

## Forum Selection Clauses in Maritime Contracts

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than one statute, as in *Thames*, the second prosecution will be allowed. But, if more than one statute is violated by the same act or conduct, as in *Bonfanti* and *Didier*, the court will use the same evidence test and the second prosecution will be barred. Criminal conduct may often give rise to two or more possible charges,<sup>43</sup> but the constitutional and statutory rights of the defendant to protection against double jeopardy must be safeguarded. A crucial factor in insuring this protection is a workable standard for defining the same offense. The standard is substantially clarified by the stress on both the same evidence and same act or conduct in the instant cases.

*Edward Sutherland*

#### FORUM SELECTION CLAUSES IN MARITIME CONTRACTS

Respondent, an American corporation, contracted with petitioner, a German firm, for the towing of respondent's drilling rig from Louisiana to the Adriatic. The contract contained provisions relieving petitioner from liability for damages suffered by the tow,<sup>1</sup> and a clause stating: "Any dispute arising must be treated before the London Court of Justice." While in tow the rig was damaged, and respondent libelled petitioner in personam and petitioner's tug *Bremen* in rem. Petitioner's motion to dismiss or stay the action pending adjudication in London, where the exculpatory provisions would be enforced, was denied.<sup>2</sup> The Fifth Circuit affirmed on appeal,<sup>3</sup> relying on an earlier decision that jurisdictional clauses providing for an exclusive forum were contrary to public policy and hence un-

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43. See LA. R.S. 14:4 (1950) which reads in part: "Prosecution may proceed under either provision, in the discretion of the district attorney, whenever an offender's conduct is: (1) Criminal according to a general article of this Code or Section of this Chapter of the Revised Statutes and also according to a special article of this Code or Section of this Chapter of the Revised Statutes; or (2) Criminal according to an article of the Code or Section of this Chapter of the Revised Statutes and also according to some other provision of the Revised Statutes, some special statute, or some constitutional provision."

1. The contract contained the following provisions: "1. . . . Unterweser and its masters and crews are not responsible for defaults and/or errors in the navigation of the tow. 2. . . . b) Damages suffered by the towed object are in any case for the account of its owners."

2. *In re Unterweser Reederei, GMBH*, 296 F. Supp. 733 (M.D. Fla. 1969).

3. *In re Unterweser Reederei, GMBH*, 428 F.2d 888 (5th Cir. 1970), *aff'd mem.*, 446 F.2d 907 (5th Cir. 1971).

enforceable.<sup>4</sup> On certiorari the Supreme Court reversed,<sup>5</sup> holding, forum selection clauses are prima facie valid and are to be enforced unless the resisting party can show that enforcement would be unreasonable under the circumstances. *M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct. 1907 (1972).

Traditionally, American courts have refused to enforce contractual stipulations designating an exclusive forum for litigation.<sup>6</sup> While some early maritime cases contained language indicating a contrary view,<sup>7</sup> judicial disapproval was thought

4. *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958). *petition for cert. dismissed*, 359 U.S. 180 (1959).

5. The Court remanded to the district court to determine whether enforcement would be "unreasonable," but with an admonition that "nothing in the record presently before us would support a refusal to enforce the forum clause." *M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct., 1907, 1916 (1972).

6. The most frequently cited early American case for this position is *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass.(6 Gray) 174 (1856), which held such clauses invalid as an attempt to affect "remedies," rather than a permissible alteration of "rights." Often enforcement was refused on the same rationale as that applied in early arbitration cases—such attempts to "oust the courts of jurisdiction" were not to be sanctioned. *See, e.g.*, *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387 (S.D. N.Y. 1918), which cited arbitration cases.

Clauses had been enforced where the cause of action had accrued; *Detwiler v. Lowden*, 198 Minn. 185, 269 N.W. 367 (1935); *Gitler v. Russian Co.*, 124 App. Div. 273, 108 N.Y.S. 793 (1908). With a changing and more favorable attitude toward arbitration clauses, some courts found that forum clauses were arbitration clauses and enforced them. This argument was successfully made in England in *Law v. Garrett*, 8 Ch. D. 26 (1878). In the United States, it met with differing degrees of approval. Compare *Kelvin Eng'r Co. v. Blanco*, 125 Misc. 728, 210 N.Y.S. 10 (1925), with *In re Hamburg-American Line*, 135 Misc. 715 238 N.Y.S. 331 (1930).

Probably the first case to abandon such tenuous distinctions and hold such clauses enforceable unless unreasonable was *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425 (1903). By the mid-twentieth century, the traditional hostility to enforceability had lessened. Compare Judge Learned Hand's concurrence in *Krenger v. Pennsylvania R. Co.*, 174 F.2d 556, 561 (2d Cir. 1949) ("What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist."), with his earlier decision in *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930), where he said it was "well settled" that such a stipulation was unenforceable. Perhaps one reason for the change in attitude was a realization that to enforce such stipulations did not effectuate an "ouster of jurisdiction," but was discretionary with the court, and simply gave effect to the expectations of the parties. *See Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951), where the court enforced a stipulation saying, "[i]t might be said the court took jurisdiction and granted specific performance." *See* Annot., 56 A.L.R.2d 300 (1957), which collects cases involving both maritime and non-maritime contracts. Citation to non-maritime cases occurs frequently in the reports and in this note.

7. *Mason v. The Blaireau*, 2 Cranch 240 (1804); *The Jerusalem*, 2 Gallis. 190 (1814); *Thompson v. The Catharina*, 1 Pet. Adm. 104 (1795). The fact that these cases all involved the jurisdiction of United States admiralty courts when all parties were foreigners probably indicates that the language

to be the well-settled rule in admiralty until the middle of this century.<sup>8</sup> Then, in 1955, the Second Circuit held such a clause enforceable in *Wm. H. Muller & Co. v. Swedish American Line*.<sup>9</sup> In *Muller*, an ocean bill of lading covering a shipment from Sweden to Philadelphia called for the exclusive jurisdiction of Swedish courts; the court dismissed the libel, holding such clauses to be enforceable unless "unreasonable in the setting of the particular case."<sup>10</sup> Although *Muller* was later overruled by the Second Circuit as being contrary to the Carriage of Goods by Sea Act,<sup>11</sup> the court's reasoning concerning jurisdictional clauses had gained general acceptance as a principle of contract law,<sup>12</sup> and many jurisdictions adopted this approach.<sup>13</sup> However, courts in the Fifth Circuit, relying on the decision in *Carbon Black Export, Inc. v. The Monrosa*,<sup>14</sup> continued to hold forum clauses unenforceable.<sup>15</sup>

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supporting dismissal if the parties had agreed upon another forum should not be taken to mean that such a stipulation would be enforceable elsewhere; American courts of admiralty quite early developed a doctrine resembling *forum non conveniens* in cases involving foreigners. See generally Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949).

8. See, e.g., *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930); *The Clano*, 58 F. Supp. 65 (E.D. Pa. 1944).

9. 224 F.2d 806 (2d Cir. 1955), cert. denied, 350 U.S. 903 (1955). This decision had been foreshadowed in *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 137 F.2d 990 (2d Cir. 1951), which also based its decision upon the doctrine of *forum non conveniens*.

10. 224 F.2d at 808.

11. 46 U.S.C. §§ 1300-15 (1970) (hereinafter cited as "Cogsa"). In *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), the court held that enforcement of jurisdictional clauses in bills of lading covered by Cogsa would lessen the liability of the carrier, which the act prohibits. To enforce the clause would require a substantial additional expenditure to prosecute claims, and foreign tribunals might not apply the act, or might apply it differently.

12. In *Indussa Corp. v. S.S. Ranborg*, the court said that in *Muller* they had "leaned too heavily on general principles of contract law," and not enough on Cogsa. 377 F.2d at 202. See also *Jack Winter, Inc. v. Koraton Co.*, 326 F. Supp. 121 (N.D. Cal. 1971). This is also pointed out by the Supreme Court in the instant case. 92 S. Ct. at 1913.

13. *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341 (3d Cir. 1966); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D. Minn. 1968); *Geiger v. Keilani*, 270 F. Supp. 761 (E.D. Mich. 1967); *Aetna Ins. Co. v. The Satrustegui*, 171 F. Supp. 33 (D. P.R. 1959); *Calzavara v. Biehl & Co.*, 181 So.2d 809 (La. App. 4th Cir. 1966). The Fifth Circuit also enforced such a clause in *Anastasiadis v. S.S. Little John*, 346 F.2d 281 (5th Cir. 1965), which can be distinguished from *Carbon Black* in that both parties were foreigners. The court probably paid more attention to this fact than to the stipulation.

14. 254 F.2d 297 (5th Cir. 1958), petition for cert. dismissed, 359 U.S. 180 (1959).

15. *Insurance Co. of N. America v. N.V. Stoomvaart-Maatschappij*, 201 F. Supp. 76 (E.D. La. 1961).

In the case under consideration, the Supreme Court placed great emphasis on the fact that the contract had been negotiated between two parties of equal bargaining power.<sup>16</sup> Even cases holding forum clauses unenforceable had considered the comparative bargaining positions of the parties in determining the validity of such provisions. *Indussa Corp. v. S.S. Ranborg*<sup>17</sup> overruled *Muller* and held forum selection clauses unenforceable insofar as they applied to Cogsa bills of lading. Although the *Indussa* court explained the conflict in terms of a prohibited "lessening [of] . . . liability"<sup>18</sup> rather than looking to the adhesive nature of a bill of lading, the principal purpose of Cogsa (and its predecessor, the Harter Act)<sup>19</sup> was to relieve American cargo interests from having to submit to terms dictated by a small number of British carriers.<sup>20</sup> If the bill of lading was not an adhesive contract, there would be no need to protect cargo interests by legislation; the rules of the market place would suffice. The question of equality of bargaining power was also presented in cases which found forum clauses to conflict with the Federal Employers' Liability Act<sup>21</sup> and its maritime counterpart, the Jones Act.<sup>22</sup> While these decisions were based on the presence of a statute prohibiting the employer from contracting to avoid liability, some members of the judiciary would have refused enforcement on the basis of the adhesive nature of the contracts involved.<sup>23</sup>

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16. The Court in *Bremen* pointed out that petitioner's towage contracts ordinarily call for German courts and German law; the stipulation of an English forum was thought to be a concession to respondent. There had also been other bidders for the contract. Chief Justice Burger's opinion speaks of the contract as "freely negotiated," "made in an arms-length negotiation." 92 S. Ct. at 1914.

17. 377 F.2d 200 (2d Cir. 1967).

18. 46 U.S.C. § 1303(8) (1970).

19. 46 U.S.C. §§ 190-96 (1970).

20. A. KNAUTH, *OCEAN BILLS OF LADING* 120 (4th ed. 1953); A. YIANNPOULOS, *NEGLIGENCE CLAUSES IN OCEAN BILLS OF LADING* 3-9 (1962).

21. 45 U.S.C. §§ 51-59 (1970). Forum clauses were held to conflict with the act in *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263 (1949); and *Krenger v. Penn. R. Co.*, 174 F.2d 556 (2d Cir. 1949).

22. 46 U.S.C. § 688 (1970). A clause was held to violate the act in *Voyatzis v. National Shipping & Trading Corp.*, 199 F. Supp. 920 (S.D. N.Y. 1961).

23. In *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 266 (1949), Justices Frankfurter and Jackson concurred in the result "upon the grounds stated by Chief Judge Hand in *Krenger v. Penn. R. Co.*" There, Judge Hand said: "The Federal Employers' Liability Act bears evidence that in the eyes of Congress employees do not bargain in all respects as equals with the roads. . . . I would hold such contracts unenforceable unless the road shows that

The Court also seemed to emphasize the international character of the agreement involved. This writer, however, does not believe that the Court intended to limit its holding to affect only contracts wherein American and foreign parties agree to submit their disputes to a neutral forum. The prior jurisprudence, apparently well regarded by the Court,<sup>24</sup> did not prohibit forum clauses in agreements between two American parties. For example, the Court cited with approval *Central Contracting Co. v. Maryland Casualty Co.*,<sup>25</sup> in which the Third Circuit enforced an agreement between Maryland and Pennsylvania corporations to litigate in New York City.<sup>26</sup> Most admiralty cases have involved parties of diverse nationalities, but rarely has a neutral forum been stipulated in the contract.<sup>27</sup> It is submitted that the instant case should be viewed as approving rather than limiting the jurisprudence which has developed since *Muller*. Lower courts would therefore be unwarranted in failing to enforce forum selection clauses merely because the parties are American and the subject matter domestic, provided the contract

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the employee was fully advised of their effect upon his rights." 174 F.2d at 561.

Judicial scrutiny of the parties' comparative bargaining power should continue. This would call for enforcement of clauses contained in charter parties, but uphold the decision in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), which refused enforcement of a clause in a bill of lading. For the proposition that inclusion of such a clause in a form contract renders it unenforceable, see *Goff v. Amco Automatic Trans. Inc.*, 313 F. Supp. 667 (D. Md. 1970).

24. "Although this traditional view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum selection clauses. . . . We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty." 92 S. Ct. at 1913.

25. 367 F.2d 341 (3d Cir. 1966).

26. For other cases holding such stipulations prima facie valid and finding no requirement that the transaction be international in scope, see *Jack Winter, Inc. v. Koraton Co.*, 326 F. Supp. 121 (N.D. Cal. 1971); *Matthiesen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D. Minn. 1968); *National Equip. Rental, Ltd. v. Sanders*, 271 F. Supp. 756 (E.D. N.Y. 1967). Whether an agreement not to litigate in federal court, as opposed to state court, would be enforceable is a matter beyond the scope of this note. *Home Ins. Co. v. Morse*, 20 Wall. 445 (1874), held such stipulations invalid, and was commonly cited as authority for invalidating all forum selection clauses. A recent case, however, *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964), held a forum clause could bar removal to federal court.

27. For example, the Court cites with approval *Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951), where there was a Norwegian respondent and a stipulation for Norwegian courts.

was freely negotiated and enforcement would not be "unreasonable."<sup>28</sup>

The criteria set forth by the Court for the determination of the "reasonableness" of enforcement include a requirement that the non-contractual forum ascertain that no public policy of that forum would be avoided by dismissal. To make such a finding in the instant case, the Supreme Court had to confront an earlier line of cases holding that *exculpatory* clauses in towing contracts were contrary to public policy and unenforceable, for to constrain respondent to litigation in England would result in enforcement of those clauses. In *Bisso v. Inland Waterways Corp.*,<sup>29</sup> the Supreme Court had said enforcement of such stipulations would encourage negligence and subject those in need of towing services to "overreaching" by "others who have power to drive hard bargains."<sup>30</sup> This reasoning has been severely criticized,<sup>31</sup> and in recent years some courts have allowed some circumvention of the policy set forth in *Bisso*.<sup>32</sup> Realizing the inherent weakness of the argument that to enforce such clauses would encourage negligence, and having found no "overreaching" in the instant case, the Court was apparently willing to limit the *Bisso* policy to domestic waters<sup>33</sup> and allow enforcement of the exculpatory provisions. This does

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28. There is some question as to whether the decision can be taken as authority in domestic *non-admiralty* cases. The federal diversity courts which have dealt with the issue of whether state or federal law should govern enforceability have managed to find the state law in line with the federal rule they wished to formulate, or found no state precedent at all. *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341 (3d Cir. 1966); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D. Minn. 1968); *Geiger v. Kellani*, 270 F. Supp. 761 (E.D. Mich. 1967).

29. 349 U.S. 85 (1955).

30. *Id.* at 91.

31. Mr. Justice Frankfurter dissented along with Justices Reed and Burton, saying that there was no evidence in the record of "over-reaching," and that the decision would not discourage negligence "unless we are prepared also to forbid the tug to insure against such losses or liabilities." *Id.* at 119. See also Covey, *Validity of Contractual Clause Exculpating a Party from Liability for His Own Negligence*, 44 ILL. B.J. 229 (1955); Note, 69 HARV. L. REV. 173 (1955); Note, 17 U. PITT. L. REV. 93 (1955); Note, 30 TUL. L. REV. 133 (1955); Note, 42 VA. L. REV. 77 (1956).

32. In *Flour W., Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971); and *Tenneco Oil Co. v. Tug Tony*, 324 F. Supp. 834 (S.D. Tex. 1971), courts enforced clauses in towage contracts which required the tow to pay for insurance and procure a waiver of subrogation against the tug. This effectively released the tug from liability for its negligence. A similar result was sanctioned in *Slade, Inc. v. Samson Towing Co.*, 327 F. Supp. 555 (E.D. Tex. 1970). But see *Crawford v. West Indian Carriers, Inc.*, 337 F. Supp. 262 (S.D. Fla. 1971).

33. 92 S. Ct. at 1916.

not mean parties will be allowed to contract for an exclusive jurisdiction in matters where the non-contractual forum has an interest of its own in adjudicating the dispute, but rather that no such interest was found in this case.<sup>34</sup> The mere fact that the contractual forum will limit or deny the plaintiff's right of recovery should not be a consideration, in light of that very result occurring in the instant case.<sup>35</sup>

The Court also stated that enforcement would be unreasonable "if the chosen forum is *seriously* inconvenient for the trial of the action."<sup>36</sup> The party bringing suit in the non-contractual forum would bear a heavy burden of proof, because the parties in their negotiations must have anticipated some inconvenience. There should be few instances in which parties of equal bargaining power dealing with a subject matter amenable to foreign trial will be able to show the unanticipated inconvenience required for a retention of jurisdiction.<sup>37</sup>

Finally, the Court found the language in the contract broad enough to provide for an exclusive forum for all actions, whether in personam or in rem. The Supreme Court's dismissal of certiorari in *Carbon Black* had been premised upon the finding that the stipulation there was not broad enough to exclude proceeding against the ship wherever it might be arrested,<sup>38</sup> and in subsequent lower court cases, the same argument was made, sometimes successfully.<sup>39</sup> Here, the language of the contract read

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34. The Hague Conference on Private International Law would hold clauses unenforceable in matters relating to the status of persons, successions, maintenance obligations, bankruptcy and analogous proceedings, in matters of real rights affecting immovable property, and in the matter of setting aside or modifying acts made in pursuance of public authority. *The Validity of Forum Selection Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157, 160 (1964).

35. Some earlier cases had held that this would render enforcement unreasonable. *General Motors Overseas Operation v. S.S. Goettingen*, 225 F. Supp. 902 (S.D. N.Y. 1964); *Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst*, 154 F. Supp. 886 (S.D. N.Y. 1957).

36. 92 S. Ct. at 1916.

37. Judge Wisdom suggested in his dissent in *Bremen* that jurisdiction must be retained if the contractual forum would not entertain the suit. 428 F.2d at 906. Dismissal might be conditioned upon the foreign court's taking jurisdiction and the waiver of such defenses as time limitations. *See, e.g., Pakhuismeesteren, S.A. v. S.S. Goettingen*, 225 F. Supp. 888 (S.D. N.Y. 1963).

38. 359 U.S. 180 (1959).

39. Clauses were held to include the in rem action in *Insurance Co. of N. America v. N.V. Stoomvaart-Maatschappij*, 201 F. Supp. 76 (E.D. La. 1961); and *Nieto v. S.S. Tinnun*, 170 F. Supp. 295 (S.D. N.Y. 1958). Jurisdic-

"any dispute," and the Court had no trouble in finding this included an action in rem. It is submitted that this distinction was made in *Carbon Black* to avoid facing the issue of the enforceability of forum selection clauses.<sup>40</sup> In light of the approval given forum clauses in the instant case, courts should be dissuaded from indulging in hypertechnical analysis of the language used, and enforce the clause whether it reads "any dispute" or merely "any action against the owner." The parties' inclusion of such a clause should indicate an intention to provide an *exclusive* forum for settling their differences, and admiralty courts have realized in other contexts that an action against the ship is an action against the owner.<sup>41</sup>

Harold Watson

#### THE DOMINANT MOTIVATION STANDARD FOR BUSINESS BAD DEBT DEDUCTIONS

Taxpayer was president of a closely held construction corporation in which he owned 44% of the outstanding stock, representing an original investment of \$33,900.<sup>1</sup> He had signed an indemnity agreement required by the bonding company which furnished the necessary performance bonds for construction contracts. After the corporation defaulted in its performance of two contracts, taxpayer indemnified the bonding company to the extent of more than \$162,000 for which he was not reimbursed. Taxpayer claimed the indemnification loss as a business bad debt and deducted it from ordinary income on his federal

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tion was retained on the basis suggested above in cases involving a contractual limitation of actions. See *Loomis v. S.S. Santa Rosa*, 447 F.2d 105 (9th Cir. 1971); *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968). One district court even went so far as to say that *Carbon Black* stood for the proposition that such a clause *could not* bar an action in rem. *Amicale Industries v. S.S. Rantum*, 259 F. Supp. 534 (D. S.C. 1966). *Peugeot v. S.S. Honestas, In Admiralty No. 8036 (E.D. Va., Nov. 10, 1959)*, also contains language which might support this proposition.

40. See the dissent of Justice Harlan in *Carbon Black*, 359 U.S. at 184.

41. See, e.g., *Continental Grain Co. v. The FBL-585*, 364 U.S. 19 (1960).

1. Taxpayer also held a full time position as president of a savings and loan association from which he received a salary of \$19,000. Taxpayer's services to the construction corporation, to which he devoted no more than six to eight hours per week, included reviewing bids, making cost estimates, obtaining performance bonds and bank financing. The son-in-law of the taxpayer also owned 44% of the corporation's outstanding stock, while the remaining 12% was owned by a son of the taxpayer and by another son-in-law.