclusion

THE LAW AND REGULATIONS: WERE THEY OBEYED?

Navy Regulations specified a number of duties for commanding officers of ships. They had to keep tactical and maneuvering data for their ships up to date. On that score, it seems that Captain Kays or his predecessor had been remiss. Ship captains also had to report fires, collisions, grounding or other serious accidents immediately. Kays had done that, and the Navy Yard at Mare Island was ready and waiting for *Chicago* when, damaged, she arrived in San Francisco. A ship's captain also had to guard and cover "fire-control and gas warfare material." Moreover—and relevant for any assessment of the collision—lookouts were covered in detail in *Navy Regulations*: "When under way during low visibility, or when approaching or traversing congested traffic lanes or areas, [the captain] shall maintain at least one lookout stationed in the bow as far forward and as near the water as feasible under the circumstances." Kays had certainly taken care of that, too. There was also a general injunction that the captain "observe every precaution required by law to prevent collisions and other accidents on the high seas and inland waters."[554]

Navy Regulations also specified the duties of a ship's navigator. Senior to "all watch and division officers," the navigating officer was in charge "of the preparation and care of the ship's log." He was responsible for seeing to it that the "deck log" was "prepared in accordance with Navy Regulations…" and for "calling attention of the watch officers to any inaccuracies or omissions in their entries." He also had to see to it that the rough deck log was copied in "smooth form and placed before the watch officers daily for signature."[555]

Each ship had at least one officer of the deck (often abbreviated to OOD), who was "the officer on watch in charge of the ship." That officer was "responsible for the safety of the ship, subject, however, to any orders he may receive from the commanding officer." Officers of the deck were responsible for making sure that all junior officers and enlisted personnel on watch were "all times alert, at their stations, attentive, and ready for duty; that every necessary precaution is taken to prevent accidents; …; that the lookouts are in place and vigilant and that they understand their duties." The officer of the deck was also supposed to "exercise great care that the ship is skillfully steered and kept on her course, and shall keep a correct account of the courses, the speed, and leeway…" There was one important proviso: "When the commanding officer is on the navigating bridge, the officer of the deck shall not change the course, alter the speed, nor perform important evolution without consulting him."[556]

Chicago also had an executive officer—Commander John H. S. Dessez. According to *Navy Regulations*, the executive officer had to always consider himself on duty when he was aboard ship, and the *Regulations* specifically stated that "The executive officer shall aid the commanding officer in every way possible in performing the duties assigned him." However, the executive officer was not required to stand watches, and that meant he would rarely visit the ship's bridge. We were surprised to find that in the almost 1500 pages of court testimony and depositions, there was no mention of Commander Dessez or even of the executive officer's duties.[557]

A ship's captain and all officers qualified to stand watch also had to know the International Rules of the Road. In the case of *Chicago* vs. *Silverpalm*, some of those international rules mattered more than others.[558] Knight's *Modern Seamanship* was

the reference used by the U.S. Naval Academy in its classes for midshipmen. The seventh edition went into detail regarding how the international rules were applied. Article 15, for example, required steamships to have an "efficient" whistle or siren. That meant that, "under reasonably favorable conditions of wind and weather," a whistle had to be audible two miles distant from a ship; a foghorn had to be audible at no less than a mile. Article 15 also noted, however, that conditions of wind and weather could affect the distance at which any signal could be heard.[559] Article 15 also required a steamship encountering fog or snow to "sound, at intervals of not more than two minutes, a *prolonged blast.*" *Modern Seamanship* considered two minutes to be too long an interval between signals, however, and advised ship captains to make the audible signal four to six seconds long at an interval of one minute between each signal.[560]

Article 16 required ships in fog, mist, heavy rain, and snow 'to go at a moderate speed, having careful regard to the existing circumstances and conditions." But what was "moderate" speed? A footnote to Article 16 noted that "There is no point in connection with seamanship or admiralty law about which there has been as much discussion as about this question…" Courts in the United States and Great Britain had ruled that "moderate speed" was a speed that would allow the ship making it to stop before hitting any ship that she could see "through the fog in its existing condition…" But all that those rulings had done was shift the emphasis from one indeterminate metric ("moderate speed") to another ("fog in its existing condition"). Somewhat ruefully, *Modern Seamanship* noted that "the burden of proof [in any collision case] is thrown upon the ship maintaining such speed."[561]

In the case of *Silverpalm* vs. *Chicago*, the lawyers for the two sides sparred over whether Article 16 required a steamer hearing a fog signal from a ship it could not then see to stop in the water completely or to just stop its engines. A ship whose engines were stopped might coast quite a distance, and, while moving, constitute a hazard in poor visibility. Shutting down its engines to be absolutely safe would, however, deprive it of power it might suddenly need to avoid a collision.[562]

Article 18 dealt with the situation where two steamships met head-on, or nearly so. The rule was that the ships needed to turn or incline their paths to starboard so as to "pass on the port side of the other."[563] However, the "port-to-port" passage rule was not written in concrete. As *Modern Seamanship* observed, "circumstances sometimes arise in which it is necessary… to pass starboard to starboard, and this manoeuvre [sic] can be justified (but only in cases of necessity), under Art. 27."[564] And what did Article 27 say? "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the… rules necessary in order to avoid immediate danger."[565] This applied to a situation where one ship attempted to pass another going in the same direction: "It is good seamanship for a vessel overtaking another from directly astern…, to pass on the left rather than on the right…" Why? Because if the passing ship goes to starboard, the ship being passed may encounter another ship approaching her and—following the rules of the road—turn to the right, which will put her in the path of the ship trying to pass on the right.[566] Captain Kays well understood this rule, and he followed it.

Modern Seamanship was based on a thorough understanding of how ships moved through the water, and therefore sometimes made recommendations that seemed at odds with the common sense of a landsman. For example, "A vessel turning away from another vessel to avoid collision should always continue at full speed, as

the effort involved in this course is an attempt to cross the other vessel's bow. To turn away and slow is the surest possible way of bringing about collision."[567] But what if collision were unavoidable? That was the argument of Captain Kays—that *Chicago* was going to be hit and that his smartest move was to make sure that *Silverpalm* struck *Chicago*'s bow and not her spaces farther aft where the crew was eating breakfast. *Modern Seamanship* agreed: "[A]ny vessel in danger of collision with another should present her stem to the danger, rather than her broadside."[568]

Modern Seamanship treated the possibility of collision in darkness, fog, or poor weather very seriously. The book also said that "*The great hope of safety in a fog lies in the sound signals prescribed by law*." [Emphasis in the original.] The rules of the road required fog signals every two minutes, yet as *Modern Seamanship* pointed out, "But in two minutes, a vessel running fifteen knots will pass over half a mile, while two vessels approaching each other, will draw together by a mile." Given atmospheric conditions that might block or channel sound, "it might easily happen that two vessels running at this speed would find themselves in collision without either one having heard the signal of the other."[569] All the more reason to treat fog with the greatest respect.

In one of his novels, merchant marine captain William McFee described the aftermath of a sudden collision of a merchant ship and a warship at sea in the fog and on a dark night. The hard but glancing blow from the warship shut off the merchant ship's lights, and the first mate, trying desperately to assess the damage forward, fell over "one of the heavy cast-iron bollards which were mounted on either side of the forecastle head." The "mass of metal… had been flung fifty feet," and the first mate "tripped upon a swaying, jagged surface that tore his clothes and cut his hands." He realized with surprise that the ship's engines were still going, but he could tell that his ship's forecastle had been heavily damaged. A hurricane lamp, which he retrieved from the chart room, showed him that "the fore deck was a mass of ripped and twisted plates, splintered doors, and fragments of the interiors of cabins…, and the whole starboard side of the forecastle" had been sliced away. The mate "lowered his lamp and saw the black water rushing past between the torn deck-beams."

The glancing blow from the unknown warship had smashed the crew's quarters, and had smashed to "sticks" one of the ship's boats. "Trailing in the water and making a soft swishing sound were the bow plates and bulwarks which had been peeled from the forepart" of the merchantman.[570] In the novel, it wasn't immediately clear to the first mate which members of the crew had been killed. Nor did the mate know which ship was more at fault. What the mate did know was that fog and darkness had combined again to hide two ships from one another. Though this account of a sudden nighttime collision was fiction, it was based on events that McFee had learned about in his time at sea.

When you understand what the Navy and international rules were, you can better understand the rapid-fire decisions made by Captain Kays when he saw *Silverpalm* emerging out of the fog close aboard *Chicago*. You can also better understand the dilemma Captain Kays was placed in by the directive from the Navy's Bureau of Engineering requiring him to vitrify the "hydrecon" in his ship's boilers. Vice Admiral Laning should certainly have understood it, but Laning made no mention of it in his memoirs.[571]

What role did Laning play in the collision? Did his cruiser division of four ships have to proceed to San Francisco at more than 12 knots? Were they going faster than advisable in order to make time? Apparently not; the evidence doesn't suggest it. Laning also said that the fog had not

been heavy, either in the night or on the morning of the collision. If so, then why did he recall being on *Chicago*'s bridge "most of the night?" Did his presence contribute to a situation where Captain Kays felt pressured to do something that went against his experience? Kays' orders when he saw *Silverpalm*—first "left" and then almost immediately "right"—suggest that Kays was trying to follow the international rules. Laning knew the international rules. He also knew about the instruction from the Bureau of Engineering, and he could have chosen to avoid placing *Chicago* in a position where the cruiser might suddenly encounter other ships in the fog.

In light of the International Rules of the Road, if there was negligence on the part of *Chicago*, it was that she was moving at a speed too great to avoid a collision, given the conditions of visibility. However, her relatively high—and immoderate—speed was the result of a directive from a Navy technical bureau—a directive that, under the circumstances, was less legally compelling than the rules of the road. For Laning to say that he was with Captain Kays on the bridge of *Chicago* through most of the night means that he could easily have discussed the directive from the Bureau of Engineering. Why didn't he? Why didn't Kays bring it up?

THE PERFORMANCES OF THE ADVOCATES

The performance of lawyers Phillips and Lillick was largely professional. Before they appeared before the district court, both had carefully read what evidence had been gathered, and each had chosen a strategy that—hopefully—would win the case. Lillick's strategy was to take the offensive against the government and stay with it, no matter what the government attorneys said. He wanted to turn the case of *Silverpalm* vs. *Chicago* into an indictment against *Chicago* and the Navy. In his initial brief to the district court, he claimed that only *Chicago* was at fault, and his subsequent examination of the witnesses shows him searching—"fishing"—for the hook that he can use to snare *Chicago*'s defenders and thereby justify his brief. Lillick tenaciously stayed on the offensive. It paid off. When the Ninth Circuit ruled on appeal that there was mutual fault, Lillick had saved the Silver Line thousands of dollars when that money was desperately needed by the firm.

Lillick's case against *Chicago* was an effort to turn the strategy of Phillips on its head. Phillips saw the demeanor of *Chicago*'s witnesses as being in the government's favor. She several times talked about how important Vice Admiral Laning's testimony was. How could anyone doubt the word of man with such credentials and such bearing? Lillick countered by saying that Laning's word wasn't enough. What about the erasures in the log and bell books? Lillick's argument was that in this case details mattered. The case wasn't about the law. It was about the facts. Just what were those facts? To find out, Lillick carefully questioned the officers and crew of *Chicago*, searching for the details that would convince a judge that *Chicago* was also at fault. All Lillick had to do was to pin some fault on *Chicago*, whereas Phillips had to exonerate *Chicago* completely.

What about the intemperate language of Judge Denman of the Ninth Circuit? By looking at the maneuvering board charts, he could have come to the conclusion that Captain Kays had made an error of navigation and therefore *Chicago* was partly to blame for the collision. Instead, he delved deeply into *Chicago*'s engine room logs. What he thought he found there convinced him that officers of the cruiser had engaged in a sort of cover-up, and he was furious about it.

What had led him to be so suspicious of the Navy? Esther Phillips suggested that it might have been Denman's experience with the

government and the Navy in a different case—O'Donnell et. al. v. United States (91 F.2d 14 [1937]).[572] This was a land title case heard at the district court level in April 1930 and appealed to the Ninth Circuit Court of Appeals in November of that year. Judge Denman wrote the decision for the Ninth Circuit that was published on 22 October 1936.

The dispute that had led to the district and circuit court hearings was over land north and west of the Navy's Yard at Mare Island. The U.S. government wanted to purchase the land in order to expand the Navy Yard. The government argued that it could do so "by virtue of reservations of the land for naval purposes, made after the lands were ceded to the United States by the Treaty of Guadalupe Hidalgo," which ended the war between the United States and Mexico in 1848.[573] The current owners denied the claim of the federal government, arguing that they had legal title to the land because their predecessors had obtained the right to it from the state of California. In its turn, California claimed that it had gained legal control of the land after Congress passed a law in September 1850 admitting California to the United States.

In a long and detailed opinion, Judge Denman, writing for the Court, argued that the current occupants had title to the land and that the federal government's claim that it could purchase the land from another party claiming ownership was legally invalid. According to the Court, the federal government had "violated a trust relationship to the State of California" with regard to the legal ownership of the land that it was trying to obtain.[574] The U.S. government's improper actions stretched back into the mid-nineteenth century, according to the ruling, and the Court condemned those actions in very strong terms.[575]

Was it Denman's experience with this case, a case where the government was represented by attorneys McPike, Phillips and McMillan of San Francisco, and Philip Buettner of the Navy Department in Washington, that had led him to be suspicious of the federal government and the Navy?[576] Or did he react negatively when he read Attorney Phillips' assertion that Vice Admiral Laning, with all his years of experience, had to be the last word regarding what took place the day of the collision?

Attorney Lillick and Judge Denman were well acquainted. Could that have had anything to do with the outcome of the case on appeal? When Lillick was badly injured in a cable car crash in May 1926, Denman visited him in the hospital "to while away," as Lillick put it, "a part of the dreary time I put in there." Denman also took books and briefs to Lillick, including Denman's brief in the case of steamship *Walter A. Luckenbach* vs. tanker *Lyman Stewart* (14 F.2d 100 [1926]), argued before the Ninth Circuit. When Denman's appointment to the Ninth Circuit bench was confirmed by the Senate in January 1935, Lillick wrote to congratulate him, saying that "We needed, as no one better than yourself could know, a lawyer of your ability, your integrity, and your experience more than at any time since the formation of this circuit and –thank the Good Lord—the appointment has gone to you."[577] High praise, indeed. Did it influence Denman's approach to the appeals? There's no evidence that it did.

WAS THE NAVY SPECIAL WHEN IT CAME TO THE INTERNATIONAL RULES OF THE ROAD?

A thread that links the cases discussed in this book is the Navy's argument that its missions and training were very different from those of the merchant marine and that therefore its ships and submarines were somewhat exempt from the International Rules of the Road. I came to think of the Navy's argument as like that applied to emergency vehicles—police cars, fire trucks, and ambulances—on the highway. In some special cases, the emergency vehicles have the right of way, and other vehicles must make room for them. To me, this thread ran from the case of *The City of Rome* vs. *S-51*through *Childs* vs. *A. Ernest Mills* and then to *Silverpalm* vs. *Chicago*.

The government had put forward a related argument in the cases regarding title to land on Mare Island: The Navy claimed to have a unique claim to the land because it had been set aside for eventual naval use. The Ninth Circuit had rejected this argument. As far as the Ninth Circuit was concerned, the government and the Navy had to play by the established rules. They had not done so in the case of the collision, and they had previously tried to pull the same sort of trick in the O'Donnell and Stewart land title cases. It may have been the Court's dissatisfaction with this repeated claim by the Navy that it was "unique" that led Judge Denman to write what he did in reversing the ruling of the District Court.

In the opinion of lawyers McPike and—especially—Phillips, Denman's opinion went beyond the bounds of accepted judicial decorum. Commander Gatch of the Navy JAG office went even farther beyond what the federal attorneys were saying. In a draft "petition for a rehearing" sent to Esther Phillips, Gatch argued that "a just comprehension of apparently minor matters of naval procedure aboard ship cannot be gained from any amount of study of books and regulations and instructions, but must be gained from practical experience at sea, just as a real knowledge of court procedure, …, cannot be gained outside of court. It would be fully as logical for a naval officer who had never set foot in court to criticize the fine points of court procedure as it would be for a person who has never steamed in a naval ship to criticize equally fine points of her procedure. The background essential to make such criticism of worth would be wholly lacking in each supposed case."[578] Though just a draft, Gatch's brief could be interpreted as a direct challenge to Judge Denman's ruling—and to Denman's knowledge of seamanship. Phillips declined to use it and warned Gatch not to distribute it.

In a 13 January 1938 letter to the Attorney General in Washington, Frank J. Hennessy, McPike's successor as Federal District Attorney in San Francisco, expressed his concern about the Ninth Circuit's ruling: "The Court goes out of its way to cast as many reflections as it can, not only upon the particular Naval officers on board [*Chicago*], but upon Naval officers generally. A complete absence of judicial poise is demonstrated on every page of the opinion." Hennessy added that "Widespread publicity has been given to these charges of fabricated logs and the inferential charges of perjury. The harm that can, and probably has been done by them, is not subject to calculation."[579] Hennessy's views have already been presented, but they merit repeating here because the government's lawyers—especially Esther Phillips—found Judge Denman's language unnecessarily extreme, and we have to wonder why Denman was so caustic.

Phillips initially regarded the Judge's words almost as a personal challenge, though by early January 1938 Denman found time to apologize to Phillips "for not having handed down his opinion on the date the Petition for Rehearing was denied" and therefore making more difficult her task in seeking a writ of certiorari from the Supreme Court.[580] One must wonder what she thought when Denman personally acknowledged his responsibility for the delay.

OUTSIDE THE COURTROOM: THE GREAT DEPRESSION

In reading the nearly 1500 pages of legal documents—hearing transcripts, briefs, depositions, and written exhibits—connected with the collision, you will not find much about either the impact of the Great Depression or the growth of the Navy in the 1930s. It is almost unnerving to read Judge Louderback's interlocutory decree of 12 July 1934 and to realize that on the same day the members of over twenty of San Francisco's labor union locals had voted to go on strike—a general strike, not a work stoppage, but a challenge to the elected authorities of San Francisco.

Crowds of angry strikers began fighting the local police for control of the city near the Embarcadero starting on 16 July. San Francisco's longshoremen had been on strike since 9 May, and on 5 July police had fired on strikers trying to close down the city's docks, killing several strikers and wounding scores more.[581] Other unions, and dockworkers in other cities on the West Coast, decided to follow the lead of the longshoremen. The governor of California eventually activated the state's National Guard to subdue the strikers, and the federal troops in the Presidio were readied in case the President ordered them to restore order alongside the National Guard.

One of the primary causes of labor unrest was the economic collapse that came to be called "The Great Depression." Economist Simon Kuznets of the National Bureau of Economic Research described the collapse in terms of some cold, hard numbers: between early 1929 and late 1932, salaries fell 40 percent, investment dividends declined by over 55 percent, and wages nearly collapsed, declining by 60 percent.[582] At least 15 million adults were out of work in a country with less than 130 million adults and children.

The two of us who worked on this book—my older brother Bill and I—were born in Youngstown, Ohio, and grew up in the "satellite" towns whose smaller businesses (such as tool and die shops) drew on the output of the steel industry. In 1931, Benjamin Roth, a Youngstown lawyer, began keeping a diary that chronicled the "hard times" that followed in the wake of the Stock Market collapse in 1929 and the steel and manufacturing plant closings that inevitably came after. At the end of 1932, to cite Roth's diary, the steel plants of the city—mainly Republic Steel and Youngstown Sheet and Tube—were operating at 13 percent of their total capacity.

Roth documented in a very personal way the tragic consequences of widespread unemployment. Losing a job meant losing income; it also meant losing a place in a society that, in the 1920s, had seemed destined to grow forever. The profoundly dispiriting effects of unemployment and personal bankruptcy spread out into all the towns in the Youngstown area, but the hoped-for recovery seemed to stay just beyond reach, year after year. Things would get better for a while, and then they'd worsen again. Hardly anyone was secure economically. Lawyer Roth saw his practice wither. His total cash receipts for the month of April 1933 amounted to just $18.[583]

Moreover, his work as a lawyer was less and less satisfying as the economy worsened. As he noted in his diary on 10 November 1933, "Law practice is very disagreeable. A good deal of it consists of trying to collect money from people who are helpless. Grown men and women come into the office and break into tears when they try to tell their story. So far I have been able to work out every situation without causing any harm. It is a thankless job."[584] Is it any wonder that the labor union violence that erupted in San Francisco was

echoed in other cities? Youngstown's steel mills were closed for three weeks in June 1937. In his diary for 22 June 1937, lawyer Roth noted that "The non-union men planned to march on the mills in a body this morning and open them but the governor declared martial law and state troops kept the mills closed. There has been much labor trouble lately and a great deal of violence."[585]

You would not have gathered that if all you read were the legal documents related to the libel case that pit the lawyers for *Silverpalm* against those representing the United States government. There was drama to the case, especially during the district court trial in 1934, but it was drama confined to a handful of lawyers, one judge, and a small group of Navy officers.

WHY DIDN'T THE SUPREME COURT GRANT *CERTIORARI*?

The law of the United States (including admiralty law) governing liability is mostly "common law"—that is, judge-made law. Judges can't make "good" law if all they have to consider are "bad" cases. In rejecting the request of the U.S. government for a writ of *certiorari* in the case of *Silverpalm* v. *Chicago*, I think the justices of the Supreme Court saw the case as one where they should not rule because, in ruling, they would not make "good" law.

And why was that? The answer, I believe, came up when Esther Phillips and Ira Lillick deposed George E. Stanley, *Silverpalm*'s Third Officer, on 4 and 6 November 1933. Phillips, saying she was trying to confirm the courses of the two ships, asked Stanley, "if your ship, the *Silverpalm*, was on a course 156 degrees and she sighted the *Chicago* one point on her starboard, at a distance of three-quarters of a mile to a mile, and if the *Chicago* was at that time on a course of 330 degrees, would a collision have been possible?" She showed Stanley "a maneuver chart" and asked him to put *Silverpalm* into the chart "on a course 156 degrees true."[586] He did so, and Phillips asked him again, should the collision have occurred? His answer was "Not if the vessels had kept their respective courses." Phillips then asked, "In other words, that is not a collision course, is that what you mean?" Stanley agreed that it was what he meant.[587]

The maneuvering board chart below illustrates *Chicago*'s course of 330 deg., and three courses for *Silverpalm*: 156 deg., 132 deg., and 120 deg. The chart after that adds *Chicago* at 350 deg.

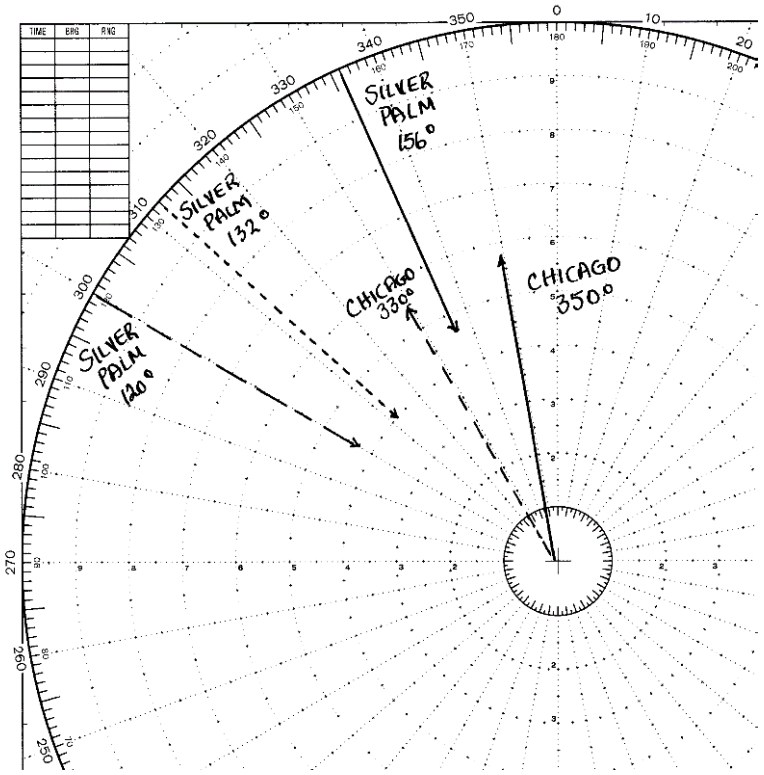
Stanley also admitted that he realized a collision was possible "As soon as the *Chicago* came into clear view." Phillips reacted by pointing out to Stanley "that if the *Silverpalm* was in fact on a course 156 true, and if the *Chicago* was in fact on a course 330 degrees true, they are not collision courses, and the vessels should have passed clear on those two courses: Is that right?" Stanley said yes. Phillips kept going: "If the order was 'Rudder hard a-starboard.' Was that designed to swing clear of the *Chicago*—was that the purpose of the maneuver?" The answer was yes. Then she asked, "Which side did you, in fact, strike the *Chicago* on?" "On the port side," answered Stanley. Phillips jumped on that, asking, "The position of the two vessels as they appear on this sketch would not make the possibility of the *Silverpalm* striking the *Chicago* on her port side even thinkable, would it?" At that point, there was nothing Stanley could say but no. Phillips hammered home her point by asking, "It would be absolutely impossible?" Yes.[588]

Phillips continued, "Of course, I take it now, all of this is subject to the qualification that I have given you, assuming that the *Chicago*'s course is 330 degrees true?" "Yes," answered Stanley, "I am basing my answers on that assumption, if the ships had been on those two courses." Phillips now put Stanley on the spot, saying, "So that your signal of 'Hard a-starboard,' if the collision

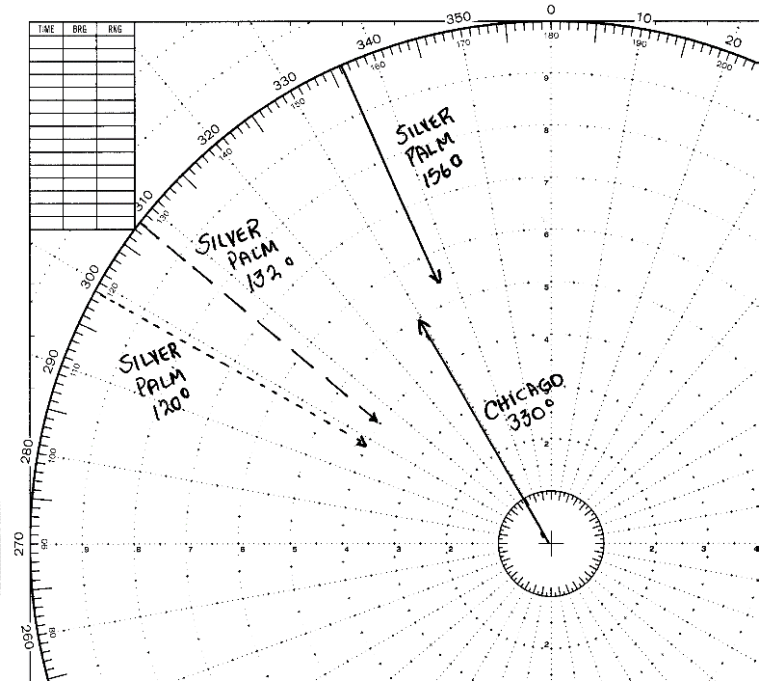
occurred, the collision should still have been the *Silver Palm* hitting the *Chicago* on her starboard side, rather than the port side, isn't that right?" Stanley agreed that it was correct, but he and Phillips knew that *Chicago* had been struck on the port side. Some piece of information given by at least one of the witnesses was wrong.

Without focusing on who might have been wrong, Phillips noted that, "The logical… conclusion is one or the other of these two vessels was not on the course that we have fixed on this little sketch, that either the *Silver Palm* was not on 156 true, or the *Chicago* was not on 330 degrees true, isn't that right?" Stanley admitted that it was right. So Phillips asked, "And there never was any risk of collision, isn't that right?" "No risk of collision," agreed Stanley, "if the vessels were on those two courses."[589]

Phillips then said, suppose "*Chicago* was on a course of 330 degrees [sic] what course would your vessel have had to be on to bring into existence the danger of collision?" Stanley could only answer, "I am afraid I could not give you that, it depends on the distance between the two ships." Phillips asked Stanley if he could plot that distance. He answered that he couldn't because the plot (or chart) had no scale of miles. Phillips tried to get Stanley to make a plot, anyway. As she said, "We have agreed that if the *Silver Palm* was on a course 156 degrees true and the *Chicago* was from 350 to 330 degrees, both ships were entirely clear, there was not a chance of collision on those two



In this first chart, *Chicago* and *Silverpalm* will pass starboard-to-starboard if they maintain their parallel courses. But if *Silverpalm* follows courses 132 deg. or 120 deg., then the ships will converge. The next chart shows that the two ships will converge if *Chicago* has not reached far enough ahead on course 350 deg. to put *Silverpalm* behind her.



courses, and so I ask you if you assume the *Chicago* to be on the course 350 or 330 degrees true, anywhere between those two courses, I ask you to put your ship on a collision course which would make danger of collision at a distance of a mile."

Lillick spoke up. "Are you assuming that the *Silver Palm* is also on 156?" Phillips ignored Lillick and addressed Stanley: "I ask you to tell me what is the course which will be a collision course… Now put your ship on a collision course which will bring the risk of collision between the two vessels at a distance of a mile, the *Chicago* remaining on your starboard bow at an approximate bearing of a point."[590] Stanley selected a course of 132 degrees true. Phillips queried, "You mean if the *Chicago* were on a course of 330 degrees true, and your ship was on a course of 132 degrees true?" Yes. "The ships would still be clear?" "There would be no danger of collision?" "No," said Stanley, "if both ships kept their respective courses."

Phillips had a point that she wanted made clear: "If your ship were on a course 120 degrees true when the *Chicago* was sighted would you say then that is a collision course?" "Yes," noted Stanley, "that could be a collision course." He repeated his answer: "Oh, yes, it could be a collision course, not taking speed into account."[591] Then Phillips asked what was "the change of helm which makes for the greatest safety for the two vessels?" Stanley: "Both ships to alter the course to starboard…" Phillips came back with this: "Would you say that this is a correct statement of the two vessels, that the *Chicago* while crossing directly across the bow of the *Silver Palm* from the starboard side to the port side of the *Silver Palm* came into collision?" Stanley admitted, "That is how it appeared to me." Phillips: "The *Chicago* was on your starboard?" Phillips: "And the collision happened crossing from your starboard to your port?" Stanley: "That is right."[592]

The international rules required two ships approaching head-to-head to each swing to starboard—that is, to swing to the right in order to pass port-side to port-side. However, the 1918 edition of *Knight's Modern Seamanship* noted that in "thick weather" the ships approaching one another might not have time to stick to the conventional rules and therefore needed to "take such action as will best aid to avert collision."[593] Did *Silverpalm* swing to starboard? Phillips pressed Stanley on this point, asking, "Don't you think it is more probable she did not begin to swing until she was within 200 or 300 yards of the *Chicago*?" Stanley's answer was "That I could not say."[594]

There it was: the issue that had puzzled the members of the Navy Board of Inquiry. After taking George Stanley's deposition, Phillips and Lillick deposed Captain Cox of *Silverpalm*. Cox said that he first sighted *Chicago* "About a point and a half on the starboard bow." He then stopped his engines and put them "full speed astern and blew three blasts on the whistle."[595] In answer to a question from attorney Lillick, Cox later said that from the time he ordered hard a-starboard to the time of the collision, he estimated that his ship had changed her course from 156 to approximately 168 degrees.[596]Under further questioning from Phillips, Cox assured her that if *Silverpalm*'s course was 156 true and *Chicago*'s was 330 degrees true, there would have been no collision.[597] But what about 168 degrees? Phillips did not pursue the point. Yet it may have been the key to the case. Yes, one or both ships might have been steaming too fast given the fog, but their respective speeds only mattered because they gave the ships' captains too little time to change what were obviously dangerous reciprocal courses.

I believe that Phillips was correct—that the key to understanding what brought on the collision were the reciprocal tracks of *Silverpalm* and

Chicago. I also sympathize with her and with Judge Louderback. Both realized that the witnesses could not agree on what those tracks were. That is, the most fundamental pieces of evidence were in dispute. As Ira Lillick had asserted, the case revolved around facts—the existing law being accepted by both sides—and the facts were in dispute. Indeed, the long district court trial had never resolved that dispute.

The dispute that the lawyers therefore focused on was whether the evidence of *Chicago*'s engine room bell books was correct. Put another way, the lawyers shifted their aim from an issue that could not be resolved to an issue (the validity of entries in *Chicago*'s engine room bell books) that they believed could be resolved. This suited Lillick's assault on the integrity of the government's witnesses. Judge Denman and his colleagues of the Ninth Circuit Court of Appeals found Lillick's assault compelling, and so it was presented to the reader that way in the 1939 *Handbook of Admiralty Law in the United States*.[598]

Over time, the law changed. As law professors Nicholas Healy and Joseph Sweeney recognized in a 1992 paper, "procedural cases before 1966 and evidentiary cases before 1975" had to "be used with caution as precedents."[599] In 1998, Healy and Sweeney, in their comprehensive *The Law of Marine Collision*, reviewed all the major changes since the *Silverpalm* case, and former Navy officer J. Michael Lennon also dealt with the changes in his "The Law of Collision and the United States Navy" (1992).[600] As at least one Navy JAG officer told me, the case of *Silverpalm* v. *Chicago* was obsolete. It had been superseded. So why care about it?

The answer is because of collisions like that of *Fitzgerald* (DDG-62) and freighter *ACX Crystal* on 17 June 2017, and that of *John S. McCain* (DDG-56) and tanker *Alnic MC* on 21 August 2017.

In reading about those tragic incidents, I discovered Captain Michael Junge's "From Accountability to Punishment," in the Spring 2020 *Naval War College Review*. As Junge revealed, though the danger of a collision is still very real for Navy ships, the "Navy has not held a court or board of inquiry for a major incident since" March 2001, despite the fact that several serious collisions have occurred.[601] Captain Junge, USN, a professor of Leadership and Ethics at the Naval War College, has argued that officers held responsible for ship collisions, such as those of *Fitzgerald* and *John S. McCain*, have recently been disciplined through an administrative process, where "immediate superiors in command" of the officers being investigated consider evidence and dispense punishments, if any. In an administrative process, there is no requirement for an open hearing, and no public record of the proceedings is obtainable. As Captain Junge put it, "In many cases, the individuals removed from command are not provided copies of the applicable investigation, even when they ask for one."[602]

As I discovered in the case of *Chicago* vs. *Silverpalm*, the Navy's formal rules that applied in 1933 were followed to the letter, including one allowing the Board of Inquiry to exclude newspaper reporters from its sessions. Moreover, reporters also weren't allowed to sit in on the district court sessions—at least so far as I could tell. Because the reporters weren't there, we don't have accounts of what the hearing room looked like, what the voices of the witnesses sounded like, and whether anyone in the room chewed gun. However, true to its own rules of procedure, the Navy kept a stenographic record of the inquiry, and that record survives today in the National Archives. The district court stenographer's record has been published, and also available are the decision of the Ninth Circuit Court of Appeals and the briefs written for and against the application for the writ of *certiorari.*

These documents allowed me to go back in time and tell the story of an event which began as a tragedy at sea and then became a legal *cause celebre*.[603]

And, as I hope this book has shown, those lawyers—*those professionals*—were skilled advocates in 1933, just as they are—and must be—today. Once they are handed a case, then what happens outside the court, like the Great Depression, fades into the background. As forensic pathologist Dr. Frederick Newbarr put it to mystery writer and lawyer Erle Stanley Gardner, "A man should never be careless in work involving life or liberties."[604] The lawyers and Navy officers involved in the case of the *Silverpalm* v. *Chicago* put those words into practice with a vengeance.

Epilogue

What happened to the people and the ships caught up in the collision and the resulting legal hearings?

Chicago supported carrier *Yorktown* during the Battle of the Coral Sea at the beginning of May 1942. The cruiser was attacked by a Japanese midget submarine while anchored in Sydney Harbor, Australia, on the night of 31 May-1 June, but was not damaged. On 9 August 1942, while supporting landings by American forces on Guadalcanal, *Chicago* was torpedoed in her port bow by a Japanese destroyer during the fierce surface battle off Savo Island. The ship returned to the United States for repairs, and, after being restored, was again deployed to Guadalcanal. On the night of 29 January 1943, the ship was torpedoed twice by Japanese aircraft, but her crew kept the ship afloat. Unfortunately, while being towed to safety the next day, Chicago was located by more Japanese planes, and she was torpedoed again and sank near Rennell Island.

Silverpalm was also a war casualty. Under the command of Captain R. L. Pallett, she sailed from Calcutta on 17 April 1941, bound for Glasgow. She disappeared after being sighted for the last time on 31 May. "On 15th July the trawler *Cave*, fishing some 500 miles west of the Hebrides, found a life-boat with eight bodies in it. Papers on the bodies identified them as crew of the *Silverpalm*." After the war, it was learned that the ship had been torpedoed by German U-101 on 9 June 1941, and all aboard were lost.[605]

George Stanley, who was 3rd officer on *Silverpalm* at the time of the collision, rose in rank one notch to be 2nd mate on *Silverwillow* and *Silverlarch*. He left the sea in 1938 and became a public health inspector in the port of Manchester, England, for 27 years.

Captain Herbert Kays served as a senior officer in the Navy's Washington, DC, Hydrographic Office in 1937. After retirement, he commanded the inshore patrol guarding the approaches to Navy installations at Norfolk, Virginia. In 1944, he was a member of the faculty of the Navy ROTC unit at the University of California at Berkeley.

Vice Admiral Harris Laning was promoted to Admiral when he commanded the U.S. Fleet's Battle Force in 1935-36. After that command, he was the Commandant of the 3rd Naval District in New York. He retired from the Navy in 1937 and died in February 1941.

Captain Manley Simons was promoted to Rear Admiral in 1935 and served as Director of Fleet Training in the Office of the Chief of Naval Operations in Washington. In 1937, he was commander of Battleship Division 1 of the Battle Force. His flagship was battleship *Texas*, which has been preserved as a museum ship and war memorial. In 1941, he was the Commandant of the Norfolk Navy Yard.

In 1935, Lieutenant Commander Ernest Colton was stationed in the headquarters of the Navy's Bureau of Engineering in Washington, DC. In January 1939, he was a Commander, serving at the Navy Yard, Pearl Harbor. By April 1941, he was awaiting orders to his next post.

The official *Navy Directory* shows Commander Lloyd Gray as "inactive" in 1935, 1937, and 1939.

Captain Frank B. Freyer served on a battleship during the voyage of the Great White Fleet, and in 1913 he graduated from the law school of George Washington University. In 1918, he served as an assistant to the Navy JAG. In 1920, as a Commander, he headed an American advisory group that helped the Peruvian government reorganize that country's navy. In

January 1921, he was named chief of staff of the Peruvian navy and served with distinction in that post. He later commanded transport *Procyon*, the flagship of the commander of the Navy's Base Force. In 1929, he commanded light cruiser *Trenton* (CL-11). In 1935, Captain Freyer was serving on the staff of the Commandant of the 12th Naval District. Illness forced him onto the Navy's inactive list by 1939.

In 1935, Lieutenant Paul Glutting was teaching at the Naval Academy. He rejoined the fleet later in the decade, serving as Commander, Submarine Squadron 5, in 1939. Commander Glutting rejoined the Naval Academy faculty in 1941.

Lieutenant Commander Wesley Hague of the Navy's Construction Corps continued to serve at the Mare Island Navy Yard until he was transferred to the navy yard at Norfolk, where in 1941 he was working as a Commander.

Chicago's gunnery officer, Lieutenant Commander Randal Dees, was a member of the Naval Academy faculty in 1937, and was promoted to Commander while there. In April 1941, he was a member of the staff of the Naval War College in Newport, Rhode Island.

Lieutenant(jg) John Leeds was with squadron VS-10S on submarine tender *Bushnell* (AS-2) in 1935. He served in destroyer *Cassin* (DD-372) in 1937 and was stationed at the Naval Academy—still as a Lieutenant(jg)—in 1939. In April 1941, he was a full Lieutenant on the staff of the commander of training for the Atlantic Fleet.

Lieutenant Joseph Kiernan served in the headquarters of the Bureau of Construction and Repair in 1937; he was promoted to Lieutenant Commander while there. In April 1941, as a Commander, he was the Supervisor of Shipbuilding at Bath Iron Works in Maine.

Chief Machinist John Kershaw was assigned to the 5th Naval District in Norfolk, Virginia, in 1935; he was still there two years later. By January 1939, he'd been promoted to Lieutenant(jg) and was assigned to the office of the Bureau of Engineering, Long Beach, California. He retired soon after.

Federal District Judge Harold Louderback remained on the bench until his death on 11 December 1941.

Esther Phillips continued as an Assistant U.S. Attorney until 1943, when she took on the added responsibility of serving as a special assistant to the Attorney General, "with authority to conduct the admiralty proceedings of the government in all districts on the West Coast."[606] She died suddenly on 30 March 1945.

Ira Lillick, one of San Francisco's most prominent admiralty lawyers, continued his practice and his involvement in local affairs. On his death in 1967 at age 91, he was still active in clubs and charities, such as the Palo Alto Medical Research Foundation, and he remained a member of the Board of Trustees of Stanford University until 1960, when, like his friend former President Herbert Hoover, he resigned.

Rear Admiral Orin G. Murfin, the Navy's JAG from 1931 through much of 1934, was given a fourth star when he was promoted to Commander-in-Chief, Asiatic Fleet. In 1937, Murfin was Commandant, 14th Naval District, and from his headquarters in Pearl Harbor he directed the Navy's search for famed aviator Amelia Earhart. He was brought out of retirement to head the Navy's Court of Inquiry that investigated the responsibility for the attack on Pearl Harbor.

Commander Thomas Gatch stayed in Washington as an assistant to the Navy JAG until he was promoted to Captain and given command of Destroyer Division 4 in 1939. By April 1941, he was back in Washington as an assistant to the JAG. Captain Gatch commanded battleship *South*

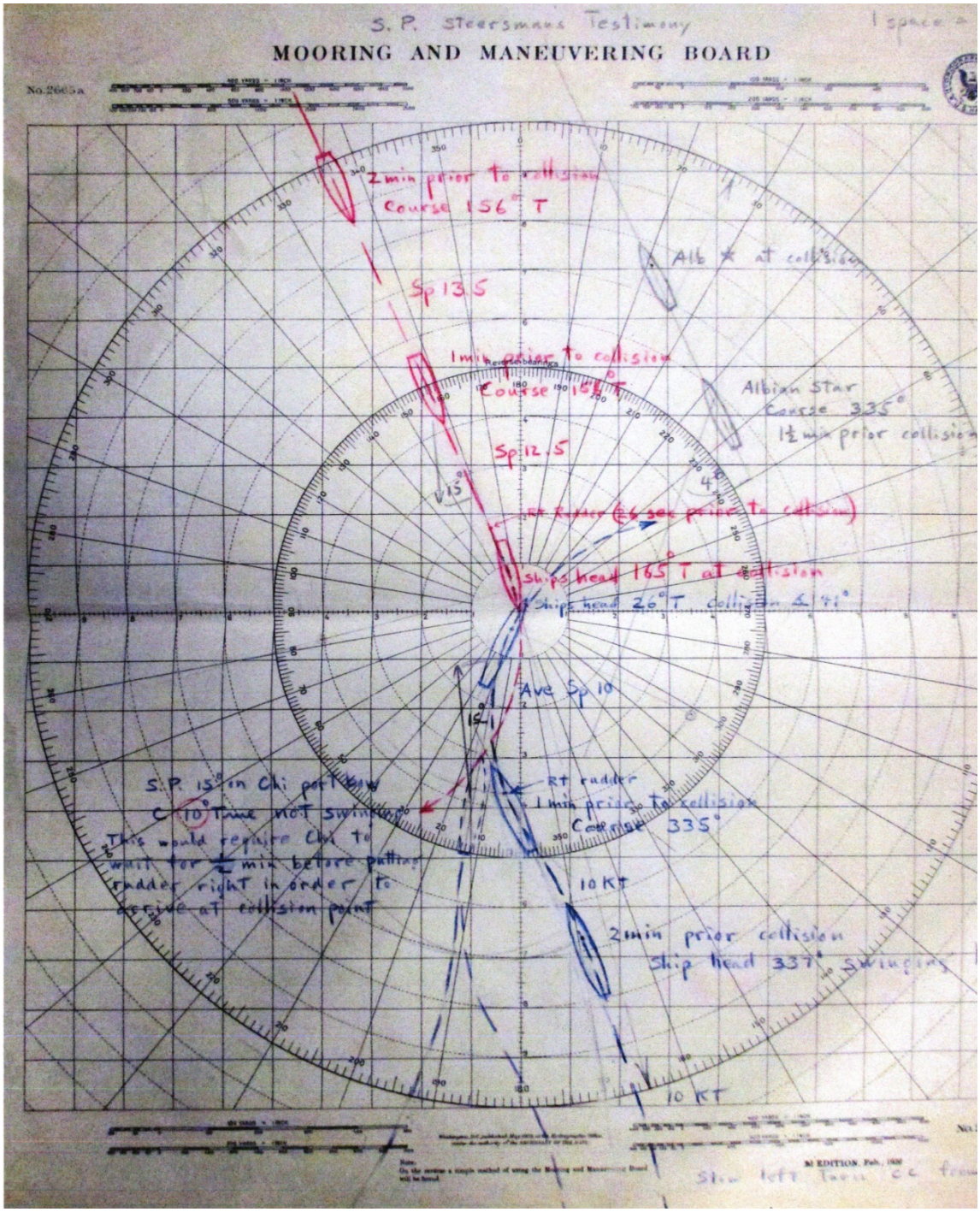
Dakota (BB-57) at the Battle of Santa Cruz in 1942. In 1943, as a rear admiral, he served again in the JAG office after recuperating from a wound he suffered in battle. In 1945, he was promoted to vice admiral and Commander, Service Forces, Atlantic Fleet.

Appendix A: Excerpt from *Chicago*'s Draft log of 24 October 1933

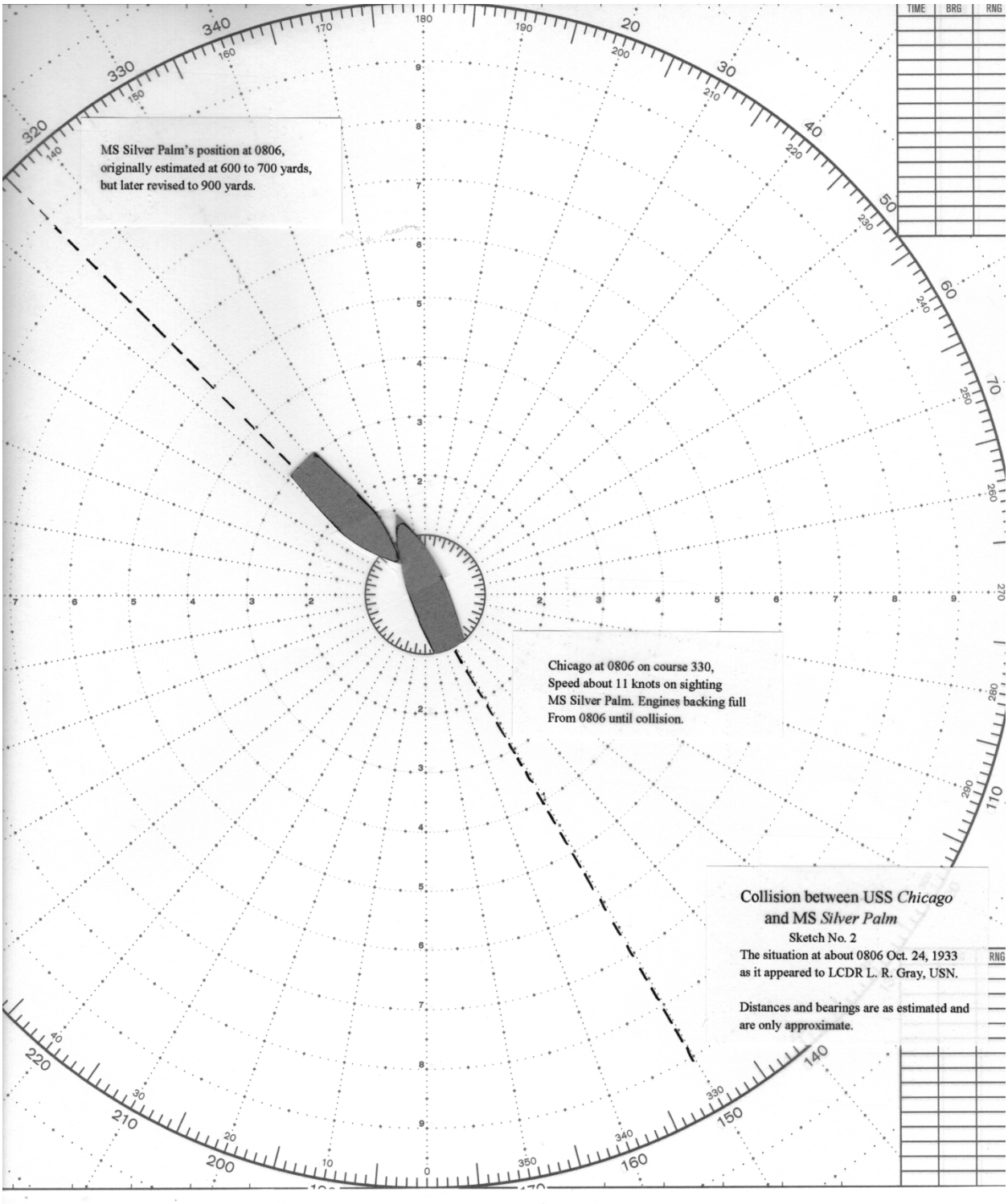
"Steaming as before on course 350 [deg.] true and gyro 334… Standard speed 18 knots (173 rpm). Boilers #5 and 6 in use for steaming purposes. Sounding fog signals at the prescribed intervals 0800. The forecastle lookout reported hearing a fog signal on the starboard bow, exact bearing uncertain 0801. All engines were ordered stopped. Made the prescribed fog signals. The Captain and Navigator in the pilot house. Sighted steamer about five points on the starboard bow, apparently on a course in the same general direction as this vessel but slightly converging with the course of this vessel, distance about 1000 yards. Executed left rudder, followed by steading [sic] on course 20 degrees left of set [?] course (330 [deg.] true and gyro). The sighted steamer was seen to change course away from the course of this vessel. 0803 All engines ordered ahead 2/3 speed, 12 knots, [unreadable]. Sounding prescribed fog signals. 0804 Ordered speed changed to standard speed, 18 knots (173 rpm). At about 0804[and one-half], forecastle lookout reported sighting a ship about two points on the port bow, course undetermined. Immediately afterwards a steamer was sighted from the bridge, showing dimly through the fog, about two points on the port bow, distance about 700 yards. 0805 Left full rudder was ordered and before it could be executed, right full rudder was ordered and executed and at the same time all engines were ordered stopped, followed by emergency full speed astern all engines and three blasts were sounded on the steam whistle. This was followed immediately by one blast on the steam siren and the sounding of the general alarm…"[607]

Appendix B: Charts of the Ships' Positions the Day of the Collision

Chart 1: Drawn from testimony by *Silverpalm*'s helmsman, Maharis Ben Latip.

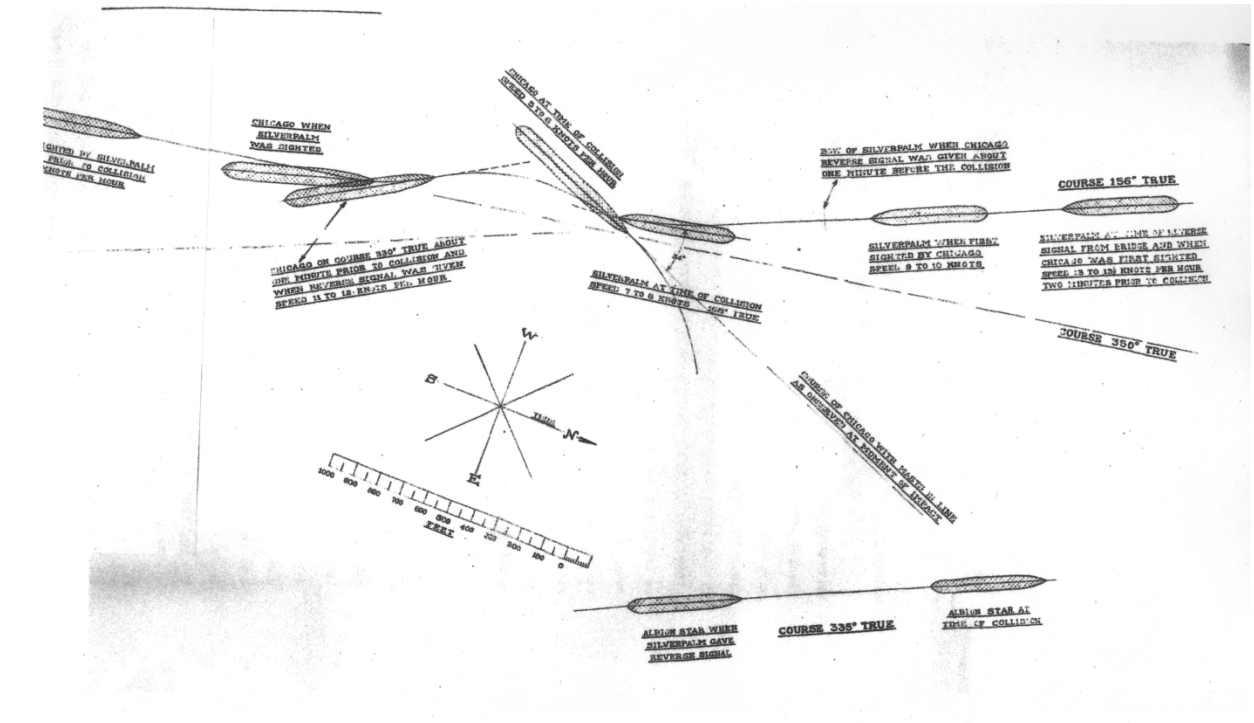


Chicago's course is traced in blue; *Silverpalm*'s course is in red. The words on the chart aren't easy to read. *Chicago* is shown swinging from course 337 deg. true to 335 deg. true two minutes prior to the collision. *Silverpalm*'s course is 156 deg. true. The next chart is an abstract of navigator Gray's chart.



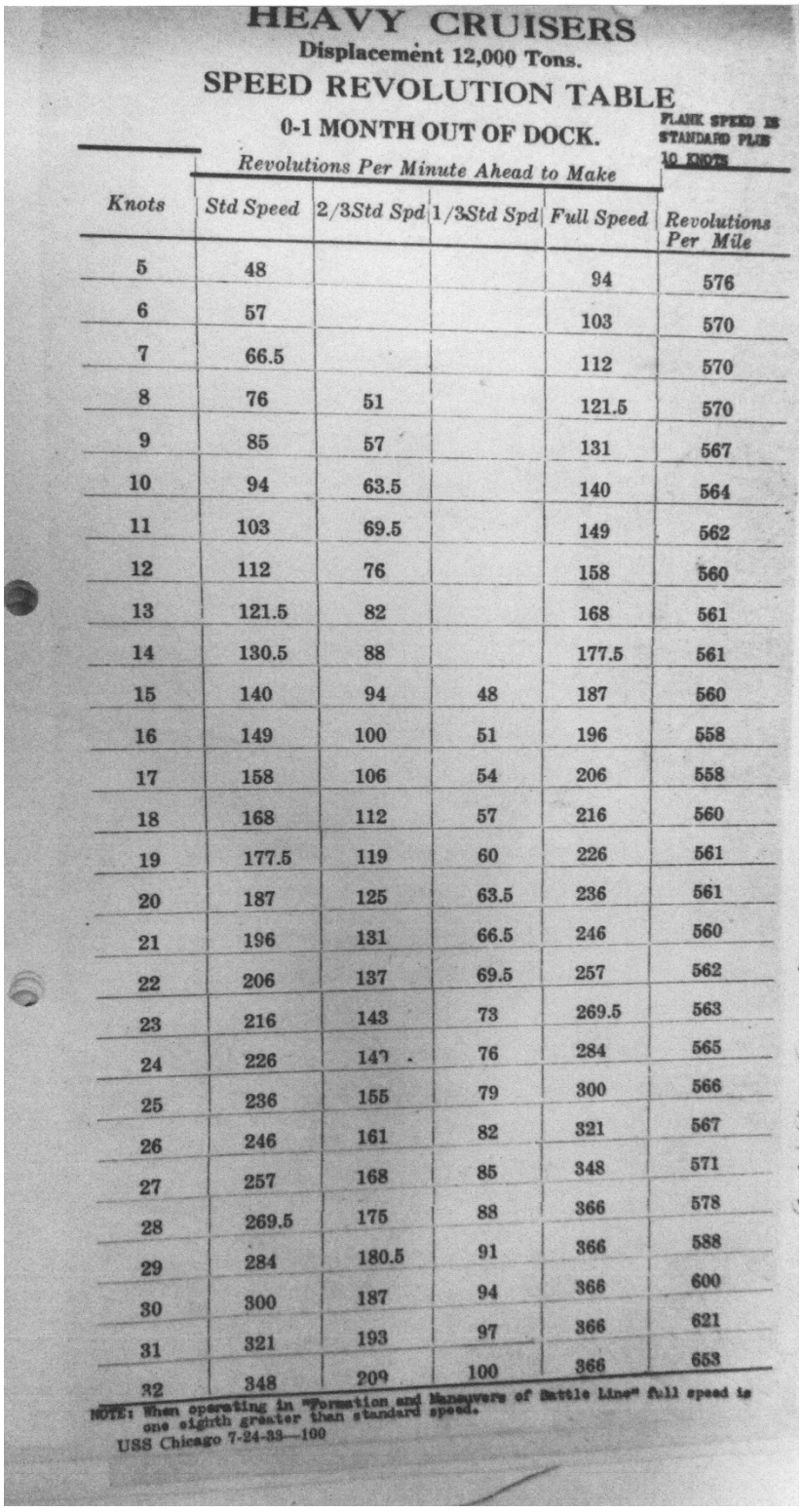
It would not take much movement by either ship to avoid a collision.

Below is another chart, this one submitted by Attorney Lillick to the district court. It shows *Silverpalm* on course 156 deg. true, with *Chicago* on course 350 deg. true just before she sighted *Silverpalm*. Then the chart shows *Chicago* swinging from 350 deg. true to 330 deg. true. The chart shows that *Chicago*'s stern would actually slide to the right as she began her turn to the left. Then, when Capt. Kays ordered right rudder, her stern would slide out to the left as the cruiser turned right around her pivoting point. *Silverpalm* was also turning—to course 165 deg. true—when the ships collided. *Albion Star* is shown at course 335 deg. true.



Not one of these three charts takes into account the effect of fog on the "pictures" the captains of *Chicago* and *Silverpalm* had in their minds before the collision. If there had been no fog bank to *Chicago*'s left (to port), and if she therefore would have sighted *Silverpalm* sooner, would she have had both the time and the space to turn to starboard to pass *Silverpalm* starboard-to-starboard?

Appendix C: Chart Relating Heavy Cruiser Speed (in knots) to Engine RPMs, 1934



HEAVY CRUISERS
Displacement 12,000 Tons.
SPEED REVOLUTION TABLE
0-1 MONTH OUT OF DOCK.

FLANK SPEED IS STANDARD PLUS 10 KNOTS

Knots	Revolutions Per Minute Ahead to Make				
	Std Speed	2/3Std Spd	1/3Std Spd	Full Speed	Revolutions Per Mile
5	48			94	576
6	57			103	570
7	66.5			112	570
8	76	51		121.5	570
9	85	57		131	567
10	94	63.5		140	564
11	103	69.5		149	562
12	112	76		158	560
13	121.5	82		168	561
14	130.5	88		177.5	561
15	140	94	48	187	560
16	149	100	51	196	558
17	158	106	54	206	558
18	168	112	57	216	560
19	177.5	119	60	226	561
20	187	125	63.5	236	561
21	196	131	66.5	246	560
22	206	137	69.5	257	562
23	216	143	73	269.5	563
24	226	147	76	284	565
25	236	155	79	300	566
26	246	161	82	321	567
27	257	168	85	348	571
28	269.5	175	88	366	578
29	284	180.5	91	366	588
30	300	187	94	366	600
31	321	193	97	366	621
32	348	209	100	366	653

NOTE: When operating in "Formation and Maneuvers of Battle Line" full speed is one eighth greater than standard speed.
USS Chicago 7-24-33—100

Source: U.S. Exhibit No. 7, Case 21666-L, RG-21, Box 1736, folder "USDC, 21666-L, NARA.

Appendix D: USS *Chicago* v. *Silverpalm* chronology

BEFORE 1933:

19 Jan 23: memo from BuC&R responding to Gen. Board request for data on 8-inch cruiser. This memo notes that such a ship would have "no protective material."

1933

24 Oct 33: *Chicago* collides with *Silverpalm*. That same day, COMCRUSCOFOR notifies for action COMSCOFOR with information copies to CINCUS, OPNAV, and COMTWELVE.

24 Oct 33: Op-23G-RSM telegram from Captain E. J. Marquart assigning *Chicago* to Mare Island. The telegram also says it would make sense to keep *Chicago* at Mare Island for her scheduled overhaul. The overhaul was scheduled from April to June 1934.

25 Oct 33: Commander Cruisers, Scouting Force (VADM Laning) issues guidance to Board of Inquiry

26 Oct 33: list of witnesses; first day of official court of inquiry (held on board *Chicago*; the rest of the hearings were held at 12th Naval District HQ, San Francisco)

27 Oct 33: second day of inquiry

27 Oct 33: Navy Yard Mare Island notes that finishing repairs to *Chicago* in a timely fashion will depend on getting ordnance material that is required

28 Oct 33: third day of inquiry

28 Oct 33: Commandant, Mare Island, sends preliminary report to Chief, Construction &Repair, in Washington with preliminary cost estimates

29 Oct 33: Attorney Esther Phillips drafts a questionnaire for the officers of *Albion Star*

30 Oct 33: fourth day of inquiry

31 Oct 33: fifth day of inquiry

31 Oct 33: VADM Laning officially appoints additional Navy officers to court of inquiry

1 Nov 33: Monition—Case 21666-S. This is a writ from the clerk of the district court summoning "all persons interested in" *Silverpalm* to appear before the district court on 14 November 1933 and "make their allegations" on behalf of *Silverpalm* or its cargo.

1 Nov 33: US Marshal posts notice of seizure on *Silverpalm*.

1 Nov 33: Silver Line (libellant) vs. U.S. Government (respondent); case 21665-K

1 Nov 33: MS *Silverpalm* vs. USS *Chicago*; case 21667-L

1 Nov 33: Case no. 21666-S: United States, libelant, vs. Motor Boat Silverpalm, her engines, tackle, apparel, and furniture, respondents. This is the first case mentioned in *Apostles on Appeal*, Vol. 1. This is where the government accuses *Silverpalm* of negligence and says *Chicago* was not negligent.

1 Nov 33: petition for exonerations from or limitation of liability; case 21697-L.

1 Nov 33: OPNAV memo on repairing *Chicago* from Capt. Marquart

1 Nov 33: sixth day of inquiry; Navy Board of Inquiry meets in 12th Naval District Headquarters in San Francisco

1 Nov 33: Navy Bureau of C&R describes the repairs needed by USS Chicago in a written memo

2 Nov 33: Commandant, Mare Island, issues revised preliminary report on damage to *Chicago*

2 Nov 33: US Attorney in San Francisco (H. H. McPike) describes litigation to US Attorney General in a letter

3, 4 and 6 Nov 33: US Commissioner takes affidavits of crew members of *Silverpalm*

6 Nov 33: Silver Line, Libellant vs. U.S. government respondent; case 21665-K; "Answer" from respondent (Attorney Esther Phillips)

7 Nov 33: seventh day of official board of inquiry

10 Nov 33: Asst. Solicitor General sends libels from both ships to the Judge Advocate General (JAG) of the Navy; the government's libel "does not plead the fog condition," and *Silverpalm*'s libel stresses crossing courses.

13 Nov 33: eighth day of Navy inquiry

13 Nov 33: Navy JAG notifies the Chief of Naval Operations (CNO) that the US Attorney needs information from the Navy Department

14 Nov 33: ninth day of inquiry

15 Nov 33: BuC&R tells CNO that his office (OPNAV) may have *Chicago*'s maneuvering data

18 Nov 33: tenth day of inquiry

23 Nov 33: Case no. 21666-S, Amended Libel in Rem filed by US Attorney.

23 Nov 33: valuation certificate for *Silverpalm*

29 Nov 33: CNO tells JAG formally about the cross libel filing in the District Court in California

30 Nov 33: attorneys for both sides in case 21666-S stipulate that *Silverpalm* may be released from custody with a bond of $352,000.

5 Dec 33: The head of the board of inquiry sends its records to Commander, Cruisers, U.S. Fleet

16 Dec 33: In case 21666-S, Silver Line, Ltd., wants the district court to "decree a restitution" of ownership of the ship *Silverpalm*.

16 Dec 33: *Silverpalm* (in case no. 21666-S) may be released until any judgment is made against the ship in a district court trial. This "Release Bond" is signed by T. A. Ensor and the Indemnity Insurance Company of North America.

16 Dec 33: B. T. Cox is deposed in San Francisco, saying he "was and is the master" of *Silverpalm*.

16 Dec 33: "Stipulation & Order for Consolidation" of cases 21665-K and 21666-S.

16 Dec 33: Attorney Lillick (*Silverpalm*) files "Petition for Exoneration from or Limitation of Liability" This is case no. 21697-L.

16 Dec 33: restraining order on *Silverpalm*

16 Dec 33: citation against *Silverpalm* signed by U.S. Marshall

18 Dec 33: Commander, Cruisers says he will take no further action regarding the collision

18 Dec 33: motion to set cause for trial

21 Dec 33: Asst. Solicitor General asks for maneuvering data from the Navy JAG

29 Dec 33: letter to the Attorney General about witnesses at the trial, scheduled for 13 March 34

1934

8 Jan 34: US Attorney asks the Commanding Officer at Mare Island to build a model of USS *Chicago* for use in March 1934 trial

9 Jan 34: US Attorney tells Attorney General that the *Silverpalm*'s diesel engines are important and how they worked may decide the case in the March trial in Federal District Court

10 Jan 34: letter from Asst. Secretary of the Navy to Attorney General

11 Jan 34: Navy JAG tells the Navy's Bureau of Navigation (BuNav) to assign a Navy captain to help the US Attorneys prepare for the trial

12 Jan 34: Bureau of Engineering letter to Navy JAG regarding diesel engine experts on Pacific Coast

12 Jan 34: 12th Naval District tells Navy Secretary that Mare Island can build model of *Chicago*

15 Jan 34: C-in-C, US Fleet approves proceedings of the official Navy board of inquiry

20 Jan 34: multiple claims filed by the US government on behalf of injured & relatives of the dead

24 Jan 34: answers to petition for exoneration & limitation filed by British firms

25 Jan 34: Silver Line's response to the Amended Libel in Rem filed by the US government, plus a cross-libel.

25 Jan 34: response of US government to the 24 January petition for exoneration.

25 Jan 34: Moniton, telling claimants when to present their claims to the commissioner

30 Jan 34: Silver Line, Ltd, begins objecting to the claims

5 Feb 34: all evidence in case no. 21666-L is considered by the court to be in evidence in case no. 21697-L. This means evidence in the libel case can be introduced (indeed—has been introduced) in the damages case. Libelants' claims are referred to Commissioner Williams.

8 Feb 34: Asst. Attorney General informs Secretary of the Navy of libel suit by *Silverpalm* owners

14 Feb 34: note to US Secretary of State from British ambassador on suits against a British firm in a US court

14 Feb 34: US Attorney in San Francisco tells Attorney General in Washington, DC, that *Silverpalm*'s attorneys offer to settle on the basis of "mutual fault"

15 Feb 34: Bureau of Engineering sends information on *Silverpalm*'s diesel engines to Navy JAG

17 Feb 34: Asst. Attorney General asks the Secretary of the Navy if he wants litigation or negotiation

21 Feb 34: Asst. Attorney General tells the Navy JAG to produce records for the trial in March

26 Feb 34: The Navy JAG tells the CNO that the liability of the *Silverpalm* "appears to be clear"

26 Feb 34: "Order Confirming Commissioner's Report on Claims"

28 Feb 34: The Navy Board of Inspection and Survey tells the CNO that USS *Chicago* will not be available for tests before the 13 March trial. The ship won't be repaired until 31 March.

1 March 34: letter on why USS *Louisville* is a substitute for *Chicago* in tests of the ship's steering and stopping

6 March 34: Reassignment of cases numbered 21665-K, 21666-K, 21697-K, and 21713-K to District Court Judge Louderback.

6 Mar 34: District Court Judge Louderback accepts damage claim cases (RG-276, folder 8152)

6 March (maybe): The four cases listed above (21665, 21666, 21697, and 21713) "came on regularly for trial, having been heretofore consolidated for the purpose of trial." *Apostles on Appeal*, Vol. 1, p. 49.

6 Mar 34: letter from acting Navy Secretary Henry Roosevelt to AG Cummings

6-7 Mar 34: Telegrams between Washington (Justice Dept.) and San Francisco regarding the preparation of evidence for trial, especially evidence from trials with USS *Louisville*, sister ship of USS *Chicago*.

23 March 34: US attorneys introduced in evidence a number of depositions and then rested the government's case. Silver Line's attorneys responded the same day.

27 March 34: The district court hearing resumes.

30 March 34: District Court Louderback ordered that the libel case be continued to 20 April 1934 "for argument."

31 Mar 34: The US Attorney in San Francisco informs the Attorney General that "The taking of evidence in the navigational issues presented in the case of the United States v. The *Silverpalm*, and the cross-libel of the Silver Line closed yesterday afternoon" after 13 days of taking evidence.

23 April 34: Oral argument before District Court Judge Louderback.

26 April 34: C-in-C US Fleet informs Captain Kays of USS *Chicago* that the court of inquiry has been approved by the Secretary of the Navy and that the C-in-C "considers that no blame whatever is attached to any officer attached to the *Chicago* at the time of the collision."

28 April 34: Silver Line Ltd had served the United States with a memorandum. This is the day the government responds. It's signed by attorneys McPike, McWilliams, and Phillips. It's filed on 2 May 34.

8 May 34: Both sides file their final briefs with Judge Louderback.

May 34: Findings of Fact and Conclusions of Law regarding cases 21666-L and 21665-L proposed by Silver Line, Ltd.

19 June 34: District Court (Judge Louderback) issues "order for decree in favor of libelant and cross-respondent." Attorney Ira Lillick submits petition for a rehearing on behalf of the Silver Line.

21 June 34: Lillick gives Louderback (District Court) a "Memorandum of Authorities" saying that the record in the case "definitely discloses errors and faults on the part of" *Chicago*.

22 June 34: Commandant of the 12th Naval District compliments the US Attorney and his staff, especially Attorney Esther Phillips, who prepared the case for trial.

27 June 34: "Findings of Fact" and Conclusions of Law issued by District Judge H. Louderback .

6-9 July 34: depositions from Silver Line about exoneration from and limitation of liability

12 July 34: district court enters interlocutory decree

12 July 34: District Court Judge Louderback denies *Silverpalm*'s petition for a rehearing.

14 July 34: *Silverpalm* appeals the 12 July decree

25 July 34: appeal from District Court's interlocutory decree

10 Aug 34: assignments of error for 21666-L filed by appellants

24 Aug 34: The Department of Justice sends copies of "findings of facts and conclusions of law" filed by the district court to the Bureau of C&R, the CNO, and the Bureau of Navigation.

3 Oct 34: hearing on damages begins

8 Oct 34: hearing on Lt. Chappelle, who was killed; his wife testifies

7 Nov 34: testimony from Navy ordnance expert in libel case of US v. *Silverpalm*.

7 Nov 34: Testimony on the career of Lt. Macfarlane.

7 Nov 34: Testimony on the career of Marine 1st Lt. F. Chappelle, also killed in the collision.

23 Nov 34: Memorandum of evidence regarding the gunnery department of USS *Chicago*

27 Dec 34: US Attorney in San Francisco asks the Navy Department for information about the injured Joseph Oehlers.

1935

2 Jan 35: letter from Chief, Bureau of Supplies and Accounts, to BuC&R, stating value of USS *Chicago* and its equipment on 30 September 1933

2 Jan 35: letter from the Bureau of Medicine and Surgery (BuMed) stating the value of medical equipment & supplies on USS *Chicago*

8 Jan 35: BuNav tells the JAG that the injured Joseph Oehlers can stay on the active list of Navy personnel

12 Jan 35: three bureaus' memo to JAG on value of *Chicago* on date of collision

9 Feb 35: order of severance

28 Dec 35: Louderback's finding of facts & conclusions of law

30 Dec 35: Judge Louderback finds that the Silver Line, owners of *Silverpalm*, can't limit its liability in the damages part of the libel case. The district court issues an order denying Silver Line's petition for exoneration from or limitation of liability.

1936

7 Jan 36: district court's interlocutory decree denying exoneration & limitation of damages

8 Jan 36: Judge Louderback says parties must go to the Commissioner to settle amounts for damages This is his interlocutory decree.

10 Jan 36: Asst. Attorney General Morris compliments Attorney Esther Phillips of San Francisco's US Attorney's office on her handling of "the entire case from its inception." She attained "unusual results."

22 Jan 36: notice of appeal by Silver Line, Ltd, to the 8 Jan 26 decree by the District Court.

22 Jan 36: assignments of error submitted by attorneys for Silver Line.

22 Jan 36: deadline for filing appeal extended to 20 March 36

11 May 36: *Apostles on Appeal* published in 3 volumes

16 Sept 36: brief for Appellant on damages case

14 Oct 36: brief for Appellees on damages case

28 Oct 36: Appellant's Reply Brief

1937

29 Jan 37: "Report of US Commissioner [Williams] on Damages"

27 Feb 37: Memorandum of Authorities in Support of Exceptions to Report of US Commissioner on Damages—submitted by Attorney Lillick on behalf of Silver Line, Ltd.

9 Mar 37: "Notice of Entry of Final Decree"

28 Oct 37: US Court of Appeals for the 9th Circuit (94 F. 2d 776) "slip opinion." Silver Line wanted to be free of liability or have its liability limited and so appealed the decision of district court Judge Louderback. The Court of Appeals ruled that the "District Court properly denied the petition for limitation."

28 Oct 37: US Court of Appeals for the 9th Circuit also ruled (in case No. 8146) that the USS *Chicago* was "equally at fault." See 94 F.2d 754 (1937). The circuit court judges argued that the USS *Chicago* was commanded in a spirit that violated the international nautical rules of the road.

29 Oct 37: Both the Silver Line and the US government asked the 9th Circuit Court to reconsider its decision. Both requests were rejected.

9 Nov 37: In a letter, the Asst. Attorney General explained what had taken place to the Navy JAG.

13 Nov 37: The Navy JAG asked the Commandant of the 12th Naval District to comment on the Circuit Court's decision. The JAG found the 9th Circuit's decision "astounding."

22 Nov 37: Esther Phillips of the US Attorney's office wrote to CDR Thomas Gatch of the Navy's JAG office, saying that "I am glad to hear that the Navy Department will leave no stone unturned to get the [9th's Circuit] decision withdrawn or overturned."

23 Nov 37: Phillips rejects Gatch's critique of the 9th Circuit's decision and proposes her own.

24 Nov 37: CDR Gatch, the Asst. Navy JAG, responds to Phillips's letter of 22 Nov, arguing that there was a "very serious conflict between the Second Circuit and the Ninth Circuit which brings the matter clearly within Supreme Court Rule 35(5) (b) …"

24 Nov 37: Phillips writes a personal, hand-written letter to CDR Gatch, discussing ways to gain a writ of certiorari from the Supreme Court. She goes so far as to ask, "Hasn't the Secretary [of the Navy] some old friends in the Senate, who will not fancy the idea of the American navy being held up to scorn as liars and fabricators?" She goes so far as to say, "*please* think of what Congress can do."

26 Nov 37: Phillips writes a formal letter to Gatch, saying "I have sent four copies of the Petition for Rehearing to the Judge Advocate General under separate cover. Four copies have also been sent to the Attorney General. The Petition for Rehearing was served and filed today." She ends by saying that "the most desirable course would be that suggested to you in my letter written Wednesday afternoon by hand."

26 Nov 37: Appellee's Petition for Rehearing on case 21666-L submitted by US Attorneys Phillips and Hennessy (Hennessy having replaced McPike).

8 Dec 37: The Attorney General writes to the Secretary of the Navy and says that "this Department will spare no effort in the endeavor to obtain a reversal of the judgment rendered by the Circuit Court of Appeals for the Ninth Circuit…"

9 Dec 37: In a letter to the Navy JAG, the Commandant of the 12th Naval District pours scorn on the 9th Circuit's decision and on Judge Denman, who wrote it. The Commandant hopes that the Supreme Court will overrule the 9th Circuit's decision, but he also says "whether or not this case would warrant further proceedings can best be determined by the Department." The Navy Department, acting on the JAG's recommendation? Or the Department of Justice?

18 Dec 37: Stipulation regarding the payment of awards. This is a "Final Decree."

31 Dec 37: The 9th Circuit Court of Appeals denies the government's Petition for Rehearing.

1938

12 Jan 38: Frank Hennessy, the US Attorney (in San Francisco) informs the Attorney General in Washington that his staff lawyers believe that "the United States should petition the Supreme Court for a writ of Certiorari in this case," and he summarizes the reasons.

14 Jan 38: In a letter to the Navy JAG, the Commandant of the 12 Naval District, RADM C. S. Kempff, tells him that "certain information has been obtained which the Commandant considers would be impractical for him to voice in a legal manner as to the background and activities of a federal or other judge." But then the Commandant goes on to say that the information in the letter is for the Navy Department to use as the Secretary sees fit.

31 Jan 38: The formal explanation by the Circuit Court of its decision to deny a rehearing.

2 Feb 38: US Attorney Hennessy sends the 9th Circuit's "Memorandum Opinion" to the Navy JAG.

2 Feb 38: Hennessy tells the Attorney General in a letter that "We have already given our recommendation that an effort should be made to have this case reviewed by the Supreme Court." Hennessy also tells the Attorney General that the Clerk of the 9th Circuit Court deliberately called the US Attorney and warned him that the time open to make an appeal to the Supreme Court from the 9th Circuit was shrinking. The "start" date for asking for a writ of certiorari was 31 Dec 37.

1 Mar 38: The Secretary of the Navy sends a 55 page letter to the Attorney General criticizing in detail the opinion of the 9th Circuit of Appeals. The Secretary also strongly urges the Attorney General to apply to the Supreme Court for a writ of certiorari.

23 March 38: CDR Gatch informs Attorney Phillips by letter that he had a radiogram from the Attorney General's office that the "mandate" in the *Chicago* v. *Silverpalm* case had been stayed until 24 March. According to the Attorney General, "Question of certiorari application not yet definitely settled." Gatch tells Phillips that "I am somewhat disturbed to think that it is unsettled at all." He presses for certiorari.

29 Mar 38: The acting attorney general tells the Secretary of the Navy in a letter that "this Department has determined to apply for certiorari, and a petition therefor is now in… preparation."

23 May 38: In a letter, the Asst. Attorney General informs the Navy JAG that on 23 May the Supreme Court denied the government's "application for certiorari," and he adds that "We assume that in due course the damages of both parties will be assessed and a final decree entered."

29 June 38: Logan Cresap, a New York lawyer and a retired Navy commander and friend of RADM H. F. Leary, sent Leary a letter in which he noted that "I have… participated in a number of Admiralty suits as an expert witness, and I have a very healthy regard for the skill and acumen of our Admiralty Bar and our Federal judges handling such cases." He said that every Navy officer should become familiar with the *Silverpalm* v. *Chicago* libel case and the arguments about damages.

15 July 38: Cresap writes again to Leary, saying, "If you have not read the decision of the Circuit Court of Appeals in the *Chicago-Silverpalm* case, I strongly urge you to do so." Cresap argues that the opinion of the 9th Circuit made allegations against the Navy that, if widely publicized and accepted as true, will hurt the Navy's national and international reputation. Cresap also sends copies of his two letters to the Navy JAG.

1943

17 & 23 March 43: final decree for cases 21665-K, 21666-L, and 21697-L

28 Mar 43: formal document submitted to the federal attorney of the Northern District of California

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Endnotes

[1] Ci*vil and Merchant Vessel Encounters with United States Navy Ships, 1800-2000,* by Greg H. Williams (Jefferson, NC: McFarland & Co., 2002).

[2] Knight's *Modern Seamanship*, 7th ed., by RADM Austin M. Knight, USN (New York, NY: D. Van Nostrand, 1918), p. 406.

[3] *Apostles on Appeal,* Vol. III, Case No. 8146, Silver Line, Ltd. vs. United States of America, U.S. Circuit Court of Appeals for the Ninth Circuit, June 15, 1936, p. 1465. Hereafter *Apostles on Appeal,* Vol. III.

[4] *Apostles on Appeal,* Vol. III, pp. 1367-1368.

[5] *Apostles on Appeal,* Vol. III, p. 1404.

[6] Kays testimony to the Navy board of inquiry, p. 133. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319, National Archives and Records Administration (hereafter NARA).

[7] Laning's testimony to the Navy board of inquiry, p. 72. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[8] Laning's testimony to the Navy board of inquiry, p. 72. Records of the Office of the JAG (Navy), RG-125. Box 635, Entry 30, Folder 18319.

[9] Kays testimony to the Navy board of inquiry, p. 133. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[10] Kays testimony to the Navy board of inquiry, p. 133. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[11] Kays testimony to the Navy board of inquiry, p. 133. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[12] Deposition of Donovan Malcolm Pitt of Silverpalm, given under oath before Ernest E. Williams, United States Commissioner for the Northern District of California, 3 Nov. 1933, at the offices of the firm of Lillick, Olson and Graham, San Francisco. See "Silver Line, Ltd., Libelant, vs. United States of America, Respondent, No. 21, 665-K, Exhibit 11, pp. 26-30, 40-41.

[13] Pitt testimony to Navy board of inquiry, p. 50. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[14] Gray's testimony to the Navy board of inquiry, p. 88. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[15] Laning's testimony to the Navy board of inquiry, p. 72. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[16] *Apostles on Appeal,* Vol. I, p. 311.

[17] *Civil and Merchant Vessel Encounters with United States Navy Ships, 1800-2000,* by Greg H. Williams (Jefferson, NC: McFarland & Co., 2002), p. 241.

[18] Leeds testimony to the Navy board of inquiry, p. 113. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[19] "Depositions of Joseph A. Oehlers and W. T. Lineberry Taken Before U.S. Commissioner William S. Wacker, Post Office Building, Philadelphia, Pennsylvania, Nov. 1, 1934," RG 118, Container 1, Folder 1, NARA, San Francisco, CA. The mess attendants who assisted Oehlers were Quirino Calpo (second class) and Justino Pletado (third class).

[20] *Apostles on Appeal,* pp. 484-489.

[21] Stanley testimony to Navy board of inquiry, p. 21 and p. 32. Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319.

[22] *Apostles on Appeal,* Vol. III, p. 1437.

[23] *Apostles on Appeal,* Vol. I, p. 109 and p. 118.

[24] *Apostles on Appeal,* Vol. I, p. 323. As Simons testified, "I found out in the inquiry afterward that the flame was caused by fused paint from both ships, which had been heated beyond the flash point."

[25] *Apostles on Appeal,* Vol. III, p. 1381 and p. 1402.

[26] *Apostles on Appeal,* Vol. III, p. 1381 and p. 1373.

[27] *Apostles on Appeal,* Vol. I, Kays court testimony, p. 160. *Apostles on Appeal,* Vol. III, Cox court testimony, p. 1633.

[28] *Apostles on Appeal,* Vol. I, p. 160.

[29] *Apostles on Appeal,* Vol. III, p. 1634.

[30] "Finding of Facts" attached to the record of the Navy Board of Inquiry, National Archives. See also "Depositions of Joseph A. Oehlers and W. T. Lineberry Taken Before U.S. Commissioner William S. Wacker, Philadelphia, Pennsylvania, Nov. 1, 1934," RG 118, Container 1, Folder 1, NARA, San Francisco. The three members of Chicago's crew who were killed were crushed in the wreckage. They were Lt.(jg) Harold A. Macfarlane, USN; Chief Pay Clerk John W. Troy, USN; and First Lt. Frederick S. Chappelle, USMC.

[31] *Apostles on Appeal,* Vol. III, pp. 1690-1691.

[32] On 28 October, RADM Yancey S. Williams, commandant of the Mare Island Navy Yard, informed RADM Emory S. Land, Chief of the Bureau of Construction and Repair, that Silverpalm had struck Chicago's portside at an angle of about 30 degrees. What had prevented Silverpalm's bow from breaking

off the forepart of Chicago altogether was the armored barbette on which the cruiser's turret rotated. "U.S.S. Chicago (CL29)—Preliminary report on damages resulting from the collision," 28 Oct 1933 (Folder CA29/L11-1 [22-235912], Box 1053, RG19, NARA), para.2.

[33] *Apostles on Appeal,* Vol. III, p. 1356.

[34] *Apostles on Appeal,* Vol. III, p. 1357.

[35] *Apostles on Appeal,* Vol. III, p. 1357.

[36] Records of the Office of the JAG (Navy), RG-125, Box 635, Entry 30, Folder 18319, NARA, p. 143.

[37] *Apostles on Appeal,* Vol. III, p. 1693.

[38] "Statement of Material Losses of the Ordnance Department of the USS Chicago Resulting from Bring Rammed by the M.S. Silver Plam [sic]," no date, RG-125, Box 635, Entry 30, Folder 18319, NARA. The number of sailors needed in the engine room was given by Lieutenant Commander Colton in Vol. III of *Apostles on Appeal,* p. 1320.

[39] *Apostles on Appeal,* Vol. III, p. 1695 and p. 1697.

[40] *Apostles on Appeal,* Vol. III, p. 1702.

[41] *Apostles on Appeal,* Vol. III, p. 1704.

[42] *Oakland Tribune,* Oct. 25, 1933. Lieutenant Martin is something of a mystery. I could not find him listed in Navy Directories, and none of the other papers cited his interview with the *Oakland Tribune.*

[43] *Santa Cruz Sentinel,* Oct. 26, 1933. The Sentinel mistakenly identified Captain Cox of *Silverpalm* as "T. B. Cox" instead of "B. T. Cox," which was his real name.

[44] *San Francisco Examiner,* Oct. 26, 1933.

[45] *Los Angeles Times,* Oct. 26, 1933.

[46] Article III, Section 2 of the U.S. Constitution extended the judicial authority of the United States to all cases of admiralty and maritime jurisdiction.

[47] "Navy Admiralty Law Practice," NAVEDTRA 14350, p. 12. This document was based on *Admiralty and Maritime Law,* 3rd. ed., by Thomas J. Schoenbaum (2001).

[48] "Navy Admiralty Law Practice, NAVEDTRA 14350, p. 4.

[49] "Navy Admiralty Law Practice," NAVEDTRA 14350, p. 4.

[50] Ltr, from: H.H. McPike; to: Attorney Gen. Homer S. Cummings, Dept. of Justice (Attention: Admiralty Division); subject: Collision USS "CHICAGO"—Motorship "SILVERPALM"—Oct. 24, 1933, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), pp. 1-2, NARA.

[51] RG 118, Container 1, "U.S. Attorneys," Folder "USS Chicago and Silverpalm Case Files, 1933-1934," NARA San Francisco.

[52] The *Los Angeles Times* story of Oct. 26, 1933, had noted that, "Purely as a matter of routine, U.S. Atty. McPike, acting for the government, filed a libel action against the freighter." That claim appears to have been at odds with McPike's own account of his actions.

[53] No. 21666-S, "In the Southern Division of the United States District Court for the Northern District of California, United States of America, Libelant, vs. Motor Boat 'Silverpalm', her engines, tackle, apparel, and furniture, Respondents," pp. 8-9.

[54] Ltr, from: H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 2, NARA.

[55] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 2, NARA.

[56] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 2, NARA.

[57] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 3, NARA.

[58] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 3, NARA.

[59] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 3, NARA.

[60] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 3, NARA.

[61] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 3, NARA.

[62] Ltr, from H.H. McPike; to: Attorney Gen. Homer S. Cummings, 2 Nov. 1933, RG-125, Box 635, Folder 18319, Records of the Office of the JAG (Navy), p. 4, NARA.

[63] Ltr, from Angus D. MacLean; to: ADM O. G. Murfin, 10 Nov. 1933, Folder CA29/L11-1, Box 1053, RG-19, NARA. NARA.

[64] Ltr, from Angus D. MacLean; to: ADM O. G. Murfin, 10 Nov. 1933, Folder CA29/L11-1, Box 1053, RG-19 NARA.

[65] Ltr, from ADM O. G. Murfin; to: The Chief of Naval Operations; subject: The collision between the U.S.S. CHICAGO and the M/S SILVERPALM, 13 Nov. 1933, 1st indorsement, L11-15/QM (331110), RG-125, Box 635, Folder 18319, NARA.

[66] "Testimony taken before William J. Graham," Nov. 7, 1934, p. 4, RG-125, Box 635, Entry 30, Folder 18319, Records of the Office of the JAG (Navy), NARA.

[67] "Testimony taken before William J. Graham, Nov. 7, 1934, p. 18, RG-125, Box 635, Entry 30, Folder 18319, NARA.

[68] Memo, "Damage to U.S.S. CHICAGO," 1 November 1933, written by then-Capt. Edward J. Marquart, Op-23-LGS, Folder CA29/L11-1, Box 1053, RG-19, NARA. Capt. Marquart had commanded USS *Louisville* (CA-28), one of *Chicago's* sisters, in 1931-32.

[69] Ltr., from Commander Cruisers, Scouting Force, to: Captain Victor A. Kimberly, U.S. Navy. Subject: "Court of Inquiry to inquire into collision at sea between the U.S.S. CHICAGO and the ship SILVERPALM of the British Kerr line, London," para. 1, 25 October 1933 (A17-24 [4662-05]), National Archives and Records Administration (hereafter NARA).

[70] Ibid., para. 2.

[71] Ibid., para. 4.

[72] JAG Instruction 5830.1A, 31 Oct. 2005, Navy Department.

[73] In 1933, there was no requirement that the Judge Advocate General be a lawyer.

[74] That is true today as well. See JAG Instruction 5830.1A, page 4(a) of Enclosure (1).

[75] JAG Instruction 5830.1A, article 8, page 9 of Enclosure (1).

[76] "Record of Proceedings of a Court of Inquiry Convened on Board the U.S.S. Chicago by Order of the Commander Cruisers, Scouting Force, United States Fleet to inquire into a Collision at Sea Between the U.S.S. Chicago and the British Motor Ship "Silverpalm," (hereafter "Navy Board of Inquiry"), 26 Oct. 1933, p. 2, RG-125, Records of the Office of the Judge Advocate General (Navy), hereafter "RG-125," Box 635, Entry 30, Folder 18319, NARA.

[77] Navy Board of Inquiry, p. 1.

[78] CDR Harold V. McKittrick had served as the commander of rotating reserve Destroyer Squadron 20, and before that he had been in charge of the naval ammunition depot at St. Juliens Creek, Virginia. LCDR William C. Vose had also been assigned to rotating reserve Destroyer Squadron 20, and before that he had been stationed at the torpedo station in Keyport, Washington. LCDR Randal E. Dees had studied at Harvard as an officer and also been a member of the staff of the Naval Governor of Guam.

[79] Navy Board of Inquiry, p. 3.

[80] Navy Board of Inquiry, pp. 3-4.

[81] Navy Board of Inquiry, p. 4.

[82] Navy Board of Inquiry, p. 4.

[83] Navy Board of Inquiry, p. 5.

[84] Navy Board of Inquiry, p. 6.

[85] Navy Board of Inquiry, p. 7.

[86] See Chapter 2 and the references to Capt. Cox's statements to the *Santa Cruz Sentinel,* the *San Francisco Examiner,* and the *Los Angeles Times.*

[87] In the *Los Angeles Times* article of Oct. 26, Capt. Cox was said to have made a formal statement to the British consul, and the consul was supposed to have forwarded it to the Board of Trade in London. However, that statement was not given to the Navy Board of Inquiry.

[88] Navy Board of Inquiry, p. 7.

[89] Navy Board of Inquiry, p. 14.

[90] Navy Board of Inquiry, p. 17.

[91] Navy Board of Inquiry, p. 18.

[92] Navy Board of Inquiry, p. 18.

[93] Navy Board of Inquiry, p. 21.

[94] Navy Board of Inquiry, p. 23.

[95] Navy Board of Inquiry, p. 28.

[96] Navy Board of Inquiry, p. 34.

[97] Navy Board of Inquiry, pp. 41-42.

[98] Navy Board of Inquiry, p. 42.

[99] Draft ltr, in pencil, to a Mrs. Falding or Galding, Sunday, Oct. 29 [1933], from: Esther Phillips, RG-118, "USS Chicago and Silverpalm Case Files, 1933-1934," Container 1, NARA at San Francisco.

[100] Navy Board of Inquiry, pp. 50-51 and p. 56.

[101] Navy Board of Inquiry, p. 63.

[102] Navy Board of Inquiry, p. 64.

[103] Navy Board of Inquiry, p. 68.

[104] Navy Board of Inquiry, p. 73.

[105] Navy Board of Inquiry, p. 74.

[106] Navy Board of Inquiry, p. 75.

[107] Navy Board of Inquiry, p. 77.

[108] Navy Board of Inquiry, p. 79.

[109] Navy Board of Inquiry, p. 78.

[110] Navy Board of Inquiry, p. 80.

[111] Navy Board of Inquiry, p. 82.

[112] Herman Wouk, *The Caine Mutiny* (Boston,MA: Little, Brown and Co., 2003), p. 430.

[113] *The Caine Mutiny,* p. 436.

[114] *The Caine Mutiny,* p. 414.

[115] Rear Admiral Fechteler was brought to the United States by his immigrant parents from Germany when he was eight. He won an appointment to the Naval Academy in 1873, and, after being commissioned, served in a series of training ships and the monitor *Monterey* (BM-6). He served in gunboat *Concord* (PG-3) beginning in December 1898 (after the Battle of Manila Bay in May of that year). Later, he commanded gunboat *Dubuque* (PG-17) and battleship *South Carolina* (BB-26). From June 1916 until February 1918, he commanded the Sixth Battleship Division of the Atlantic Fleet.

[116] Navy Board of Inquiry, pp. 82-83.

[117] Navy Board of Inquiry, p. 83.

[118] Navy Board of Inquiry, pp. 95-96.

[119] Navy Board of Inquiry, p. 98.

[120] Navy Board of Inquiry, p. 98.

[121] Navy Board of Inquiry, p. 99. On page 102 of the transcript of the Navy Board of Inquiry Chief Machinist Kershaw told the Board that "It would take twenty seconds to close the ahead throttle and open the astern throttle, and the engines to start turning over astern."

[122] Navy Board of Inquiry, p. 102.

[123] Navy Board of Inquiry, p. 106.

[124] Navy Board of Inquiry, p. 106.

[125] Navy Board of Inquiry, p. 108.

[126] Navy Board of Inquiry, p. 108.

[127] Navy Board of Inquiry, p. 109.

[128] *Modern Seamanship,* 7th ed., by Rear Adm. Austin M. Knight (New York: D. Van Nostrand Co., 1918), p. 350. See also the 10th ed. (1941), p. 443.

[129] *Modern Seamanship,* 7th ed., p. 350.

[130] *Modern Seamanship,* 7th ed., p. 350.

[131] Navy Board of Inquiry, p. 111. The signal for "stopping" was three blasts of the ship's whistle. The collision signal was sounded by a siren.

[132] Navy Board of Inquiry, p. 112.

[133] *Modern Seamanship,* p. 350.

[134] Navy Board of Inquiry, p. 116.

[135] Navy Board of Inquiry, p. 123.

[136] Navy Board of Inquiry, p. 127.

[137] Navy Board of Inquiry, p. 133.

[138] Navy Board of Inquiry, p. 134.

[139] Navy Board of Inquiry, p. 135.

[140] "Silver Line, Ltd., Libelant, vs. United States of America, Respondent, Case No. 21665-K, Exhibit 11, p. 1, Navy Board of Inquiry.

[141] Navy Board of Inquiry, pp. 137-138.

[142] Navy Board of Inquiry, p. 138.

[143] Navy Board of Inquiry, p. 143.

[144] Navy Board of Inquiry, p. 149.

[145] Navy Board of Inquiry, p. 151.

[146] Navy Board of Inquiry, p. 151.

[147] Navy Board of Inquiry, appendix, pp. 18-20.

[148] Navy Board of Inquiry, appendix, pp. 20-21.

[149] Navy Board of Inquiry, appendix, pp. 21-22.

[150] The proceedings, findings, and recommendations of the Navy Board of Inquiry were formally sent to VADM Laning on 5 December 1933.

[151] "Findings of Fact, Opinion, and Recommendation," Record of Proceedings of a Court of Inquiry Convened on Board the U.S.S. Chicago by Order of the Commander Cruisers, Scouting Force, United States Fleet, To inquire into a Collision at Sea Between the U.S.S. CHICAGO and the British Motor Ship "Silverpalm," 26 October 1933, Appendix, p. 22, in RG-125, Records of the Office of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[152] Ltr., from: VADM Harris Laning, Commander Cruisers, Scouting Force, United States Fleet, 18 December 1933, folder "USS Chicago—SS Silverpalm Collision Case," Entry UD4, RG-125, Records of the Office of the JAG (Navy), NARA.

[153] Ltr., from: ADM D. F. Sellers, Commander-in-Chief, United States Fleet, 15 January 1934, folder "USS Chicago—SS Silverpalm Collision Case," file CA29/A17-24 (340115), RG-125, NARA.

[154] Ltr., from; ADM D.F. Sellers, Commander-in-Chief, United States Fleet, 26 April 1934, folder "USS Chicago—SS Silverpalm Collision Case," file CA29/A17-24/1678, RG-125, NARA. This letter was sent "Via Commander Scouting Force and Commander Cruisers, Scouting Force."

[155] Ltr., from: H.H. McPike, to: Attorney General H. S. Cummings, subj: "(Attention: Admiralty Division), Collision USS 'CHICAGO' - Motorship 'SILVERPALM' - October 24, 1933," Nov. 2, 1933, Box 635, RG-125, Records of the Office of the JAG (Navy), NARA.

[156] Memorandum, from Lt. J. M. Kiernan, Construction Corps, USN; to: Navy Board of Inquiry; subj: "Testimony" regarding repairs to USS *Chicago*, 1 Nov. 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[157] Memorandum, from: Capt. Hollis M. Cooley, USN; to: Capt. Edward J. Marquart (OP-23A); subj: "U.S.S. CHICAGO—Work in connection with damage sustained in collision," 7 Nov. 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA. Capt. Marquart was a former captain of USS *Louisville* (CA-28), a sister ship of *Chicago*.

[158] Ltr., from: The Judge Advocate General; to, The Chief of Naval Operations; via: The Chief of the Bureau of Construction and Repair and the Chief of the Bureau of Engineering; subj: "Department of Justice forwards copy of letter from United States Attorney at San Francisco relative to the collision between the U.S.S. Chicago and the M/S SILVERPALM, …," November 13, 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[159] *Apostles on Appeal,* Vol. I, pp. 9-10. The pages of the Forgotten Books reprint faithfully reproduce the pages of the actual *Apostles on Appeal,* Vol. I, pp. 1-648, and Vol. II, pp. 649-1307. Those originals are in Box 2888, RG-276, "Appeal Case Files, 1891-1994," NARA San Francisco. However, I am using the page numbers in the Forgotten Books reprint edition.

[160] *Apostles on Appeal,* Vol. I, p. 24. On 9 November 1933, the Board of Marine Underwriters of San Francisco reported to Attorney Phillips and Attorneys Lillick, Olson and Graham that the value of *Silverpalm* in "damaged condition" was $275,000. The value of her cargo was set at just over $61,000, and the value of her "consumable stores" at almost $15,000, bringing the total value of the ship and what she contained to approximately $352,000. RG 118, Container 1, Folder 2, NARA San Francisco.

[161] *Apostles on Appeal,* Vol. 1, p. 25.

[162] Ltr., from: Bureau of Construction and Repair; to, Chief of Naval Operations and Bureau of Engineering; subj: "Dept. of Justice let. 61-4268 of 10 Nov. 1933 to J.A.G.", Nov. 15, 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[163] Memorandum, from: George C. Day, head of the Board of Inspection and Survey; to: Chief of Naval Operations; subj: U.S.S. CHICAGO—Tactical Data, 27 November 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[164] *Apostles on Appeal,* Vol. I, p. 11.

[165] *Apostles on Appeal,* Vol. I, p. 14.

[166] *Apostles on Appeal,* Vol. I, pp 16-17.

[167] *Apostles on Appeal,* Vol. I, pp. 18-19.

[168] *Apostles on Appeal,* Vol. I, pp. 19-21. On 16 December 1933, the federal district court judge agreed to consolidate the libels filed by the United States, by the injured sailors, by the survivors of those killed, and by the officers and crew of *Chicago*.

[169] Cross libels were allowed under the provisions of the Public Vessels Act of 3 March 1925. Prior to the Act's passage, Congress dealt with major collisions between commercial and Navy ships by passing special legislation that permitted an individual who was injured by a U.S. ship to sue in federal court. It was a case-by-case system and dealt only with merchant ships operated by the government. The 1925 law allowed private vessels to sue public vessels without having to petition Congress. However, a foreign national could not sue unless his government permitted American citizens to do the same in his courts. See *The Law of Maritime Collision,* by Nicholas J. Healy and Joseph C. Sweeney (Centreville, MD: Cornell Maritime Press, 1998), pp. 453-455.

[170] *Apostles on Appeal,* Vol. I, pp. 31-34.

[171] Ltr., from Asst. Solicitor General Angus D. MacLean; to: Admiral O. G. Murfin, JAG; subj: "USS CHICAGO—SS SILVERPALM collision," 21 December 1933, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[172] Ltr., from: U.S. Attorney H.H. McPike, to: Commanding Officer, U.S. Navy Yard, Mare Island; subj: "USS CHICAGO—SS SILVERPALM—Collision," 8 Jan. 1934, P. 1, RG 125, Entry UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[173] Ltr., from: U.S. Attorney H. H. McPike, to: Commanding Officer, U.S. Navy Yard, Mare Island; subj: "USS CHICAGO—SS SILVERPALM—Collision," 8 Jan. 1934, p. 1, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[174] Telegram, from: H.H. McPike, to: Attorney General, 9 Jan. 1934, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[175] Ltr., from: Bureau of Engineering, Rear Adm. S. M. Robinson, Chief to; Judge Advocate General, subj: "U.S. Attorney, San Francisco, request for information on construction of Diesel engines etc. regard S.S. SILVERPALM—U.S.S. CHICAGO collision" 12 January 1934, p. 1, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[176] Ltr., from: Rear Adm. Robinson, to: Judge Advocate General, subj: S.S. Silverpalm—U.S.S. Chicago Collision Case," 12 Jan. 1934, p. 2.

[177] Ltr., from: Adm. D. F. Sellers, COMINCH, to: Judge Advocate General, subj: "Court of Inquiry," 15 Jan. 1934, RG125, Entry UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[178] Ltr., from: Rear Adm. S. M. Robinson, Chief of the Bureau of Engineering, to: The Judge Advocate General, subj: "Department of Justice requests that manufacturer's operating instructions to engineers respecting the operation of the Doxford type of engines be obtained," 15 Feb. 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[179] Ltr., from: Lillick, Olson and Graham, to: United States Attorney, Northern District of California, subj: "SILVERPALM—CHICAGO," 14 Feb. 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[180] Ltr., from: United States Attorney H.H. McPike, to: The Attorney General, subj: U.S.S. "CHICAGO" – M.S. "SILVERPALM," Feb. 14, 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[181] Ltr., from: George A. Sweeney, Asst. Attorney General, to: The Secretary of the Navy, subj: "SS [sic] CHICAGO—SS SILVERPALM Collision," Feb. 17, 1934, p. 1, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[182] Ltr., from: George C. Sweeney, Asst. Attorney General, to: The Secretary of the Navy, subj: "SS [sic] CHICAGO—SS SILVERPALM Collision," Feb. 17, 1934, p. 1, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[183] Ltr., from: George C. Sweeney, Asst. Attorney General, to: Adm. O. G. Murfin, Judge Advocate General of the Navy, subj: "USS CHICAGO—SS SILVERPALM," Feb. 21, 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[184] Ltr., from: O. G. Murfin, Judge Advocate General, to: The Chief of Naval Operations, subj: "Department of Justice forwards letter from United States Attorney at San Francisco relative to collision between the

U.S.S. CHICAGO and the M/S SILVERPALM," Feb. 26, 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[185] Ltr., from Henry L. Roosevelt, Asst. Secretary of the Navy, to: The Attorney General, L11-15/QM (331110), Mar. 6, 1934, Folder 2 ("Exhibit item, Related Backup Material"), Container 1, RG-118, NARA San Francisco.

[186] Ltr., from Rear Adm. George C. Day, to: Chief of Naval Operations; subj: "Department of Justice forwards letter from United States at San Francisco relative to collision between the U.S.S. CHICAGO and the M/S SILVERPALM," 28 Feb. 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA. The letter from CNO Standley to Day, also dated Feb. 28, 1934, is in the same folder.

[187] Telegram, from: McPike, to: Secretary of the Navy, subj: "Chicago Silverpalm Collision," 7 March 1934, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[188] Telegram, from: Secretary of the Navy, to: McPike, subj: "Official and Steering Gear Trials *Louisville*," no date, RG125, UD4, Folder "USS Chicago—SS Silverpalm—Collision Case," NARA.

[189] "Answer to Petition for Exoneration from or Limitation of Liability," 20 Jan. 1934; "Restraining Order and Order for Moniton," 25 Jan. 1934; and "Report of Commissioner on Claims," 25 Jan. 1934. All in Folder 8152, Box 2887, RG-276 ("Records of the U.S. Court of Appeals for the Ninth Circuit, Appeal Case Files, 1891-1994"), NARA San Francisco.

[190] Memorandum, "Chicago-Silverpalm Collision," Question: "If the petition for limitation is denied, and the court proceeds to adjudicate the claim, rendering judgment for damages, may it enter personal judgments against the petitioner even though the aggregate of the claims exceeds the stipulated value of the offending ship?" Answer: "This seems to be the law." No author cited; no date. "Work Papers, Silverpalm vs United States" folder, Container 1, "USS Chicago v Silverpalm Case Files, 1933-34, RG-118, NARA San Francisco.

[191] "STIPULATION AND ORDER FOR CONSOLIDATION," Dec. 16, 1933, in "U.S. District Court, Northern District of California, Admiralty Case Files, 1850-1934," RG-21, Box 1733, NARA San Francisco.

[192] These include the ramming and sinking of destroyer *Woolsey* (DD-77) by the freighter *Steel Inventor* on 27 February 1921, and the ramming and sinking of submarine *O-5* (SS-66) by the steamship *Abangarez* in daylight in Colon Harbor, Panama, on 28 October 1923. See *Civil and Merchant Vessel Encounters with United States Navy Ships, 1800-2000,* by Greg H. Williams (Jefferson, NC: McFarland & Co., 2002).

[193] An accurate and brief explanation of what happened is in *Civil and Merchant Vessel Encounters with United States Navy Ships,* by Greg H. Williams (Jefferson, NC: McFarland & Co., 2002), pp. 61-65.

[194] *The Literary Digest for October 10, 1925,* pp. 7-8.

[195] The crippled submarine was also evidence, and the Navy wanted that evidence to hand when it sought a claim against the owners of *The City of Rome.*

[196] *The Literary Digest for October 10, 1925,* p. 7.

[197] *Hell at 50 Fathoms,* by VADM Charles A. Lockwood, USN (Ret.) and Col. Hans Christian Adamson, USAF (Ret.), (Philadelphia, PA: Chilton Publishers, 1962, p. 134.

[198] "Report of the Judge Advocate General," in *Annual Report of the Secretary of the Navy, 1929,* p. 129.

[199] *Hell at 50 Fathoms,* by VADM Charles A. Lockwood, USN (Ret.) and Hans Christian Adamson, p. 135.

[200] *Hell at 50 Fathoms,* Lockwood and Adamson, p. 136.

[201] *Annual Report of the Secretary of the Navy, 1929,* p. 53.

[202] "Report of the Judge Advocate General," in *Annual Report of the Secretary of the Navy, 1929,* p. 129

[203] *U.S. District Court, S.D. New York, Feb. 26, 1928, 24 F. 2d 729.*

[204] *The City of Rome, 24 F. 2d 729 (1928).*

[205] *The City of Rome, 24 F. 2d 729 (1928).* The opinion is that of Judge Henry W. Goddard.

[206] The judge's ruling and his justification is in *Dobson v. United States (27F.2d 807 [2d Cir. 1928]).*

[207] *Ocean S.S. Co. of Savannah v. United States, 38 F.2d 782 (1930).*

[208] *Civil and Merchant Vessel Encounters with United States Navy Ships, 1800-2000,* by Greg H. Williams (Jefferson, NC: McFarland & Co., 2002), p. 9.

[209] *New England Maritime Co. v. United States*, and six other cases, 55 F.2d 674 (1932), found at scholar.google.com/scholar_case?case=711047241075892595 5&q, p. 1. Page numbering by google scholar.

[210] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* pp. 1-2.

[211] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* p. 4.

[212] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* p. 4.

[213] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* p. 5.

[214] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* pp. 6-7.

[215] *New England Maritime Co. v. United States, and six other cases, 55 F.2d 674 (1932),* p. 12.

[216] Ltr, from McPike to Cummings, Nov. 2, 1933, RG-125, UD4, folder "USS Chicago—SS Silverpalm Collision Case," Records of the Office of the JAG (Navy), p. 3, NARA.

[217] The 28 Oct. 1933 editorial in the New York *Herald Tribune* was printed in the U.S. Naval Institute *Proceedings,* Dec. 1933, p. 1794.

[218] *Army & Navy Journal,* Oct. 28, 1933, p. 167.

[219] The cases were (a) Silver Line, Ltd., Libelant, vs. United States of America, Respondent; (b) United States of America, Libelant, vs. Motorboat Silverpalm, Respondent; (c) Petition of Silver Line, Ltd., for limitation of or Exoneration from Liability; and (d) Hayward, Young & Co., Ltd., et. al., Libelants, vs. United States of America, Respondent. See *Apostles on Appeal,* Vol. I, pp. 48-49. There were also libels filed on behalf of the survivors of the three officers killed on Chicago: First Lt. Frederick S. Chappelle, USMC, Lt.(jg) Harold A. MacFarlane, USN, and Chief Pay Clerk John W. Troy, USN. Finally, there were libels filed on behalf of two of the injured sailors on Chicago: Machinist Joseph A. Oehlers and Electrician Louis Giard. See pp. 11-13 in *Apostles on Appeal,* Vol. I.

[220] *Apostles on Appeal,* Vol. I, pp. 5-6.

[221] *Apostles on Appeal,* Vol. I, pp. 15-16.

[222] *Apostles on Appeal,* Vol. I, pp. 31-32.

[223] *Apostles on Appeal,* Vol. I, pp. 33-34.

[224] *Apostles on Appeal,* Vol. I, p. 36.

[225] Ltr., from the British Ambassador, to: the Secretary of State of the United States, 14 Feb. 1934, RG-118, Container 1, Folder 2 (Civil Case No. 21667-L, "Exhibit item, Related Backup Material," NARA.

[226] *The Healy Lectures on Admiralty Law, 2005-2015,* ed. by John D. Kimball (New York, NY: Routledge Informa Law, 2016).

[227] *Hanford* [California] *Morning Journal,* Aug. 10, 1945. Phillips was a native of Hanford.

[228] *Apostles on Appeal,* Vol. I, p. 50 and then p. 78.

[229] *Apostles on Appeal,* Vol. I, pp. 78-79.

[230] *Apostles on Appeal,* Vol. I, pp. 88-93.

[231] *Apostles on Appeal,* Vol. I, p. 106.

[232] *Apostles on Appeal,* Vol. I, p. 112.

[233] *Apostles on Appeal,* Vol. I, p. 123.

[234] *San Francisco Examiner,* 26 October 1933.

[235] *Apostles on Appeal,* Vol. I, p. 137.

[236] *Apostles on Appeal,* Vol. I, p. 138.

[237] The 10th edition of Knight's *Modern Seamanship* noted that "experiment shows that the use of more than 36 [deg.] of rudder actually increases the diameter of the turning circle as well as slowing the vessel down. For this reason, naval ships are generally designed with a maximum rudder angle of 35 [deg.]." Page 501.

[238] *Apostles on Appeal,* Vol. I, pp. 154-156.

[239] *Apostles on Appeal,* Vol. I, p. 167.

[240] *Modern Seamanship*, by RADM Austin M. Knight, USN, rewritten and revised by the Officers of the Department of Seamanship and Navigation, U.S. Naval Academy, 10th ed. (New York, NY: Van Nostrand, 1944), p. 499.

[241] *Modern Seamanship*, by RADM Austin M. Knight, USN, rewritten and revised by the Officers of the Department of Seamanship and Navigation, U.S. Naval Academy, 10th ed. (New York, NY: Van Nostrand, 1944), p. 499.

[242] *Apostles on Appeal,* Vol. I, pp. 211-212. On p. 232, Judge Louderback was puzzled when told by Seaman First Class Julius K. Deming that "30 degrees is full rudder. 35 you use only in an emergency." This means that the judge still didn't understand how large ships turned. He was still, it seems, thinking in terms of driving and steering an automobile.

[243] *Modern Seamanship*, by RADM Austin M. Knight, USN, 7th ed. (New York, NY: Van Nostrand, 1918), p. 363.

[244] *Modern Seamanship*, by RADM Austin M. Knight, USN, 7th ed. (New York, NY: Van Nostrand, 1918), p. 363, Note 25.

[245] *Modern Seamanship*, by RADM Austin M. Knight, USN, rewritten and revised by the Officers of the Department of Seamanship and Navigation, U.S. Naval Academy, 10th ed. (New York, NY: Van Nostrand, 1944), p. 147.

[246] *Apostles on Appeal,* Vol. I, pp. 171-172.

[247] *Apostles on Appeal,* Vol. I, p. 179.

[248] *Apostles on Appeal,* Vol. I, p. 181.

[249] *Apostles on Appeal,* Vol. I, p. 187.

[250] *Apostles on Appeal,* Vol. I, pp. 224-225.

[251] *Apostles on Appeal,* Vol. I, p. 294.

[252] *Apostles on Appeal,* Vol. I, p. 313.

[253] *Apostles on Appeal,* Vol. I, pp. 314-315.

[254] *Apostles on Appeal,* Vol. I, p. 363.

[255] "Sal" was an acronym for "Svenska Aktiebolaget Logg." The device had been developed in Sweden.

[256] *Apostles on Appeal,* Vol. I, p. 350.

[257] *Apostles on Appeal,* Vol. I, p. 385, p. 388.

[258] *Apostles on Appeal,* Vol. I, pp 401-402, and 407. Seaman 1st Class Wilfred L. Lemire, who was the lookout in the foretop station, testified that the fog was thick enough to keep him from seeing Connard and Leeds in Chicago's bow. See p. 421.

[259] *Apostles on Appeal,* Vol. I, p. 406.

[260] *Apostles on Appeal,* Vol. I, p. 408.

[261] *Chicago* had two engine rooms. C-2 was below the ship's waterline and aft of her second funnel. It was where the two inboard propeller shafts began. C-1 was also below the waterline but forward of the second funnel. It was where the two outboard propeller shafts began. Engine No. 1 drove the starboard outboard propeller; engine No. 2 drove the starboard inboard propeller; engine No. 3 drove the port inboard propeller; and No. 4 engine drove the port outboard propeller. All four engines were linked to the propeller shafts through reduction gears. The throttlemen controlling the outboard engines (numbers 1 and 4) were in Engine Room C-1. The inboard engines (numbers 2 and 3) responded to the throttlemen in Engine Room C-2. C-2 apparently contained the rpm dials for all four throttles. See *Apostles on Appeal,* Vol. I, p. 424 and p. 462.

[262] *Apostles on Appeal,* Vol. I, p. 425.

[263] *Apostles on Appeal,* Vol. I, p. 429.

[264] *Apostles on Appeal,* Vol. I, p. 431.

[265] *Apostles on Appeal,* Vol. I, pp. 444-445.

[266] *Apostles on Appeal,* Vol. I, p. 445.

[267] *Apostles on Appeal,* Vol. I, P. 447.

[268] *Apostles on Appeal,* Vol. I, pp. 454-455.

[269] *Apostles on Appeal,* Vol. I, p. 460.

[270] *Apostles on Appeal,* Vol. I, pp. 478-479.

[271] *Apostles on Appeal,* Vol. I, pp. 491-493.

[272] *Apostles on Appeal,* Vol. I, pp. 494-499.

[273] *Apostles on Appeal,* Vol. I, pp. 502-505.

[274] *Apostles on Appeal,* Vol. I, pp. 506-508.

[275] *Apostles on Appeal,* Vol. I, pp. 508-509.

[276] *Apostles on Appeal,* Vol. I, p. 518.

[277] *Apostles on Appeal,* Vol. I, p. 552.

[278] *Apostles on Appeal,* Vol. I, pp. 553-554.

[279] *Apostles on Appeal,* Vol. I, pp. 556-557.

[280] *Apostles on Appeal,* Vol. I, pp. 557-558.

[281] *Apostles on Appeal,* Vol. I, p. 561.

[282] *Apostles on Appeal,* Vol. I, p. 567.

[283] *Apostles on Appeal,* Vol. II, p. 589.

[284] *Apostles on Appeal,* Vol. II, p. 590.

[285] *Apostles on Appeal,* Vol. II, p. 594.

[286] *Apostles on Appeal,* Vol. II, p. 593.

[287] *Apostles on Appeal,* Vol. II, p. 598.

[288] *Apostles on Appeal,* Vol. II, p. 601.

[289] *Apostles on Appeal,* Vol. II, p. 692.

[290] *Apostles on Appeal,* Vol. II, p. 698.

[291] *Apostles on Appeal,* Vol. II, p. 704.

[292] *Apostles on Appeal,* Vol. II, p. 750.

[293] *Apostles on Appeal,* Vol. II, p. 756.

[294] *Apostles on Appeal,* Vol. II, p. 768.

[295] *Apostles on Appeal,* Vol. II, p. 796.

[296] *Apostles on Appeal,* Vol. II, p. 795.

[297] *Apostles on Appeal,* Vol. II, pp. 796-798.

[298] *Apostles on Appeal,* Vol. II, pp. 800-801.

[299] *Apostles on Appeal,* Vol. II, p. 803.

[300] *Apostles on Appeal,* Vol. II, p. 805.

[301] *Apostles on Appeal,* Vol. II, pp. 806-808.

[302] David W. Dickie was the son of James Dickie, who had "learned shipbuilding and marine engineering at Greenock, with the North British Railway," and in his father's shipyard at Tayport, Scotland. There were three Dickie brothers: George, John, and James, and all three left Scotland and emigrated to California after the middle of the 19th century. George Dickie became manager of the Union Iron Works in 1881. John and James were partners in a San Francisco firm they founded that built and repaired coastal vessels built from local wood. When John died in 1927, James joined his older brother George in managing the Union Iron Works. See *Historical Transactions, 1893-1943,* Society of Naval Architects and Marine Engineers (New York, NY, 1945), p. 47.

[303] *Apostles on Appeal,* Vol. II, p. 815. Dickie testified that "The damaged part of the ship extended from frame 166 or the collision bulkhead forward… The bulge [of the hull plating] is greatest on the port side and extends forward to frame 173, when there is a fold like an accordion pleating which extends aft to starboard, and then at frame 174 there is another bulge which extends forward to frame 175. Then there is another fold which extends aft and to the starboard, and ahead of that between frame 175 and 176. [sic] There is another bulge to which the stem is attached." See pp. 823-824.

[304] *Apostles on Appeal,* Vol. II, p. 828.

[305] *Apostles on Appeal,* Vol. II, p. 830.

[306] *Apostles on Appeal,* Vol. II, pp. 832-833.

[307] *Apostles on Appeal,* Vol. II, p. 834.

[308] *Apostles on Appeal,* Vol. II, pp. 840-841.

[309] *Apostles on Appeal,* Vol. II, p. 841-842.

[310] *Apostles on Appeal,* Vol. II, p. 847.

[311] *Apostles on Appeal,* Vol. II, p. 848.

[312] *Apostles on Appeal,* Vol. II, pp. 857-858.

[313] *Apostles on Appeal,* Vol. II, p. 863.

[314] *Apostles on Appeal,* Vol. II, pp. 864-865.

[315] *Apostles on Appeal,* Vol. II, pp. 865-866.

[316] *Apostles on Appeal,* Vol. II, pp. 900-901.

[317] *Apostles on Appeal,* Vol. II, pp. 930-931.

[318] *Apostles on Appeal,* Vol. II, pp. 938-939.

[319] *Apostles on Appeal,* Vol. II, p. 942.

[320] *Apostles on Appeal,* Vol. II, p. 956.

[321] *Apostles on Appeal,* Vol. II, p. 958.

[322] *Apostles on Appeal,* Vol. II, p. 959.

[323] *Apostles on Appeal,* Vol. II, p. 984, p. 986, and pp. 987-988.

[324] *Apostles on Appeal,* Vol. II, pp. 988-989.

[325] *Apostles on Appeal,* Vol. II, pp. 994-995.

[326] *Apostles on Appeal,* Vol. II, pp. 998-999.

[327] *Apostles on Appeal,* Vol. II, pp. 1002-1004.

[328] *Apostles on Appeal,* Vol. II, pp. 1016-1018. Rear Admiral Taylor was a pioneer in the use of model tests. He built the Navy's first towing tank and the Navy's first wind tunnel. He was also Chief of the Navy's Bureau of Construction and Repair during World War I.

[329] *Apostles on Appeal,* Vol. II, pp. 1024-1027.

[330] *Apostles on Appeal,* Vol. II, pp. 1031-1033.

[331] *Apostles on Appeal,* Vol. II, pp. 1033-1034.

[332] *Apostles on Appeal,* Vol. II, p. 1045.

[333] *Apostles on Appeal,* Vol. II, pp. 1046-1047.

[334] *Apostles on Appeal,* Vol. II, pp. 1049-1050.

[335] *Apostles on Appeal,* Vol. II, pp. 1054-1055.

[336] *Apostles on Appeal,* Vol. II, pp. 1056-1057.

[337] *Apostles on Appeal,* Vol. II, p. 1061.

[338] *Apostles on Appeal,* Vol. II, pp. 1062-1063.

[339] *Apostles on Appeal,* Vol. II, pp. 1063-1064.

[340] *Apostles on Appeal,* Vol. II, pp. 1065-1066.

[341] *Apostles on Appeal,* Vol. II, pp. 1071-1072.

[342] *Apostles on Appeal,* Vol. II, p. 1079.

[343] *Apostles on Appeal,* Vol. II, pp. 1080-1081.

[344] *Apostles on Appeal,* Vol. II, pp 1084-1085.

[345] *Apostles on Appeal,* Vol. II, p. 1087.

[346] *Apostles on Appeal,* Vol. II, pp. 1088-1089.

[347] *Apostles on Appeal,* Vol. II, p. 1090.

[348] McPike's praise of Hague was actually in a letter from McPike to Attorney General Cummings dated 16 April 1934. "USS *Chicago* – SS *Silverpalm* Collision" "(Your file GCS-JFS 61-4268)," RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[349] Ltr., from: H. H. McPike, US Attorney for the Northern District of California, to: US Attorney General Homer S. Cummings, 31 March 1934, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[350] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 729, RG-125 (Admiralty Case Files), Box 1735, Folder "USDC (21665-L, Vols. 10 and 11)," U.S. District Court for the Northern District of California, USDC-ND CA SF, NARA San Francisco.

[351] "United States of America, Libelant, vs., Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 730. RG-125 (Admiralty Case Files), Box 1735, Folder "USDC (21665-L, Vols. 10 and 11), U.S. District Court for the Northern District of California, USDC-ND CA SF, NARA San Francisco. Hereafter "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934.

[352] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 732.

[353] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 734 and p. 735.

[354] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 738.

[355] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 741.

[356] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 743.

[357] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 746.

[358] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 752.

[359] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 756.

[360] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 758-760.

[361] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 762.

[362] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 767.

[363] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 767.

[364] "United States of America, Libelant, vs. Silver line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 768-769 and 771-772.

[365] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 773.

[366] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 776.

[367] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 777.

[368] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 778.

[369] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 779.

[370] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 781 and p. 782.

[371] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 785.

[372] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 790.

[373] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 793-794. Harold M. Sawyer of Berkeley, California, was later President of the San Francisco chapter of the National Lawyers Guild, accredited as an advocate before the U.S. Supreme Court, and in 1940 Chairman of the Civil Liberties Committee of "The Conference for Democratic Action."

[374] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 794-795.

[375] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 795-796.

[376] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 797.

[377] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 798.

[378] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 798, 798a, and 799.

[379] "United States of America, Libelant, vs. Silver Line, Respondent," Reporter's Transcript, April 23, 1934, pp. 799-800.

[380] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 802.

[381] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, p. 805.

[382] "United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Reporter's Transcript, April 23, 1934, pp. 809-810.

[383] "The United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Memorandum of Points and Authorities on Behalf of Respondent, RG-125 (Admiralty Case Files), Box 1736, Folder USDC (21666-L) (4 of 8), USDC-ND CA SF, Filed June 19, 1934, p. 1. Hereafter "The United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Memorandum of Points and Authorities on Behalf of Respondent.

[384] "The United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Memorandum of Points and Authorities on Behalf of Respondent, p. 6.

[385] "The United States of America, Libelant, vs. Silver Line, Ltd., Respondent," Memorandum in Behalf of Silver Line, Ltd., RG-125 (Admiralty Case Files), Box 1736, Folder USDC (21666-L) (4 of 8), USDC-ND CA SF, Filed 28 April 1934.

[386] "Findings of Fact and Conclusions of Law," Case 21666-L, Harold Louderback, U.S. District Judge, p. 3, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case."

[387] Ltr., from: Assistant Attorney General George C. Sweeney, to: Admiral C. C. Bloch, subj: "SS [sic] CHICAGO – SS SILVERPALM Collision, GCS 61-4268, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[388] Ltr., from: Thomas J. Senn, Commandant, Twelfth Naval District and Naval Operating Base, San Francisco, to: Secretary of the Navy, subj: "Suit for Damages in connection with Collision of U.S.S. CHICAGO – MOTORSHIP SILVERPALM," A17-24/L11-1/CA29/SILVERPALM (5387-02 ty), 22 June 1934, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[389] The incident is described in the *Dictionary of American Naval Fighting Ships* (Washington, DC: Navy History and Heritage Command).

[390] *Apostles on Appeal,* Vol. I, p. 77.

[391] See Folder 8152, Container No. 2887, RG-276, "Records of the U.S. Court of Appeals for the Ninth Circuit," Appeal Case Files, 1891-1994, NARA San Francisco.

[392] *Apostles on Appeal,* Vol. III, pp. 1706-1719.

[393] In Vol. III, p. 1707, of *Apostles on Appeal,* the wording was that "the District Court erred" "In finding and holding that the British motorship *Silverpalm* was solely at fault for the collision…" This could be taken as opening the door, so to speak, for a decision of shared fault.

[394] "Report of Survey," from: Board of Marine Underwriters of San Francisco, Inc., and Pillsbury & Curtis, Ship Appraisers, to: Office of the U.S. District Attorney, San Francisco, subj: Twin Screw M. V. "Silverpalm," Case No. 4908-V. RG-118, Container 1, Folder 2, NARA San Francisco.

[395] Folder 8152, Box 2887, RG-276, "Records of the U.S. Court of Appeals for the Ninth Circuit, Appeal Case Files, 1891-1994, NARA San Francisco.

[396] "Report of Commissioner on Claims, for libels 21665-K, 21666-S, and 21697-L," Jan. 25, 1934," Jan. 25, 1934, Folder 8152, Box 2887, RG-276, "Records of the U.S. Court of Appeals for the Ninth Circuit, Appeal Case Files, 1891-1994, NARA San Francisco.

[397] *Apostles on Appeal,* Vol. III, pp. 1717-1719.

[398] Ltr., from Commander W. D. Brereton, USN, attached to U.S.S. Chicago, to: U.S. Attorney, San Francisco, 18 September 1934, subj: "CHICAGO – SILVERPALM COLLISION." RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA. The figures in Brereton's letter were not in constant dollars.

[399] Ltr., from H. H. McPike, U.S. Attorney, to: The Attorney General, subj: "USS "CHICAGO" – SS "SILVERPALM" Collision, 27 December 1934, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[400] Ibid.

[401] The Navy's Bureau of Navigation ruled in early January 1935 that Machinist Oehlers was retained on the active list for shore duty only. Ltr., from: Rear Adm. William D. Leahy, Chief of the Bureau of Navigation, to: Judge Advocate General, subj: "Communication dated 4 January 1935 from the Attorney General, inclosing photostatic copy of letter from United States Attorney at San Francisco, California, relative to claim Machinist Joseph Adolph Oehlers, U.S. Navy – U.S.S. CHICAGO – S.S. SILVERPALM," Nav-327-OF, 8 Jan. 1935, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[402] *Apostles on Appeal,* Vol. III, p. 1329.

[403] *Apostles on Appeal,* Vol. III, pp. 1330-1332.

[404] Ltr., from: Chief of the Bureau of Supplies and Accounts, to: chiefs of the bureaus of Construction and Repair, Bureau of Engineering, and Ordnance, subj: "Value of USS CHICAGO on date of collision with the SS SILVERPALM on 24 October 1933," 2 Jan. 1935 (FS/L10-3[11] (AB)), RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[405] Ltr., from the chiefs of the bureaus of Construction and Repair, Ordnance, and Engineering, to: the Judge Advocate General, subj: "Value of USS CHICAGO on date of collision with the SS SILVERPALM on October 24, 1933," C&R No. CA29/L11-1 (F), BuOrd No. CA29/L11-1 (11), and BuEng No. CA29/L9 (12-29), 12 Jan. 1935, RG-125. Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[406] "The Silverpalm," No. 21697-L, U.S. District Court, Northern District of California, 13 F. Supp. 212 (N.D. Cal. 1935), p. 1 of the Finding (28 Dec. 1935). Retrieved by casetext.

[407] "The Silverpalm," No. 26197-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 1 of the Finding (28 Dec. 1935).

[408] USC 46, Chap. 8, Para. 183, Subsections (b) and (e).

[409] "The Silverpalm," No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 1 of the Finding (28 Dec. 1935).

[410] "The Silverpalm," No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 1 of the Finding (28 Dec. 1935).

[411] "The Silverpalm." No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 2 of the Finding (28 Dec. 1935).

[412] "The Silverpalm." No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 3 of the Finding (28 Dec 1935).

[413] "The Silverpalm." No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 4 of the Finding (28 Dec. 1935).

[414] "The Silverpalm." No. 21697-L, 13 F. Supp. 212 (N.D. Cal. 1935), p. 6 of the Finding (28 Dec. 1935).

[415] Ltr., from H. H. McPike, to: Commandant, 12th Naval District, subj: "USS "CHICAGO" – Motorship "SILVERPALM" collision, Petition for Limitation of Liability," Dec. 30, 1935, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case, NARA.

[416] As a commander, Captain William P. Gaddis had commanded Navy storeship USS Arctic (AF-7) in 1927. In 1929, he led the hydrographic office of the 12th Naval District, and in July 1932, after being promoted to captain, he was the chief personnel officer for the 12th District. In 1935, he was given command of the modernized battleship Mississippi (BB-41). As a commander, Captain Ross S. Culp had commanded submarine tender Beaver (AS-5) in 1927. As a captain, in 1932 he served as Pacific coast communications officer. In 1935, he was the officer in charge of the 12th Naval District's hydrographic office.

[417] Ltr., from: James W. Morris, Assistant Attorney General, to: Admiral [sic] C. C. Bloch, Judge Advocate General of the Navy, subj: SS CHICAGO – SS SILVERPALM, Correspondence No. 61-4268, RG-125, Entry UD4, Folder "USS Chicago—SS Silverpalm Collision Case," NARA.

[418] "Notice of Appeal," In the Matter of the Petition of Silver Line, Limited, owner and operator of the British Motorship "Silverpalm," for exoneration from or limitation of liability, by Lillick Olson Levy & Geary, Jan. 22, 1938, RG-276, "Records of the U.S. Court of Appeals for the Ninth Circuit, Appeal Case Files, 1891-1994, Container 2887, Folder 8152 (Silver Line, Ltd., vs. United States of America, … concerning order of severance, Feb. 9, 1935), NARA San Francisco.

[419] *Apostles on Appeal,* Vol. III, "Stipulation and Order Waiving Printing of Certain Original Exhibits," signed by H. H. McPike, Esther B. Phillips, Sawyer & Cluff (Proctors for Cargo Claimants), Ira S. Lillick, and Joseph J. Geary (Proctors for Appellant and Petitioner, Silver Line, Limited), pp. 1721-1722.

[420] *Apostles on Appeal,* Vol. III, 1723-1725.

[421] RG-276, "Records of the U.S. Court of Appeals for the Ninth Circuit," Appeal Case Files, 1891-1994, Container 2887, Folder 8152, NARA San Francisco.

[422] *Apostles on Appeal,* Vol. III, pp. 4-5 in U.S. Circuit Court of Appeals, Ninth Circuit, No. 8146.

[423] *Apostles on Appeal,* Vol. III, p. 9 in U.S. Circuit Court of Appeals, Ninth Circuit, No. 8146. Hereafter cited as "Vol. III, Ninth Circuit, No. 8146, p. 9."

[424] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 14.

[425] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 18.

[426] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 25.

[427] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 33.

[428] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 38.

[429] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 41.

[430] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 42.

[431] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 45, p. 47.

[432] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 52.

[433] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, pp. 57-58.

[434] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 66.

[435] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, pp. 83-87.

[436] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 89.

[437] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, p. 94.

[438] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, pp. 95-96.

[439] *Apostles on Appeal,* Vol. III, Ninth Circuit, No. 8146, pp. 100-102.

[440] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 7.

[441] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 7.

[442] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 12.

[443] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 12.

[444] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 13.

[445] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 16-17.

[446] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 19.

[447] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 26-27.

[448] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 29.

[449] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 30-31.

[450] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 34.

[451] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 36.

[452] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 42.

[453] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 42.

[454] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 54.

[455] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 59.

[456] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 67.

[457] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 80-81.

[458] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 71.

[459] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 89.

[460] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 90-91.

[461] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 95.

[462] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 96.

[463] *Apostles on Appeal,* Vol. III, Brief for Appellees, pp. 99-100.

[464] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 107.

[465] *Apostles on Appeal,* Vol. III, Brief for Appellees, p. 108.

[466] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, p. 2.

[467] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, p. 6.

[468] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, pp. 8-9.

[469] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, p. 18.

[470] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, pp. 23-24.

[471] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, p. 34.

[472] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, pp. 34-35.

[473] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, p. 40.

[474] *Apostles on Appeal,* Vol. III, Appellants' Reply Brief, pp. 42-43.

[475] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, p. 1.

[476] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, p. 2.

[477] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, p. 3.

[478] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, p. 6.

[479] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, pp. 12-13.

[480] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, pp. 18-19.

[481] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, p. 20.

[482] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, pp. 26-27.

[483] *Apostles on Appeal,* Vol. III, Appellees' Reply Memorandum, pp. 28-29.

[484] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, Circuit Court of Appeals, Ninth Circuit, Oct. 28, 1937, 94 F.2d 754 (9th Cir. 1937), found at justia.com/cases/federal/appellate-courts/F2/94/754/1505973/ on 10/14/2019, page 2. The page numbering is that of the printout.

[485] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 3.

[486] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 4.

[487] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 4.

[488] "Memorandum of remarks on the opinion of the Circuit Court of Appeals for the Ninth Circuit in the SILVERPALM-CHICAGO Collision Case," p. 1, no author, no date, Folder CA29/L11-1, Box 1053, RG-19, NARA.

[489] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 5. The Ninth Circuit's decision noted that actual visibility from Chicago was at times 50 yards, and at times 75 yards, and therefore the international rules required the cruiser to stop within a distance of 25 yards—an absurdly short length.

[490] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 6.

[491] "Memorandum of remarks on the opinion of the Circuit Court of Appeals for the Ninth Circuit in the SILVERPALM-CHICAGO Collision Case," p. 3.

[492] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 7.

[493] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 7.

[494] "Memorandum of remarks on the opinion of the Circuit Court of Appeals for the Ninth Circuit in the SILVERPALM-CHICAGO Collision Case," p. 4.

[495] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 11.

[496] "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al." No. 8146, p. 12.

[497] "Memorandum of remarks on the opinion of the Circuit Court of Appeals for the Ninth Circuit in the SILVERPALM-CHICAGO Collision Case," p. 6.

[498] "Memorandum of remarks on the opinion of the Circuit Court of Appeals for the Ninth Circuit in the SILVERPALM-CHICAGO Collision Case," p. 6.

[499] "The Papoose." C.C.A. 2, 85 F (2d) 54. The opinion was found at casetext.com/case/the-papoose.

[500] "The Papoose." C.C.A. 2, 85 F. (2d) 54.

[501] "The Silverpalm. The Chicago. Silver Line Limited, v. United States et al." No. 8146, p. 26.

[502] "The Silverpalm. Silver Line, Limited, v. United States at al." Ninth Circuit Court of Appeals, 94 F. 2d 776 (1937), No. 8152, Oct. 28, 1937, p. 7. This ruling was found at law.justia.com/cases/federal/appellate-courts/F2/94/776/1505859/.

[503] Ltr., from: Sam E. Whitaker, Asst. Attorney General, to: RADM G. J. Rowcliff, Judge Advocate General of the Navy, subj: "SS SILVERPALM—SS [sic] CHICAGO Collision," Nov. 9, 1937, L11-15/QM (331110-20), RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[504] Ltr., from: RADM G. J. Rowcliff, to: RADM Arthur St. Clair, Commandant of the 12th Naval District, subj: CHICAGO—SILVERPALM case, Nov. 13, 1937, L11-15/QM (331110-21), RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[505] Ltr., from: Esther B. Phillips, Asst. U.S. Attorney, to: Commander T. L. Gatch, Navy Department, subj: "CHICAGO" – "SILVERPALM" Collision, Nov. 22, 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[506] Ltr., from: Esther B. Phillips, Asst. U.S. Attorney, to: Commander T. L. Gatch, Navy Department, subj: "CHICAGO" – "SILVERPALM" Collision, Nov. 23, 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[507] Ltr., from Commander T. L. Gatch, Assistant Judge Advocate General, to: Miss Esther Phillips, Assistant United States Attorney, no specific subject, Nov. 24, 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[508] Handwritten Ltr., from Esther Phillips, Asst. U.S. Attorney, to: Commander Gatch, Asst. Navy JAG, no specific subject, Nov. 24, 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[509] *Apostles on Appeal,* Vol. 3, p. 1376.

[510] Ltr., from Esther B. Phillips, Asst. U.S. Attorney, to: Commander T. L. Gatch, Asst. Navy JAG, subj: "CHICAGO – "SILVERPALM" Collision, 26 November 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[511] Ltr., from: the Attorney General (Cummings), to: the Honorable Claude A. Swanson, Secretary of the Navy, no subject, Dec. 8, 1937, NY9/N1-13 (340829-11), RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA.

[512] Rear Adm. Kempff had won a Navy Cross for his service in World War I, attended the Naval War College in 1923, commanded battleship *Nevada* in 1926-27, served as Hydrographer of the Navy from 1927 to 1930, and, as a Vice Admiral, had commanded one of the major fleets in Fleet problem XVII in the spring of 1936. He reverted to his permanent rank of rear admiral when he left his post as Commander, Battleships, Battle Force.

[513] Ltr., from RADM C. S. Kempff, Commandant, Twelfth Naval District, to: The Judge Advocate General, Navy Department, subj: "Your letter L11-15/QM (331110-21) of November 13, 1937," A17-24/L11-1/CA29/SILVERPALM (8070-11 ha), 9 December 1937, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA. The status of Rear Admiral Clarence S. Kempff is somewhat uncertain. The *Navy Directory* for January 1937 lists him as Commandant of the Mare Island Navy Yard. The 1 April 1938 directory of officers in the 12th Naval District also lists him as Commandant of the Mare Island Navy Yard. According to the 1 Jan. 1939 Navy Directory, he was retired.

[514] *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941,* by David C. Frederick (Berkeley, CA: Univ. of California Press, 1994), p. 178.

[515] *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941,* by David C. Frederick (Berkeley, CA: Univ. of California Press, 1994), pp. 179-180 and end note 37, page 304.

[516] "On Petition for Rehearing," "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al," No. 8146, p. 27.

[517] "On Petition for Rehearing," "The Silverpalm. The Chicago. Silver Line, Limited, v. United States et al," No. 8146, p. 28.

[518] 94 F. 2d 776 (1937), "The Silverpalm. Silver Line, Limited, v. United States et. al.," No. 8152, Oct. 28, 1937, p. 2 (from *Justia,* consulted on 1 June 2018).

[519] 94 F. 2d 776 (1937), "The Silverpalm, Silver Line, Limited, v. United States et. al.," No. 8152, Oct. 28, 1937, p. 5 (from *Justia,* consulted on 1 June 2018).

[520] 94 F. 2d 776 (1937), "The Silverpalm, Silver Line, Limited, v. United States, et. al.," No. 8152, Oct. 28, 1937, p. 6 (from *Justia,* consulted on 1 June 2018).

[521] 94 F. 2d 776 (1937), "The Silverpalm, Silver Line, Limited, v. United States, et. al.," No. 8152, Oct. 28, 1937, p. 7 (from *Justia,* consulted on 1 June 2018).

[522] RG-21, "U.S. District Court for the Northern District," Admiralty Case Files, 1850-1934, Box 1733, Folder USDC (21665-K), "Notice of Entry of Final Decree," 9 March 1937. The "Stipulation regarding the payment of awards" is in Box 1734, dated 18 Dec. 1937, NARA San Francisco.

[523] RG-21, "U.S. District Court for the Northern District," Admiralty Case Files, 1850-1934, Box 1734, Folder USDC (21665-K), NARA San Francisco.

[524] Steffens v. United States, 32 F.3d 206, No. 253, April 8, 1929, decision written by Judge Learned Hand.

[525] Ltr., from: Frank J. Hennessy, U.S. Attorney, to: The Attorney General, subj: "Attention: Admiralty Division. CHICAGO – SILVERPALM Collision," Jan. 13, 1938, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[526] Ltr., from: Commandant, Twelfth Naval District, to: The Judge Advocate General, subj: "CHICAGO – SILVERPALM Case," 14 Jan. 1938, L11-15/QM (331110-20), RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[527] "SILVER LINE, LIMITED" vs. "UNITED STATES OF AMERICA," no. 8146, On Petition for Rehearing, Jan. 31, 1938, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[528] Ltr., from: Federal District Attorney Frank J. Hennessy, to: The Attorney General, subj: "Attention: Admiralty Division, 'CHICAGO' - 'SILVERPALM' Collision," p. 2, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[529] Memo, from: Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, pp. 2-3, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[530] Memo, from: Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 8, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[531] Memo, from: Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 11, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[532] Memo, from: Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, pp. 16-18, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[533] Memo, from: Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 27, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[534] Memo, from Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 38, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[535] Memo, from Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 39, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30,

Folder 18319, NARA. The case of Kendall v. Stokes is 44 U.S. 87 (1845), "Syllabus," found at https://supreme.justia.com/cases/federal/us/44/87/.

[536] Memo, from Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, pp. 40-41, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[537] Memo, from Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 51, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[538] Memo, from Claude A. Swanson, Secretary of the Navy, to: The Attorney General, no subject, March 1, 1938, p. 48, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[539] Ltr., from: Esther B. Phillips, Asst. U.S. Attorney, to: CDR T. L. Gatch, Office of the JAG, no subject, March 23, 1938, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[540] Ltr., from: Acting Attorney General Robert H. Jackson, to: The Secretary of the Navy, no subject, March 29, 1938 (L11-15/QM (331110-24), RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, NARA.

[541] In the Supreme Court of the United States, October Term, 1937, "Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit," No. 963, p. 2. In "US & the Chicago v. Silver Line & the Silverpalm, U.S. Supreme Court Transcript of Record with Supporting Pleadings," MOML print edition.

[542] "Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit," No. 963, p. 9, pp. 11-12.

[543] "Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit,' N. 963, pp. 12-27.

[544] In the Supreme Court of the United States, October Term, 1937, "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 5.

[545] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 6.

[546] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 7.

[547] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, pp. 11-12.

[548] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, pp. 13-17.

[549] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 17.

[550] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, pp. 20-21.

[551] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 25.

[552] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 41.

[553] "Brief for Respondents in Opposition to Petition for a Writ of Certiorari," No. 963, p. 45.

[554] Navy Regulations 1920, (Washington, DC: GPO, 1920 and 1941), articles 833, 840, 857, and 880.

[555] *Navy Regulations 1920,* articles 1007, 1022.

[556] *Navy Regulations 1920,* articles 1061, 1063.

[557] *Navy Regulations 1920,* articles 933 and 944.

[558] Creating the rules was an extraordinary achievement, and an equally extraordinary achievement was getting almost every seagoing nation to accept them and make them a part of each nation's statutes.

[559] *Modern Seamanship*, by RADM Austin M. Knight, USN (New York, NY: D. Van Nostrand, 1918), 7th ed., pp. 349-350.

[560] *Modern Seamanship*, 7th ed., p. 350.

[561] *Modern Seamanship*,7th ed., p. 353. The book also noted that the large ocean liners routinely steamed at high speed through dense fogs. "[I]n the eyes of the law,' that was "altogether unjustifiable." (p. 353)

[562] *Modern Seamanship*, 7th ed., p. 357.

[563] *Modern Seamanship*, 7th ed., p. 359.

[564] *Modern Seamanship*, 7th ed., p. 363.

[565] *Modern Seamanship*. 7th ed., p. 365.

[566] *Modern Seamanship*, 7th ed., p. 379.

[567] *Modern Seamanship*, 7th ed., p. 400.

[568] *Modern Seamanship*, 7th ed., p. 406.

[569] *Modern Seamanship*, 7th ed., p. 411.

[570] *Command,* by William McFee (Garden City, New York: Doubleday, 1922), pp. 258-260.

[571] VADM Laning did say in his memoirs that he had been on *Chicago's* "bridge most of the night." See An Admiral's Yarn, by ADM Harris Laning, USN, (Newport, RI: Naval War College Press, 1999), p. 354.

[572] Ltr., from: Esther B. Phillips, to: CDR T. L. Gatch, 22 Nov. 1937, RG-125, Box 635, Entry 30, Folder 18319, p. 1, NARA. Fraudulent land claims apparently had a long and notorious history in California. See Gustavus Myers, *History of the Supreme Court of the United States* (Chicago, IL: Charles H. Kerr, 1912).

[573] "O'Donnell et. al. v. United States," 91 F.2d 14 (1937), Oct. 22, 1936, p. 17, consulted at https://scholar.google.com/scholar_case?case=5319476369657019876&hl=en&as_sdt=6...

[574] "O'Donnell et. al. v. United States," 91 F.2d 14 (1937), Oct. 22, 1936, p. 17.

[575] "O'Donnell et. al. v. United States," 91 F.2d 14 (1937), Oct. 22, 1936, pages 21, 23, and 33-35.

[576] Philip Buettner was the "Principal Attorney" in the Office of the Judge Advocate General of the Navy. Mare Island was at the center of several legal conflicts. In addition to the O'Donnell case, there was United States v. Stewart (29 F. Supp. 59 (N.D. Cal. 1939) and Stewart v. United States (121 F.2d 705 1941). Stewart v. United States went all the way to the Supreme Court, which reversed the judgment of the 9th Circuit Court of Appeals. In United States v. Stewart, Judge Denman argued that only action by Congress could settle the Mare Island land title disputes. The Committee on Naval Affairs of the House of Representatives had taken testimony on the matter in 1936, but the district court ruling in the O'Donnell case was then being appealed, and so the Committee took no action.

[577] Ltr., from Ira Lillick to William Denman; no date, but clearly written to Denman after Lillick was hospitalized in May 1926; in William Denman's correspondence, Box 13, Call Number C-B 817, Bancroft Library, Univ. of California, Berkeley, CA. The second letter was handwritten and dated (apparently) Jan. 15, 1935. It is in the same box as the May 1926 letter.

[578] Draft "PETITION FOR A REHEARING," no date, no author, RG-125, Records of the JAG (Navy), Box 635, Entry 30, Folder 18319, NARA. This was, I think, the draft petition that Commander Gatch sent to Esther Phillips and which she regarded as far too intemperate to submit to the 9th Circuit Court of Appeals.

[579] Ltr., from: Frank J. Hennessy, U.S. Attorney, to: The Attorney General; Attention: Admiralty Division; subj: "CHICAGO"– "SILVERPALM" Collision, Jan. 13, 1938, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, p. 2, NARA.

[580] Ltr., from: Frank J. Hennessy, U.S. Attorney, to: The Attorney General; Attention: Admiralty Division; subj: "CHICAGO" – "SILVERPALM" Collision, Feb. 2, 1938, RG-125, Records of the Office of the Judge Advocate General (Navy), Box 635, Entry 30, Folder 18319, p. 1, NARA.

[581] See news reporter Royce Brier's dramatic account in the "San Francisco Chronicle" for July 6, 1934, at http://www.sfmuseum.org/hist/thursday2.html. The title of his story was "Bloody Thursday."

[582] Frederick Lewis Allen, *Since Yesterday: The 1930s in America* (New York, NY: Perennial Library, 1972), p. 45.

[583] *The Great Depression, A Diary,* by Benjamin Roth, ed. by James Ledbetter and Daniel B. Roth (New York, NY: Public Affairs, 2009), p. 104.

[584] *The Great Depression, A Diary,* by Benjamin Roth, ed. by James Ledbetter and Daniel B. Roth (New York, NY: Public Affairs, 2009), p. 137.

[585] *The Great Depression, A Diary,* by Benjamin Roth, ed. by James Ledbetter and Daniel B. Roth (New York, NY: Public Affairs, 2009), p. 200.

[586] *Apostles on Appeal,* Vol. III, p. 1595.

[587] *Apostles on Appeal,* Vol. III, p. 1596.

[588] *Apostles on Appeal,* Vol. III, p. 1598.

[589] *Apostles on Appeal,* Vol. III, pp. 1598-1599.

[590] *Apostles on Appeal,* Vol. III, p. 1602.

[591] *Apostles on Appeal,* Vol. III, p. 1603.

[592] *Apostles on Appeal,* Vol. III, pp. 1604-1605.

[593] Knight's *Modern Seamanship*, 7th ed. (New York, NY: D. Van Nostrand, 1918), p. 363.

[594] *Apostles on Appeal,* Vol. III, p. 1605.

[595] *Apostles on Appeal,* Vol. III, p. 1626.

[596] *Apostles on Appeal,* Vol. III, p. 1639.

[597] *Apostles on Appeal,* Vol. III, p. 1665.

[598] *Handbook of Admiralty Law in the United States,* by Gustavus H. Robinson (St. Paul, MN: West Publishing Co., 1939).

[599] Nicholas J. Healy and Joseph C. Sweeney, "Establishing Fault in Collision Cases," *Journal of Maritime Law and Commerce,* Vol. 23, No. 3 (July 1992), p. 354.

[600] Nicholas J. Healy and Joseph C. Sweeney, *The Law of Marine Collision* (Centreville, MD: Cornell Maritime Press, 1998). J. Michael Lennon, "The Law of Collision and the United States Navy," *Buffalo Law Review,* Vol. 50, No. 3 (Fall 2002), pp. 981-1016.

[601] Capt. Michael Junge, "From Accountability to Punishment," *Naval War College Review,* Vol. 73, No. 2 (Spring 2020), p. 24.

[602] Junge, "From Accountability to Punishment," p. 25.

[603] Yet the case did not garner the media attention that had been given other Navy accidents. For example, in his careful study of Navy public relations between World Wars One and Two, Ryan D. Wadle did not

find any "big stories" of the collision. See *Selling Sea Power, Public Relations and the U.S. Navy, 1917-1941,* by Ryan D. Wadle (Norman, Oklahoma: Univ. of Oklahoma Press, 2019).

[604] Erle Stanley Gardner, "Forward" to *The Case of the Runaway Corpse* (New York, NY: Random House, 1954).

[605] *Looking for the Silver Lining, A British Family's Shipowning Century, 1875-1975,* by Martin Barraclough (Heyford Park, UK: Bound Biographies, 2009), p. 149.

[606] *Hanford* (California) *Morning Journal*, "Statement of Hon. Frank J. Hennessy," p. 12.

[607] RG-21, U.S. District Court, Northern District, Admiralty Case Files, 1850-1934, Box 1740, Folder Chicago's Log Book, NARA San Francisco.