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A Selection of Cases and Other Authorities on the Law of Admiralty, Pt.1: The Jurisdiction of Admiralty Courts

Edwin D. Dickinson

University of Michigan Law School

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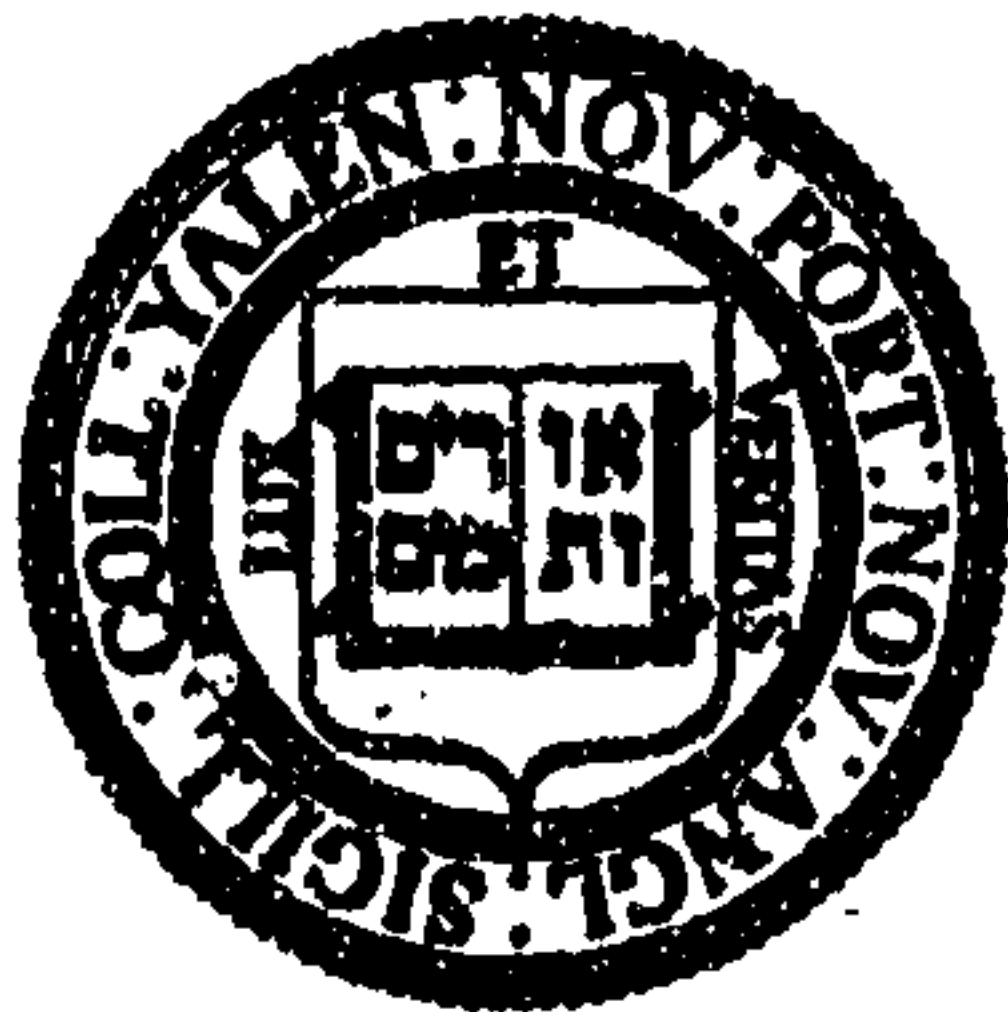
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A Selection of Cases and Other Authorities

on

THE LAW OF ADMIRALTY

By

Edwin D. Dickinson
¶

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PREFACE

The following collection of cases and other authorities on the Law of Admiralty requires prefatory comment in at least two particulars.

In the first place, the collection is incomplete. It has been necessary to keep within rather definite limits of space. Within those limits it has seemed better to develop selected topics somewhat fully, leaving out others altogether, rather than to spread the collection out over as much of the field as one would like to include. In the result, the subjects of jurisdiction, the maritime lien, and the reception and modification of the maritime law have been treated at length. Average, salvage, insurance, collision, affreightment contracts, limited liability, the Harter Act, and other interesting and important topics have not been treated at all. It is planned to publish cases on additional topics in the substantive maritime law if the undertaking seems warranted after experience with the present collection.

In the second place, the collection is tentative. There are no footnotes and such materials as are usually thus included must be supplied by the instructor. The cases are so arranged that the order may be changed, new cases inserted, or old cases omitted without preparing new stencils for the rest of the book. It is planned to make revisions frequently. There is a special significance, therefore, in the somewhat platitudinous remark that criticisms and suggestions will be greatly appreciated.

E. D. D.

Ann Arbor
June 21, 1924.

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ERRATA

- The H. S. Pickands, p. 1, para. 1, line 13 -- the first word in the line should be "go" instead of "to".
- Campbell v. Hackfeld & Co., p. 2, para. 6 -- these two lines should be deleted.
- Atlantic Transport Co. v. Imbrovek, p. 3, para. 2, line 13 -- semicolon after first "ship".
- Ship Mortgage Act, 1920, p. 1, para. 3, line 6 -- insert "or" after "possession".
- Israel v. Moore & McCormack Co., p. 1, para. 2, line 5 -- "fiction" instead of "fixtion".
- United States v. Brig Malek Adhel, p. 3, para. 1, line 18 -- "se" instead of "re".
- Currie v. M'Knight, p. 2, para. 3, line 4 -- delete beginning with words "the other point" through and including the words "I think it is".
- The William M. Hoag, p. 3, para. 2, line 12 -- "thing" instead of "think".
- Lien Act of 1910, p. 1, para. 3, line 3 -- "charterer" instead of "charter".
- The Yankee, p. 3, para. 1, line 2 -- period after "cases". Insert "The earlier cases" before "are".
- Piedmont Coal Co. v. Seaboard Fisheries Co., p. 3, para. 3, line 28 -- semicolon after "sary".
- The Trenton, p. 2, para. 4, line 5 -- insert "The ship's creditors" before "must" at beginning of line.
- The Trenton, p. 3, para. 2, line 1 -- "or" instead of "of".
- The Lottawanna, p. 5, para. 5, line 2 -- "of" instead of "or".
- The Harrisburg, p. 5, para. 4, line 10 -- insert "to" after "go".
- Southern Pacific v. Jensen, p. 3, para. 2, line 17 -- delete beginning with word "regard" through and including word "provides".
- The Runa, p. 4, para. 2, line 15 -- insert "state" before "statutes" and "other" before "cases".

In the following cases the paragraphs indicated have been supplied by the editor and should be enclosed in square brackets: The Genesee Chief v. Fitzhugh, p. 9, para. 2; The Hine v. Trevor, p. 3, para. 4; Kynoch v. The S. C. Ives, p. 1, para. 5; The Ship Annie H. Smith, p. 3, para. 3; Steele v. Thacher, p. 1, para. 3; The Normannia, p. 2, para. 3; Diefenthal v. Actien-Gesellschaft, p. 1, para. 2; The Bold Buccleugh, p. 1, para. 4; The Cerro Gordo, p. 3, para. 2; The China, p. 1, para. 4 and para. 6; The Gustaf, p. 1, para. 3; The John G. Stevens, p. 5, para. 2; Southern Pacific v. Jensen, p. 9, para. 4.

PART I

The Jurisdiction of Admiralty Courts

Chapter I

Admiralty Jurisdiction in General

The Constitution of the United States, 1789.

Article III, sections 1 and 2.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

The Judiciary Act of the United States, 1789.

An Act to establish the Judicial Courts of the United States,
September 24, 1789, chapter 20, section 9.

1 Statutes at Large 73, 76.

Sec. 9. And be it further enacted, That the district courts shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. . . . And the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

Glass, et al. Appellants, v. The Sloop Betsey, et al.

Supreme Court of the United States, 1794.

3 Dallas 6.

Captain Pierre Arcade Johannene, the commander of a French privateer, called the Citizen Genet, having captured as prize, on the high seas, the sloop Betsey, sent the vessel into Baltimore; but upon her arrival there, the owners of the sloop and her cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned, jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed; the Circuit Court affirmed the decree; and, thereupon, the present appeal was instituted.

The general question was-- Whether under the circumstances of this case, an American Court of Admiralty, has jurisdiction to entertain the complaint, or libel, of the owners, and to decree restitution of the property? It was argued by E. Tilghman and Lewis, for the appellants; and by Winchester (of Maryland) and Du Ponceau, for the appellee.

For the Appellants, the case was briefly opened, upon the following principles. The question is of great importance; and extends to the whole judicial authority of the United States; for, if the admiralty has no jurisdiction, there can be no jurisdiction in any common law court. . . . There can be no doubt that this is a civil cause of admiralty and maritime jurisdiction, and so within the very terms of the judicial act. Restitution, or no restitution, is the leading point; that, necessarily, indeed, involves the point of prize, or no prize, as a defence for capturing; but if the admiralty is once fairly possessed of a cause, it has a right to try every incidental question. That the vessel is a legal prize, may be a good plea to the suit; but it is not a good plea to the jurisdiction of the court; and the captor by bringing his prize into an American port, has himself submitted to the American jurisdiction, which is in this instance to be exercised by the Judicial, not the Executive department. Const. U. S. art. 3. s. 1. Jud. Act. s. 9. Doug. 580, 84, 5. 592. 4. Carth. 474. 1 Sid. 320. 3 T. Rep. 344. 4 T. Rep. 394, 5. Skyn. 59. T. Ray. 473. Carth. 32. 6 Vin. Abr. 513. 3 Bl. Com. 108. 1 Vent. 173. 2 Saund. 259. 2 Keeb. 829. Lev. 25. Sid. 320. 4 Inst. 152. 154. 2 Bulst. 27, 8, 9. 2 Vern. 592. 3 Bl. C. 108. 2 L. Jenk. 755, 727, 733, 751, 754, 755, 780.

For the Appellees, the captors . . .

I. The District Court has no jurisdiction by the Constitution and laws of the United States (which form the only possible

source of Federal jurisdiction) for, although it is admitted, that by the 1st and 2d sections of the 3d article of the Constitution, and the Judicial act, the jurisdiction of the District Court extends to all civil causes of admiralty and maritime jurisdiction; yet, it is denied, that prize is a civil cause of that description; nor can the expression vest a power in the District Court to decide the legality of a prize, even by a citizen of the United States. A citizen, indeed, can only make a prize when the United States are at war with some foreign power; but being at peace with all the world, no such question can now be agitated; and, of course, no jurisdiction, in such a case, can exist in any of its courts. By comparing the act of Congress with the Constitution, it is obvious, that the former does not vest in the District Court, the same, or so extensive, a judicial power, as the latter would warrant. The Constitution embraces admiralty cases of whatever kind,-- whether civil, or criminal, done in time of peace, or in time of war; but the act of Congress limits the power of the District Court to civil causes of admiralty and maritime jurisdiction; and the court can have no other, or greater power, than the act has given. Civil causes cannot possibly include captures, or the legality of a prize which can only be made in time of war. The words are used to denote that the causes are not to be foreign causes, or arising from, and determinable by, the jus belli; but are such as relate to the community, arising in the time of peace, and are determinable by the civil or municipal law; whereas prize is not a civil marine cause; nor is it a subject of civil jurisdiction. Doug. 2. Ruth. Inst. 595. The jurisdiction of the admiralty courts of England, and of the United States, arises from the same words; but it is manifest, that the latter has no other jurisdiction by law, than that which has been exercised by the Instance court in England, which is widely different from the prize court, though the powers are usually exercised by the same person. The prize court can only have continuance during war, and derives its powers from the warrant which calls it into activity. Doug. 613. 2 Woodes. 452. Collect. Juris. 72. The Instance court derives its jurisdiction from a commission, enumerating particularly every object of judicial cognizance; but not a word of prize; any more than is contained in the act of Congress, when enumerating the objects of judicial cognizance in the district court. The manner of proceeding in these courts is totally different. The question of prize, or no prize, is the boundary line, and not the locality; and the nature of that question not only excludes the Instance, but the common law and all other courts; so that whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court. Besides, Congress have not yet declared the rules for regulating captures on land, or water; (Const. art. 1. sec. 8.) and if the district court is now a court of prize, it is a court without rules, to determine what is,

or what is not, lawful prize; for, the rules of an Instance court will not apply. If, upon the whole, the district court has no jurisdiction, under the act of Congress, of a case of prize by a citizen of the United States, it cannot have jurisdiction of a prize by a citizen of France, which is the question raised by the libel. . . .

For the Appellants, in reply. . . .

II. It is admitted that the Constitution gives to Congress, the power of vesting a prize jurisdiction in the Federal Courts; but, it is urged, that this power has not been exercised, because "all civil causes of admiralty and maritime jurisdiction," which are the terms of the investment, do not include prize causes. In examining the judicial act, however, to discover the intention of the legislature, it is plain that civil is used, upon this occasion, in contra-distinction to criminal. In other parts of the act, the word "civil" is dropped; (sec. 12. 13. 19. 21.) and in the 30th section a provision is made expressly for a case of capture. The truth is, Admiralty is the genus, instance and prize courts are the species, comprehended in the grant of admiralty jurisdiction. Doug. 580. 579. 582. 583. 594. 1 Sid. 367. 3 T. Rep. 323. 1 Dall. Rep. 105. 6. Lord Mansfield does, indeed, say, that prize is not a civil and maritime cause, Doug. 592; but he, also says, that, it is a cause of admiralty jurisdiction. It is urged, that prizes can only be made in time of war; but it is sufficient to observe, in answer, that, however the abstract proposition may be, it is equally clear, that prize courts may proceed in time of peace, for what was done in time of war. Doug. 583. Carth. 474. 4 Inst. 154. Buls. 13. 1 Lev. 243. Hume's Hist. of Eng. vol. 7. p. 431. 2 Saund. 259. 2 Lev. 25. . . .

By the Court: The Judges being decidedly of opinion, that every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court, and that the plea of the aforesaid Appellee, Pierre Arcade Johannene, to the jurisdiction of the District Court of Maryland, is insufficient: Therefore it is considered by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said District Court of Maryland, founded thereon, be, and the same is hereby revoked, reversed and annulled.

And the said Supreme Court being further clearly of opinion, that the District Court of Maryland aforesaid, has jurisdiction competent to enquire, and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part (that is whether such restitution can be made consistently with the laws of nations and the

treaties and laws of the United States) Therefore it is ordered and adjudged that the said District Court of Maryland do proceed to determine upon the libel of the said Alexander S. Glass, and others, agreeably to law and right, the said plea to the jurisdiction of the said court, notwithstanding. . . .

It is further ordered by the said Supreme Court, that this cause be, and it is hereby, remanded to the District Court, for the Maryland District, for a final decision, and that the several parties to the same do each pay their own costs.

The United States v. La Vengeance.

Supreme Court of the United States, 1796.

1 Curtis' Decisions 230.

Error to the circuit court for the district of New York. The district attorney filed an ex officio information in the district court against the French privateer La Vengeance, alleging that certain arms and ammunition were exported in that schooner, contrary to the act of May 22, 1794, (1 U. S. Stat. at Large, 369.) The owner of the schooner filed a claim and answer, denying the exportation of arms, and as to the gunpowder, alleging it to have been part of the supplies of the Semillante, a frigate belonging to the republic of France, and to have been taken from the frigate, and put on board the schooner, by order of the proper officer of the republic. The district judge decreed a forfeiture, but on appeal this decree was reversed by the circuit court, sitting without a jury.

The only questions made by the attorney-general on this writ of error were, whether this was a civil cause, and a cause of admiralty and maritime jurisdiction.

The chief justice informed the opposite counsel, (Du Ponceau,) that as the court did not feel any reason to change the opinion, which they had formed upon opening the cause, they would dispense with any further argument; and on the 11th of August, he pronounced the following judgment.

By the Court. We are perfectly satisfied upon the two points that have been agitated in this cause. In the first place, we think, that it is a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is, simply, the offence; and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have commenced at Sandy Hook; which, certainly, must have been upon the water. In the next place, we are unanimously of opinion, that it is a civil cause; it is a process of the nature of a libel in rem; and does not, in any degree, touch the person of the offender.

In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction. Therefore,

Let the decree of the circuit court be affirmed, with costs.

But on opening the court the next day, the chief justice directed the words "with costs" to be struck out of the entry, as there appeared to have been some cause for the prosecution. He observed, however, that in doing this, the court did not mean to be understood, as at all deciding the question, whether, in any case, they could award costs against the United States; but left it entirely open for future discussion,

The United States v. James M'Gill.

Circuit Court of the United States, Pennsylvania
District, 1806.

4 Dallas 426.

This was an indictment for the murder of Richard Budden, containing three counts. 1st. Charging the murder to have been committed on the high seas. 2d. Charging it to have been committed in the haven of Cape Francois. 3d. Charging the mortal stroke to have been given on the high seas, and the death to have happened, on shore, at Cape Francois.

The indictment was founded on the 8th section of the penal law (1 vol. 102.) which provides "that if any person, or persons, shall commit upon the high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state, murder, &c. every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death."

Upon the evidence it appeared, that the prisoner was mate of the brig Rover, of which Richard Budden, the deceased, was master; that, on the 3d of May 1806, while the brig lay in the harbour of Cape Francois, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning; and that he died the day subsequent to that, on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (Ingersoll and Joseph Reed) objected, in point of law, that the death, as well as the mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this Court, under the terms of the act of Congress. These positions were elaborately argued; and the following authorities were cited in support of them. 1 Hale, 425, 6. 4 Co. 42. 6. 2 Hale, 188. 3 Hawk. 188. 333. Plowd. 1 Hale, 427. Leach C. L. 723. 4 Bl. C. 303. 2 Co. Rep. 93. 2 Inst. 1 Hawk. 187. East's C. L. 365. 1 Leon. 270. Cro. E. 196. Leach's C. L. 432. . . .

[The argument of the district attorney is omitted.]

Peters, Justice. It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that,

at all events, it is not a case within the jurisdiction of this Court. The Court can only take cognizance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas to give jurisdiction; not one part on the high seas, and another part in a foreign country.

Washington, Justice. The point, principally, urged by the prisoner's counsel, is so clear, that it can receive little elucidation from argument. The offence, of which we have cognizance, is murder committed on the high seas. Now, murder is a technical term, of known and settled meaning; and, when used by the legislature, it imports the same, as if they had said, that the Court shall have jurisdiction, in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case, remains unprovided for, by the laws of the United States. The judicial act gives jurisdiction to the Circuit Court, of "all crimes and offences, cognizable under the authority of the United States." 1 vol. 55. s. 11. There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States, which have not been specially defined by law; for, I have often decided, that the federal Courts have a common law jurisdiction in criminal cases; and in order to ascertain the authority of the United States, independent of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction". But still the question recurs, is this case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice we derive our systems of jurisprudence, and, generally speaking, obtain the best glossary) but no case, no authority, has been produced to show, that in England such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor, am I disposed to consider the doctrine of the civil law, which has been mentioned, as furnishing a guide, to escape from the silence of our own code, as well as of the English code, upon the subject.

Upon the whole, therefore, I am of opinion, that the present is a case omitted in the law; and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case.

It is true, that it would be inconsistent with common law notions to call it murder; but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony.

Upon this charge, the jury immediately acquitted the prisoner.

The United States v. Coolidge, et. al.

Supreme Court of the United States, 1816.

1 Wheaton 415.

This was an indictment in the circuit court for the district of Massachusetts, against the defendants, for forcibly rescuing a prize, which had been captured and taken possession of by two American privateers. The captured vessel was on her way, under the direction of a prize master and crew, to the port of Salem for adjudication. The indictment laid the offence as committed upon the high seas. The question made was, whether the circuit court has jurisdiction over common law offences against the United States? on which the judges of that court were divided in opinion.

The Attorney-General stated that he had given to this case an anxious attention; as much so, he hoped, as his public duty, under whatever view of it, rendered necessary. That he had also examined the opinion of the court, delivered at February term, 1813, in the case of the United States v. Hudson and Goodwin. That considering the point as decided in that case whether with or without argument, on the part of those who had preceded him as the representative of the government in this court, he desired respectfully to state, without saying more, that it was not his intention to argue it now.

Story, J. I do not take the question to be settled by that case.

Johnson, J. I consider it to be settled by the authority of that case.

Washington, J. Whenever counsel can be found ready to argue it, I shall divest myself of all prejudice arising from that case.

Livingston, J. I am disposed to hear an argument on the point. This case was brought up for that purpose, but until the question is re-argued, the case of the United States v. Hudson and Goodwin must be taken as law.

Johnson, J. delivered the opinion of the court.

Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of the United States v. Hudson and Goodwin, or draw it into doubt. They will, therefore, certify an opinion to the circuit court in conformity with that decision.

Certificate for the defendant.

The United States v. George Wilson.

Circuit Court of the United States, Southern District of
New York, 1856.

3 Blatchford 435.

This was an indictment for a capital offence, charging that the prisoner, who was a colored man, being a mariner, belonging to the schooner Eudora Imogene, which vessel was not owned in whole or in part by him, and was the property of Asa R. Shaifer and others, citizens of the United States, did, on the 23d of November, 1855, on the high seas, and within the jurisdiction of this Court, feloniously, wilfully, and corruptly destroy the said vessel, (specifying the means and manner by which the act was committed). The indictment varied the statement of the crime, in different counts, but the charge was substantially the same in all.

The prisoner demurred to the indictment. . . .

Betts, J. The indictment in this case is founded on the Act of Congress, approved March 26th, 1804, (2 U.S. Stat. at Large, 290), entitled "An Act in addition to the Act entitled 'An act for the punishment of certain crimes against the United States,'" by the 1st section of which it is enacted, that any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.

The fact charged against the prisoner is admitted by his demurrer to the indictment; and, it being conceded, on the part of the United States, that the vessel was destroyed in the East River or Western extremity of Long Island Sound, at a point between City Island and Hart Island, within the territorial limits of the town of Pelham, in the county of Westchester and State of New York, and accordingly within the jurisdiction of that State, the question raised by the demurrer is, whether the place where the act was done is within the criminal jurisdiction of the Federal Courts. We assume it as a notorious geographical fact, that the breadth of water at that place, from Long Island on the South to the main land on the North shore, is not beyond the reach of ordinary eyesight, and does not exceed two miles. That point was not in controversy on the argument, and therefore we have not called for specific evidence to fix the distance.

The Constitution of the United States declares, (Art. 3, § 2), that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and it is now

indisputable that, by force of the Constitutional provision, the civil jurisdiction of the Courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea and harbors along the sea-coast of the country, and in navigable rivers. (The *Thomas Jefferson*, 10 Wheat., 428; *The Steamboat Orleans v. Phoebus*, 11 Peters, 175; *The United States v. Coombs*, 12 Peters, 72; *Waring v. Clarke*, 5 How., 441; *The N. J. Steam Nav. Co. v. The Merchants' Bank*, 6 How., 344). But it is a fundamental doctrine, in respect to the Federal Courts of inferior jurisdiction, that they cannot take cognizance of criminal offences of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the Constitution over crimes and misdemeanors, there must be a designation, by positive law, both of the offence and of the tribunal which shall take cognizance of it. (The *United States v. Hudson*, 7 Cranch, 32; *Ex parte Bollman*, 4 Cranch, 75; *The United States v. Collidge*, 1 Wheat., 415; *Wharton's Cr. Law*, 76 to 80). Congress has, by the statute referred to, defined the crime of destroying a vessel. The act must be done wilfully and feloniously, by a person not an owner, and on the high seas. The place where the offence is committed becomes, thus, an essential element in the description of the crime. The mere fact that the accused wilfully destroyed the vessel, being upon waters within the jurisdiction of the United States, does not subject him to prosecution and punishment under this act, unless the vessel was at the time on the high seas.

It is no doubt within the competency of Congress to bring all waters subject to Federal jurisdiction within the scope of its criminal jurisprudence. This is manifestly the doctrine declared by the Supreme Court in the cases of *The United States v. Bevans*, (3 Wheat., 336), and *The United States v. Wiltberger*, 5 Wheat., 76. But the power is regarded as dormant unless exercised by direct enactments of law. It is not enough that a felony of the highest enormity is charged in the indictment, or that the laws of the United States denounce it as a capital crime, and subject it to trial and judgment in the national Courts; but it must further be manifest that the place where the transaction occurred is designated by legislative enactment as one over which this authority may be exercised by the Court. Thus, any person committing murder on board an American vessel in bays, harbors, basins, or rivers, not within the jurisdiction of any State of the Union, is triable in the Courts of the United States, and punishable therefor, the same as if the crime were committed upon the high seas. (Act of April 30th, 1790, § 8, 1 U.S. Stat. at Large, 113). But he cannot be punished for manslaughter committed elsewhere than upon the high seas, because the 12th section of the Act of April 30th, 1790, extends only to that offence when committed in that locality. (*The United States v. Wiltberger*, 5 Wheat., 76). Place is made, by the statute, and essential ingredient in the offence; and, if the locus in quo specified in the indictment, is not, in a legal sense, the high

seas, this Court has no jurisdiction over the charge. (The United States v. Furlong, 5 Wheat., 184).

There is less precision in the use of the term high seas in reference to the jurisdiction of maritime courts in civil actions, than in cases of a criminal character, because, in the former, it is immaterial to the authority of the Court whether the transaction be on the open ocean, or on inland waters subject to the ebb and flow of the tide. In those cases, it might be immaterial whether tide waters where or were not universally denominated high seas, neither the rights of the parties nor the power of the Court being affected by the appellation. In the construction of criminal law, greater exactness and certainty are demanded, and words must be interpreted so as to carry out clearly the intention of the law-maker.

It appears to us very manifest, that Congress, prior and subsequently to the enactment under consideration, has, in its criminal legislation, sedulously evinced the intention to use the term high seas in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens and basins. Thus, in the 8th section of the Act of April 30th, 1790, and in the 4th, 5th, 6th, 7th, 8th, and 11th sections of the Act of March 3d, 1825, (4 U.S. Stat. at Large, 115, 116, 117), high seas are discriminated from rivers, havens, basins and bays, which are not within any State in the Union, all the enactments importing unequivocally the meaning of Congress, that the term high seas alone embraces no waters that are land-locked in their position, and are subject to territorial jurisdiction.

The adjudications already cited from the Supreme Court affirm that to be the legal import and effect of the language; and the more labored and erudite elucidations made by inferior Courts show that construction to be in consonance with the principles of general jurisprudence. (United States v. Grush, 5 Mason, 290; The Schooner Harriot, 1 Story, 251; Thomas v. Lane, 2 Sumner, 1). In United States v. Robinson, (4 Mason, 307), Judge Story applied the doctrine to the Act now under consideration, and held that a bay in the Island of Bermuda, where an American vessel had been feloniously burned and destroyed, was not on the high seas, within the purview of the statute in question.

We are of opinion, upon a careful consideration of the subject, that the offence charged in this indictment is not, within the purview of the Act of March 26th, 1804, cognizable by this Court, and that, accordingly, judgment must be rendered for the prisoner. The prisoner will be remitted by the Marshal to the custody of the proper State authority by which he was detained when he was arrested on this indictment.

The Moses Taylor.

Supreme Court of the United States, 1866.

4 Wallace 411.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Field delivered the opinion of the court.

This case arises upon certain provisions of a statute of California regulating proceedings in civil cases in the courts of that State. Laws of California of 1851, p. 51. The sixth chapter of the statute relates to actions against steamers, vessels, and boats, and provides that they shall be liable--1st, for services rendered on board of them, at the request of, or on contract with, their respective owners, agents, masters, or consignees; 2d, for supplies furnished for their use upon the like request; 3d, for materials furnished in their construction, repair, or equipment; 4th, for their wharfage and anchorage within the State; 5th, for non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, agents, masters, or consignees; 6th, for injuries committed by them to persons or property; and declares that these several causes of action shall constitute liens upon the steamers, vessels, and boats, for one year after the causes of action shall have accrued, and have priority in the order enumerated, and preference over all other demands. The statute also provides that actions for demands arising upon any of these grounds may be brought directly against the steamers, vessels, or boats by name; that process may be served on the master, mate, or any person having charge of the same; that they may be attached as security for the satisfaction of any judgment which may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, they may be sold, with their tackle, apparel, and furniture, or such interest therein as may be necessary, and the proceeds applied to the payment of the judgment.

These provisions, with the exception of the clause designating the order of priority in the liens, and their preference over other demands, were enacted in 1851; that clause was inserted by an amendment in 1860.

In 1863, the steamship Moses Taylor, a vessel of over one thousand tons burden, was owned by Marshall O. Roberts, of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carrying passengers and freight between Panama and San Francisco. In October of that year the plaintiff in the court below, the defendant in error in this court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport

him from New York to San Francisco as a steerage passenger, with reasonable despatch, and to furnish him with proper and necessary food, water, and berths, or other conveniences and lodging, on the voyage. The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by the Moses Taylor, but the case was tried upon the supposition that such was the fact, and we shall, therefore, treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco. For alleged breach of this contract the present action was brought, under the statute mentioned, in a court of a justice of the peace held within the city of San Francisco. Courts held by justices of the peace were at that time by another statute invested with jurisdiction of these cases, where the amount claimed did not exceed two hundred dollars, except where the action was brought to recover seamen's wages for a voyage performed, in whole or in part, without the waters of the State.

The agent for the Moses Taylor appeared to the action, and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, and also traversed the several matters alleged as breaches of the contract.

The justice of the peace overruled the objection to his jurisdiction, and gave judgment for the amount claimed. On appeal to the County Court the action was tried de novo upon the same pleadings, but in all respects as if originally commenced in that court. The want of jurisdiction there, and the exclusive cognizance of such causes of action by the courts of admiralty were again urged and were again over-ruled; and a similar judgment to that of the justice of the peace was rendered. The amount of the judgment was too small to enable the owner of the steamer to take the case by appeal to the Supreme Court of the State. That court has no appellate jurisdiction in cases where the demand in dispute, exclusive of interest, is under three hundred dollars, unless it involve the legality of a tax, impost, assessment, toll, or municipal fine. The decision of the County Court was the decision of the highest court in the State which had jurisdiction of the matter in controversy. From that court, therefore, the case is brought here by writ of error.

The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and contract for the transportation of merchandise. The same liability attaches upon their execution both to the owner and the ship. The passage-money in the one case is equivalent to the freight-money in the

other. A breach of either contract is the appropriate subject of admiralty jurisdiction.

The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The statute of California, to the extent in which it authorizes actions in rem against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that State has decided in several cases. In *Averill v. The Steamer Hartford*, 2 California, 308, the court thus held, and added that "the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act."

This jurisdiction of the courts of California was asserted and is maintained upon the assumed ground that the cognizance by the Federal courts "of civil causes of admiralty and maritime jurisdiction" is not exclusive, as declared by the ninth section of the Judiciary Act of 1789.

The question presented for our determination is, therefore, whether such cognizance by the Federal courts is exclusive, and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the ninth section of the act of Congress.

The Constitution declares that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects."

How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 334, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited, between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to all cases; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts,--a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a

Federal or a State court, at the option of the plaintiff; and if brought in the State court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts.

Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment.

By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts.

The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. "The admiralty jurisdiction," says Mr. Justice Story, "naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home. Commentaries, [1672.

The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common-law remedy, where the common law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.

It follows, from the views expressed, that the judgment of the County Court must be reversed, and the cause remanded, with directions to dismiss the action for want of jurisdiction.

And it is so ordered.

Knapp, Stout & Co. v. McCaffrey.

Supreme Court of the United States, 1900.

177 United States 638.

This was a bill in equity filed in the Circuit Court for the county of Mercer, Illinois, by the defendant in error, John McCaffrey, against the Knapp, Stout & Co. Company, (hereinafter called the Knapp Company,) and the Schulenburg & Boeckler Lumber Company, (hereinafter called the Schulenburg Company,) and its assignees, to enforce a lien for towage upon a half raft of lumber then lying at Boston Bay, in Mercer County.

The suit arose from a contract made April 6, 1893, by McCaffrey with the Schulenburg Company, in which, after reciting that McCaffrey had purchased of this company three steam tow boats for the sum of \$17,500, it was agreed that McCaffrey was to tow all the rafted lumber such company would furnish him at or below their mill at Stillwater, Minnesota, to St. Louis and deliver the same there to the company in quantities not exceeding one half a raft at a time, for which service he was to be paid \$1.12 1/2 per thousand feet, board measure, for the lumber contained in the raft. The other provisions of the contract, of which there were many, were not material to the present controversy. After towing a number of rafts for the company, the charges for which remained unpaid, one of McCaffrey's steamers, known as the Robert Dodds, left Stillwater, October 13, 1894, with raft No. 10 of that year. The river being low and navigation difficult, McCaffrey was instructed to divide the raft, to bring one half to St. Louis, and to lay up the other half in some safe harbor. In compliance with these instructions McCaffrey divided the raft on October 20 at Boston Bay harbor in Mercer County, leaving one half there, while the other half was towed to St. Louis and delivered to the lumber company on November 2. The company paid the clerk of the boat \$1250 without directions as to its application, and McCaffrey applied it on the amount due him for the towage of other rafts. The steamer returned to Boston Bay the morning of November 4, and laid up outside the raft for the winter.

On the next day, November 5, the Schulenburg Company sold the half raft in Boston Bay to the Knapp Company for \$15,000, part in cash and the remainder in a note due in four months, which was paid at maturity. A bill of sale was given for the lumber, and a letter written to the watchman in charge of the raft informing him of the sale. On November 9 the Schulenburg Company made a voluntary assignment in St. Louis for the benefit of creditors. McCaffrey, hearing of the assignment, offered both companies to tow the half raft to St. Louis under his contract, but the Knapp Company informed him that they did not wish him to do so, saying that they did their own towing; whereupon McCaffrey, claiming to be still in possession of the half raft and believing that the

company was about to take it from him by force, filed this bill to foreclose his lien for towage. The Knapp Company gave a bond for the amount of the claim and took the raft away.

The case came on for hearing in the Circuit Court upon pleadings and proofs, and resulted in a decree dismissing the bill without prejudice. McCaffrey appealed to the appellate court, which reversed the decree of the Circuit Court, and remanded the cause with directions to enter a decree for the sum of \$3643.17, with interest thereon. The Knapp Company appealed to the Supreme Court of the State, which affirmed the judgment of the appellate court, (178 Ill. 107); whereupon defendant sued out a writ of error from this court. . . .

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

Defendants set up in their answers and insisted, both before the appellate court and the Supreme Court of Illinois, that, if plaintiff had any lien upon the raft at all for his towage services, it was a maritime lien, enforceable only in the District Court of the United States as a court of admiralty. This is the only Federal question presented in the case.

By article three, section two, of the Constitution, the judicial power of the general government is declared to extend to "all cases of maritime and admiralty jurisdiction;" and, by section nine of the original judiciary act of September 24, 1789, c. 20, 1 Stat. 73, 76, it was enacted "that the District Courts shall have, exclusively of the courts of the several States, . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This language is substantially repeated in subdivision eight of Rev. Stat. §563, wherein it is expressly stated that "such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Courts."

The scope of the admiralty jurisdiction under these clauses was considered in a number of cases, arising not long after the District Courts were established, notably so in that of *De Lovio v. Boit*, 2 Gall. 398, wherein Mr. Justice Story brought his great learning to bear upon an exhaustive examination of all the prior authorities upon the subject both in England and in America.

But the exclusive character of that jurisdiction was never called to the attention of this court until 1866, when the States had begun to enact statutes giving liens upon vessels for causes of action cognizable in admiralty, and authorizing suits in rem in the state courts for their enforcement. The validity of these laws had been expressly adjudicated in a number of cases in Ohio,

Alabama and California. The earliest case arising in this court was that of *The Moses Taylor*, 4 Wall. 411, in which was considered a statute of California creating a lien for the breach of any contract for the transportation of persons or property, and also providing that actions for such demands might be brought directly against the vessel. The act further provided that the complaint should designate the vessel by name; that the summons should be served upon the master, or person in charge, the vessel attached, and, in case of judgment recovered by the plaintiff, sold by the sheriff. An action having been brought by a passenger before a justice of the peace of the city of San Francisco for failure to furnish him with proper and necessary food, water and berths, the defence was interposed that the cause of action was one of which the courts of admiralty had exclusive jurisdiction. The case finally reached this court, where the defence was sustained, the court holding that the contract for the transportation of the plaintiff was a maritime contract; that the action against the steamer by name, authorized by the statute of California, was a proceeding in the nature and with the incidents of a suit in admiralty. Upon this point Mr. Justice Field observed: "The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold." The court also held that the statute of California to the extent to which it authorized actions in rem against vessels for causes of action cognizable in admiralty, invested her courts with admiralty jurisdiction, and to that extent was void.

At the same term arose the case of *The Hine v. Trevor*, 4 Wall. 555, in which a statute of Iowa giving a lien for injuries to persons or property, and providing a remedy in rem against the vessel, was held to be obnoxious to the exclusive jurisdiction of the Federal courts. Speaking of the common law remedy, saved by the statute, Mr. Justice Miller observed: "But the remedy pursued in the Iowa courts in the case before us, is in no sense a common law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in rem. The statute provides that the vessel may be sued and made defendant without proceeding against the owners or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the

general character of the steamboat laws of the Western States." The same principle was applied in the case of *The Belfast*, 7 Wall. 624, to a statute of Alabama under which contracts of affreightment were authorized to be enforced in rem in the state courts by proceedings the same in form as those used in the courts of admiralty. This was also held to be unconstitutional.

The principle of these cases was restated in *The Lottawanna*, 21 Wall. 558, 579, although the question settled by that case was that materialmen furnishing repairs and supplies to a vessel in her home port do not acquire thereby a lien upon the vessel by the general maritime law. To the same effect is *The J. E. Rumbell*, 148 U.S. 1, in which a lien by a state law for such repairs and supplies was given precedence of a prior mortgage. Finally, in the case of *The Glide*, 167 U.S. 606, it was held that the enforcement of such a lien upon a vessel, created by a statute of Massachusetts, for repairs and supplies in her home port, for which a remedy in personam may be had in admiralty, was exclusively within the admiralty jurisdiction of the courts of the United States, and that the statute of Massachusetts to the extent that it provided for a proceeding in rem, and for a sale of the vessel, was unconstitutional and void. See also *Moran v. Sturges*, 154 U.S. 256.

The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, *The Jefferson*, (*People's Ferry Co. v. Beers*,) 20 How. 393; *The Capitol*, (*Roach v. Chapman*,) 22 How. 129, we held in *Edwards v. Elliott*, 21 Wall. 532, that, in respect to such contracts, it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement in rem. The same principle was applied in *Johnson v. Chicago &c. Elevator Co.*, 119 U.S. 388, to a statute of Illinois giving a lien upon a vessel for damage done to a building abutting on the water, upon the ground that the court had previously held that there was no jurisdiction in admiralty for damage done by a ship to a structure affixed to the land. *The Plymouth*, 3 Wall. 20; *Ex parte Phoenix Ins. Co.*, 118 U.S. 610. There was really another sound reason for the decision in the fact that the suit was in personam, with an attachment given upon the property of the defendant, which, as we shall see hereafter, is quite a different case from a proceeding in rem.

To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit in rem within the cases above cited, and not within the exception of a common law remedy, which section 563 was never designed to forestall.

The first of these conditions may be readily admitted. That a contract to tow another vessel is a maritime contract is too clear for argument, and there is no distinction in principle between a vessel and a raft. Whether the performance of such a contract gives rise to a lien upon the raft for the towage bill admits of more doubt; indeed, the authorities, as to how far a raft is within the jurisdiction of admiralty, are in hopeless confusion, but for the purposes of this case we may admit that such lien exists. But, if existing, it would not oust or supplant the common law lien dependent upon possession.

The real question is whether the proceeding taken is within the exception "of saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." It was certainly not a common law action, but a suit in equity. But it will be noticed that the reservation is not of an action at common law, but of a common law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as "the means employed to enforce a right, or redress an injury." While, as stated by him, remedies for non-fulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent--a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action.

Some of the cases already cited recognize the distinction between a common law action and a common law remedy. Thus in *The Moses Taylor*, 4 Wall. 411, 431, it is said of the saving clause of the judiciary act: "It is not a remedy in the common law courts which is saved, but a common law remedy." To same effect is *Moran v. Sturges*, 154 U.S. 256, 276.

In the case under consideration the remedy chosen by the

plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug. But whatever might be our own opinion upon the subject, the Supreme Court of Illinois, having held that under the laws of that State the plaintiff had a possessory lien upon this raft, that such lien extended to so much of the raft as was retained in his possession, for the entire bill, and that under the facts of this case plaintiff did have possession of the half raft until he surrendered it under order of the court for its release upon bond given, we should defer to the opinion of that court in these particulars, as they are local questions dependent upon the law of the particular State.

Whether a bill in equity will lie to enforce a possessory lien may admit of some doubt, and the authorities are by no means harmonious. That a person having a lien upon chattels has no right himself to sell such chattels in the discharge of his lien, is well settled. *Doane v. Russell*, 3 Gray, 382; *Jones v. Pearle*, 1 Strange, 557; *Lickbarrow v. Mason*, 6 East, 21; *Briggs v. Boston and Lowell Railroad*, 6 Allen, 245; *Indianapolis & St. Louis Railroad v. Herndon*, 81 Ill. 143; *Hunt v. Haskell*, 24 Me. 339; and in the case of the *Thames Iron Works & Co. v. Patent Derrick Co.*, 1 J. & H. 93, it was held by Vice Chancellor Wood that ship builders, having a lien upon the ship built by them according to the contract for the purchase money, could not enforce their lien by sale. But in some jurisdictions, and notably so in Illinois, it is held that liens for the enforcement of which there is no special statutory provision, are enforceable in equity. *Black v. Brennan*, 5 Dana, 310; *Charter v. Stevens*, 3 Denio, 33; *Dupuy v. Gibson*, 36 Ill. 197; *Cushman v. Hayes*, 46 Ill. 145; *Cairo & Vincennes Railroad v. Fackney*, 78 Ill. 116; *Barchard v. Kohn*, 157 Ill. 579. Such being the practice in Illinois, we recognize it as expressive of the local law. There were circumstances in this case which appealed with peculiar force to the discretion of a court of equity. The defendant disputed McCaffrey's lien and right of possession to the raft, and announced its intention of towing it to St. Louis itself. It was in a position where it might have been taken away by a superior force, unless the plaintiff incurred the expense of employing a gang of men to watch it. Under such circumstances it was not only natural but just that he should have applied to a court of equity for relief in the enforcement of his common law remedy.

We have held in several cases that analogous proceedings were

no infringement upon the exclusive admiralty jurisdiction of the Federal courts. Thus, in *Leon v. Galceran*, 11 Wall. 185, three sailors brought suits in a state court against the owner of a schooner to recover their wages, and had the schooner, which was subject to a lien or privilege in their favor, according to the laws of Louisiana, similar in some respects to the principles of the maritime law, sequestered by the sheriff of the parish. The writ was levied upon the schooner, which was afterwards released upon a forthcoming bond. This was held to be an ordinary suit in personam with an auxiliary attachment of the property of the defendant, and no infringement upon the admiralty jurisdiction. Said Mr. Justice Clifford: "They brought their suits in the state courts against the owner of the schooner, as they had a right to do, and, having obtained judgment against the defendant, they might levy their execution upon any property belonging to him, not exempted from taxes or execution, which was situated in that jurisdiction."

In *Steamboat Co v. Chase*, 16 Wall. 522, a steamboat owned by the company ran over a sail boat containing the plaintiff's intestate, and killed him. His administrator brought suit against the company in a state court of Rhode Island, under an act making common carriers responsible for deaths occasioned by their negligence, and providing that the damages be recovered in an action on the case. Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common law remedy. The contention was held to be unsound. So, also, in *Schoonmaker v. Gilmore*, 102 U.S. 118, it was held that courts of admiralty had no exclusive jurisdiction of suits in personam growing out of collisions.

In the case already cited of *Johnson v. Chicago &c. Elevator Co.*, 119 U.S. 388, a petition was filed by the elevator company against the owner of a tugboat for injuries done by the jib boom of a schooner in tow of the tug to the wall of plaintiff's warehouse. The petition prayed for a writ of attachment against the defendant, commanding the sheriff to attach the tug, summon the defendant to appear, and for a decree subjecting the tug to a lien for such damages. The statute under which the proceedings were instituted gave a lien for all damages arising from injuries done to persons or property by such water craft. It was held that the damage having been done upon the land, there was no jurisdiction in admiralty, and that the suit was in personam with an attachment as security, the attachment being based upon a lien given by the state statute. Said the court: "There being no lien on the tug by the maritime law for the injury on land inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce." It would seem that even if the suit had been in rem against the vessel, it would have been sustained,

as the injury was not one for which an action would have lain in admiralty.

In the case under consideration the suit was clearly one in personam to enforce a common law remedy. It was no more a suit in rem than the ordinary foreclosure of a mortgage. The bill prayed for process against the several defendants; that they be required to answer the bill; that plaintiff be decreed to have a first lien upon the raft for the amount due him; that the defendants be decreed to pay such amount; that in default of such payment the raft be sold to satisfy the same; and, that in case of such sale, the purchaser have an absolute title, free from all equity of redemption and all claims of the defendants, and that they be debarred, etc. This is the ordinary prayer of a foreclosure bill. The decree of the appellate court reversed that of the Circuit Court, and directed a recovery of a specified amount. It resembles a decree in rem only in the fact that the property covered by the lien was ordered to be sold. Such sale, however, would pass the property subject to prior liens, while a sale in rem in admiralty is a complete divestiture of such liens, and carries a free and unincumbered title to the property, the holders of such liens being remitted to the funds in the registry which are substituted for the vessel. *The Helena*, 4 Rob. Ad. 3.

The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be in rem against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (sec. 563) of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction.

The decree of the Supreme Court of Illinois is, therefore, . .

Affirmed.

James L. and Samuel L. Taylor, Administrators of Robert Taylor, Deceased, Plaintiffs in Error, v. Nathan T. Carryl, Who Survived William J. Ward.

Supreme Court of the United States, 1857.

20 Howard 583.

[The arguments of counsel are omitted. The facts are stated in the opinion.]

Mr. Justice Campbell delivered the opinion of the court.

This cause comes before this court by writ of error to the Supreme Court of Pennsylvania, under the twenty-fifth section of the judiciary act of the 24th September, 1789.

The defendants (Ward & Co.) instituted an action of replevin in the Supreme Court of Pennsylvania, for the barque Royal Saxon.

Upon the trial of the cause at nisi prius, it appeared that the barque arrived at the port of Philadelphia in October, 1847, on a trading voyage, and was the property of Robert McIntyre, of Londonderry, in Ireland. In November, 1847, she was seized by the sheriff of Philadelphia county, under a writ of foreign attachment that was issued against her owner and another, at the suit of McGee & Co., of New Orleans, from the Supreme Court; and at the same time her captain was summoned as a garnishee. On the 15th January, 1848, those creditors commenced proceedings in the Supreme Court to obtain an order of sale, because the barque was of a chargeable and perishable nature, suffering deterioration from exposure to the weather, and incurring expenses of wharfage, custody fees, &c, &c. This application was opposed by the captain of the barque, but was allowed by the court on the 29th of January, 1848. The vessel was duly sold by the sheriff under this order, the 9th February, 1848, to the plaintiffs in the replevin, Ward & Co.

On the 21st January, 1848, while the writs of attachment were operative, and a motion for the sale of the barque was pending in the Supreme Court, the seamen on board the barque filed their libel in the District Court of the United States for the eastern district of Pennsylvania, sitting in admiralty, for the balances of wages due to them respectively, up to that date, and prayed for the process of attachment against the barque, according to the practice of the court. This was issued, and, on the same day, the marshal returned on the writ, "Attached the barque Royal Saxon, and found a sheriff's officer on board, claiming to have her in custody." The captain appeared to this libel, and filed an answer admitting the demands of the seamen.

On the 25th January he exhibited a petition to the District Court, in which he represented the pendency of the suits in

attachment and in admiralty; that the barque was liable to him for advances; that she was subject to heavy charges, and could not be employed to carry freight; and therefore he, with the approbation of the British consul, which accompanied the petition, solicited an order of sale for the benefit of all persons interested. This order was granted by the District Court, after due inquiry, on the 9th February, 1848, and was executed the 15th of February, 1848, by the marshal of the court, at which time the defendant in the replevin was the purchaser, who took the possession of the vessel, and held her until retaken in this replevin suit of Ward & Co. Upon the trial of the replevin cause at nisi prius, the defendant solicited instructions to the jury, which were refused by the court, and the court instructed the jury unfavorably to his title. From the instructions asked, and the charge delivered, a selection is made, to exhibit the questions decided. The court was requested to charge--

3. "That when the lien of a mariner for wages is sought to be enforced in the admiralty by libel, and the marshal has attached the vessel under such proceedings, the vessel so attached is in the exclusive custody of the admiralty until the claims of the libellants have been adjudicated, or the vessel relieved by order of the court, on stipulation or otherwise; and such exclusive custody exists, notwithstanding a previous foreign attachment from a court of law served on the vessel by the sheriff."

5. "That a foreign attachment is not properly a proceeding in rem; but an attachment from the admiralty on a libel for mariners' wages is in rem; and the legal possession acquired by the sheriff, on service of the writ of foreign attachment, is ended, superseded, or suspended, by the service of such attachment from the admiralty."

8. "That when, on the 21st of January, 1848, the Royal Saxon was attached under the process issued on the libel for mariners' wages, she came by virtue of that attachment into the exclusive custody of the court of admiralty; and such exclusive legal custody continued from the 21st January, 1848, until the sale by the marshal, by order of that court, on the 15th February, 1848."

10. "That the legal possession of the vessel being exclusively in the admiralty court from the 21st January, 1848, till the sale made, by order of that court, on the 15th February, 1848, the sale by the sheriff on the 9th February, 1848, gave no title to the purchaser as against the sale by the marshal."

The court refused so to instruct the jury, but charged them: "That the court of admiralty could not proceed against the vessel while she remained in the custody of an independent and competent jurisdiction; that the presence of the marshal on the ship did not prove his custody, for the sheriff's officer was there before him;

that the marshal did not dispossess the sheriff, but prudently retired himself, and informed the court in his return that the vessel was in the custody of the sheriff; that if the sheriff first took possession of the vessel, and maintained it until she was sold to the plaintiffs, they had the better title; and that the fact of the continuing possession of the sheriff was for the jury." A verdict was returned in favor of the plaintiffs, upon which a judgment was rendered in the Supreme Court in their favor, confirming the opinion of the judge as expressed to the jury at nisi prius. . . .

This cause has been regarded in this court as one of importance. It has been argued three different times at the bar, and has received the careful consideration of the court. The deliberations of the court have resulted in the conviction that the question presented in the cause is not a new question, and is not determinable upon any novel principle, but that the question has come before this and other courts in other forms, and has received its solution by the application of a comprehensive principle which has recommended itself to the courts as just and equal, and as opposing no hindrance to an efficient administration of the judicial power.

In *Payne v. Drew*, 4 East., 523, Lord Ellenborough said: "It appears to me, therefore, not to be contradictory to any cases nor any principles of law, and to be mainly conducive to public convenience and to the prevention of fraud and vexatious delay in these matters, to hold that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed."

This rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain.

Those courts take efficient measures to maintain their control over property within their custody, and support their officers in defending it with firmness and constancy. The court of chancery does not allow the possession of its receiver, sequestrator, committee, or custodee, to be disturbed by a party, whether claiming by title paramount or under the right which they were appointed to protect, (*Evelyn v. Lewis*, 3 Hare, 472; 5 Madd., 406,) as their possession is the possession of the court. (*Noe v. Gibson*, 7 Paige, 713.) Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. (*Russell v. East Anglian R. Co.*, 3 McNaughton & Gordon, 104) The courts of law uphold the right of their officers to maintain actions to recover

property withdrawn from them, and for disturbance to them in the exercise of the duties of their office.

But it is in this court that the principle stated in *Payne v. Drew* has received its clearest illustration, and been employed most frequently, and with most benignant results. It forms a recognised portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations. The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government. The decision in the case of *Hagan v. Lucas*, 10 Pet., 400, is of this class. It was a case in which a sheriff had seized property under valid process from a State court, and had delivered it on bail to abide a trial of the right to the property, and its liability to the execution. The same property was then seized by the marshal, under process against the same defendant. This court, in their opinion, say: "Where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy by the order of the court. But the same rule does not govern when the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys collected under different executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff; a most injurious conflict of jurisdiction would be likely often to arise between the Federal and the State courts, if the final process of the one could be levied on property which had been taken on process of the other. The marshal or the sheriff, as the case may be, by a levy acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction." The principle contained in this extract from the opinion of the court was applied by this court to determine the conflicting pretensions of creditors by judgment in a court of the United States, and an administrator who has declared the insolvency of his estate, and was administering it under the orders of a probate court, (8 How. S. C. R., 107.) in a controversy between receivers and trustees holding under a court of chancery, and judgment creditors seeking their remedy by means of executory process, (14 How. S. C. R., 52, 368,) and to settle the priorities of

execution creditors of distinct courts. (Pulliam v. Osborn, 17 How., 471.). . .

[In an omitted part of the opinion, the court reviewed Harmar v. Dennie, 3 Pet. 292, and Peck v. Jenness, 7 How. S. C. 1. 612.]

It follows, by an inevitable induction from the cases of Harmar v. Dennie, 3 Pet., 299; Hagan v. Lucas, 10 Pet., 400; and Peck v. Jenness, 7 How., 612, that the custody acquired through the seizure or "annual occupation" of the Royal Saxon, under the attachment by the sheriff of Philadelphia county, could not legally be obstructed by the marshal, nor could he properly assert a concurrent right with him in the property, unless the court of admiralty holds some peculiar relation to the State courts or to the property attached, which authorized the action or right of its marshal. The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: "Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and marine torts,) there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation," continues the commentator, "would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction." (3 Story's Com., sec. 1666, note.)

In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution, and the titles to them, or contracts and torts relating to them, are cognizable in those courts.

It has not been made a question here that the Royal Saxon

could not be attached, or that the title could not be decided in replevin. But the District Court seems to have considered that a ship was a juridical person, having a status in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The District Court, in describing the source of its authority, says of the contract of bottomry, that "it is made with the thing, and not the owner," and that the contract of the mariners is similar; that the res "represents" in that court all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the res, and which might be seized by the sheriff, even though the res might be in the admiralty. This representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. "In all causes of action," says the judge of the admiralty of Great Britain, "which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship, where the owners were not themselves personally liable, or where the liability had not been given up." (The Druid, 1 Wm. Rob, 399.) And the opinion of this court in The Schooner Freeman v. Buckingham, 18 How., 183, was to the same effect.

In courts of common law, the forms of action limit a suit to the persons whose legal right has been affected, and those who have impaired or injured it. In chancery, the number of the parties is enlarged, and all are included who are interested in the object of the suit; and as the parties are generally known, they are made parties by name and by special notice.

In admiralty, all parties who have an interest in the subject of the suit - the res - may appear, and each may propound independently his interest. The seizure of the res, and the publication of the monition or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity. But the res is in no other sense than this the representative of the whole world. But it follows, that to give jurisdiction in rem, there must have been a valid seizure and an actual control of the ship by the marshal of the court; and the authorities are to this effect. (Jennings v. Curson, 4 Cr., 2; 2 Ware's Adm. R., 362.) In the present instance, the service was typical. There was no exclusive custody or control of the barque by the marshal, from the 21st of January, 1848, to the day of the sale; and when the order of sale was made in the District Court, she was in the actual and legal possession of the sheriff.

The case of the Oliver Jordan, 2 Curtis's R., 414, was one of a vessel attached by a sheriff in Maine, under process from the

Supreme Court. She was subsequently libelled in the District Court of the United States, upon the claim of a material man. The District Court sustained the jurisdiction of the court. But on appeal the exception to the jurisdiction was allowed, and the decree of the District Court reversed. Mr. Justice Curtis observed: "This vessel being in the custody of the law of the State, the marshal could not lawfully execute the warrant of arrest." In the case of the ship Robert Fulton, 1 Maine C. C. R., 620, the late Mr. Justice Thompson held that the warrant from the admiralty could not be lawfully executed under similar circumstances, and that the District Court could not proceed in rem. The same subject has been considered by State courts, and their authority is to the same effect. (Keating v. Spink, 3 Ohio R., N. S. 105; Carryl v. Taylor, 12 Harri. 264.)

Our conclusion is, that the District Court of Pennsylvania had no jurisdiction over the Royal Saxon when its order of sale was made, and that the sale by the marshal was inoperative.

The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them.

Our opinion is, that there is no error in so much of the record of the Supreme Court of Pennsylvania as is brought before this court by the writ of error, and the judgment of the court is consequently affirmed. . . .

[The dissenting opinion of Mr. Chief Justice Taney, in which Mr. Justice Wayne, Mr. Justice Grier, and Mr. Justice Clifford concurred, is omitted.]

Moran v. Sturges.

Supreme Court of the United States, 1894.

154 United States 256.

The Schuyler Steam Tow-Boat Company was a corporation organized under the laws of New York. On July 31, 1891, the trustees of the company filed a petition in the Supreme Court of the State of New York for the voluntary dissolution of the company. Thereupon the presiding judge, the attorney general of New York appearing and consenting thereto, signed an order to show cause on November 16, 1891, why the company should not be dissolved, and by the same order appointed Frank D. Sturges temporary receiver. It was further ordered "that all creditors of said corporation, be and they are hereby restrained and enjoined from bringing any actions against the said corporation for the recovery of a sum of money, and from taking any further proceedings in any action already commenced against the said corporation for such purpose." It was further ordered that before entering upon the duties of such receivership the said receiver should execute and acknowledge in due form of law a bond in the penal sum of \$50,000, payable to the State of New York, with sureties. This order was entered and the petition and accompanying papers filed in the forenoon of August 1, 1891. On the afternoon of August 1, 1891, which was Saturday, and on Monday, August 3, 1891, plaintiffs in error, Micheal Moran and other coowners of certain tugs, filed libels in admiralty in the District Court of the United States for the Eastern District of New York against certain steamboats, which were the property of the Schuyler Company. Process was issued under said libels to the United States marshal for that district, and on August 1 he seized and took into his possession the steamboats Niagra, Belle, and Syracuse, and affixed his notice of seizure thereto. On August 3 he seized and took into his custody the steamboats Vanderbilt, Jacob Leonard, and America, and affixed his notice of seizure thereto. On August 4, 1891, the receiver went on board the steamboats mentioned and ascertained that the marshal was in possession thereof by his keepers, and he also found affixed to the boats the marshal's notice of seizure. The receiver applied to the state court, August 26, and was duly authorized to contest said libels or to take such other proceedings therein as might be advisable. In September, 1891, the receiver made a motion in the United States District Court for an order directing the marshal to withdraw from the custody of the steamboats held under the admiralty process. The motion was denied on the ground that the question should be raised by answer to the libels, and leave was given to answer accordingly. The receiver availed himself of this permission and appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. He thereafter made an application to this court for a writ of prohibition to the District Court, which was denied November 13, 1891.

On November 10 the receiver verified a petition to the Supreme Court of New York in which he asked that plaintiffs in error herein might be enjoined from prosecuting the libels which they had filed in the District Court. Petitioner denied the jurisdiction of the District Court over the steamboats at the time the libels were filed, and asserted that they were at that time in the custody of the state court, and not liable or subject to the attachment made by the marshal. On December 7, 1891, the special term of the Supreme Court granted the prayer of the receiver and entered an order for an injunction, enjoining plaintiffs in error from taking any further proceedings upon their libels in the District Court of the United States.

Plaintiffs in error appealed from that order to the general term, by which it was affirmed, and they then carried the case to the Court of Appeals of New York, which affirmed the order of the general term, 136, N.Y. 169, whereupon this writ of error was sued out.

[The statement of the case is abridged. The arguments of counsel are omitted.]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court. . . .

The proceeding in which upon petition the injunction under consideration was granted, was a proceeding in insolvency in the state court to dissolve and wind up the Schuyler Company on its own application, under the statutes of New York in that behalf, and if it be conceded that that court could protect its exercise of jurisdiction over that subject-matter by enjoining creditors from prosecuting suits against the company on petition of the receiver in that suit and without the bringing of a new suit for that purpose, it does not follow that it had power to grant the injunction in question.

If the state court could not restrain proceedings in the District Court of the United States; if the jurisdiction of the state court over the libellants had not attached; or if the District Court obtained jurisdiction over the vessels in priority to the state court, then this judgment must be reversed.

It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been repeatedly affirmed by this court. Hagan v. Lucas, 10 Pet. 400; Taylor v. Carryl, 20 How. 583; Peck v. Jenness, 7 How. 612, 625; Freeman v. Howe, 24 How. 450; Ellis v. Davis, 109 U. S. 485, 498; Krippendorf v. Hyde, 110 U.S. 276; Covell v. Heyman, 111 U.S. 176; Borcer v. Chapman, 119 U.S. 587, 600. These cases were cited in Byers v. McAuley, 149 U. S. 608,

614; and the language of Mr. Justice Matthews in *Covell v. Heyman* was quoted to this effect: "The point of the decision in *Freeman v. Howe*, supra, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And vice versa, the same principle protects the possession of property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States." *Porter v. Sabin*, 149 U.S. 473.

In *Buck v. Colbath*, 3 Wall. 334, 341, 345, the same rule was referred to as settled, and Mr. Justice Miller said: "A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit. This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudication of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions." It was further said: "It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby

excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits." Hence it was held that an action of trespass might be sustained in the state court against the marshal for levying on property not belonging to the defendant in his writ, although his possession could not have been interfered with.

The reason was that his possession was the possession of the court, and, pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession, while the action of trespass constituted no such interference.

In this and like cases the question has arisen in respect of courts of concurrent jurisdiction as to parties and subject-matter.

But the question in the case at bar arises in respect of the state court and a District Court of the United States, whose cognizance of all civil causes of admiralty and maritime jurisdiction is, under the Constitution and by the ninth section of the Judiciary Act of 1789, (reproduced in Rev. Stat. § 711,) exclusive. *The Lexington*, New Jersey Nav. Co. v. Merchants' Bank, 6 How. 344, 390; *The Moses Taylor*, 4 Wall. 411; *The Hine*, 4 Wall. 555; *The Lottawanna*, 21 Wall. 558, 580; *Johnson v. Chicago &c. Elevator Co.*, 119 U.S. 388, 397; *The J.E. Rumbell*, 148 U.S. 1, 12. As said by Mr. Justice Miller: "It must be taken as the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law." 4 Wall. 568. The act saves to suitors in all cases "the right of a common law remedy, where the common law is competent to give it;" that is, not a remedy in the common law courts, but a common law remedy. Suitors are not compelled to seek such remedy, if it exist, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty, and the state courts have no authority to hear and determine a suit in rem to enforce a maritime lien. *The Belfast*, 7 Wall. 624, 644; *The Josephine*, 39 N.Y. 19, 27.

A statutory proceeding to wind up a corporation is not a common law remedy, and a maritime lien cannot be enforced by any proceeding at common law. These libellants were entitled to have their causes tried in the court of admiralty, according to the rules and practice of admiralty, and that right could not be taken away from them, nor would the decree or judgment of the state court be pleadable in bar to their libels. If, then, the receiver had first taken actual possession of these vessels and sold them, such

sale would not have cut off maritime liens and the right to have them enforced, and while it may be true that the state courts, exercising equitable jurisdiction, might undertake, in the distribution of property, to save the rights of holders of maritime liens, yet it is certain that those courts would have no power by a sale under statute to destroy their liens unless they had voluntarily submitted themselves to that jurisdiction.

In Taylor v. Carryl, 20 How. 583, 601, it was held that where a vessel had been seized under process of foreign attachment issuing from a state court in Pennsylvania, and a motion was pending in that court for an order of sale, process issued under a libel filed in the District Court of the United States for mariners' wages and supplies, could not divest the authorities of the State of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative. And this because while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. Mr. Chief Justice Taney and three of his associates dissented upon the ground that the question was not one "between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in the case of an admitted maritime lien." The Chief Justice stated that the following propositions were undisputed: "The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid. By the Constitution and laws of the United States, the only court that has jurisdiction over this lien, or is authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so. The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they may not be left penniless, and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman. A general creditor of the ship owner has no lien on the vessel. When she is attached (as in this case) by process from a court of common law, nothing is taken, or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship. And the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seaman's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the court of admiralty." Mr. Justice Campbell, who delivered the opinion of the majority, observed, at its close, that the view taken of the case rendered it

unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them;" and he cited the case of *The Oliver Jordan*, 2 Curtis, 414, in which Mr. Justice Curtis held that property in the custody of the law of a State, under an attachment, cannot be arrested by a warrant from a District Court, sitting in the admiralty, in a proceeding to enforce the lien of a material-man, but declined to then order the libel to be dismissed as "the state process may be so terminated as to render it practicable to proceed in the admiralty against the vessel."

As already pointed out, it was held in *Buck v. Colbath*, supra, that whenever the litigation in the court where the property is first seized has ended, or the possession of such court or its officers is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. This view is illustrated by many decisions in the District Courts, and was applied by Mr. Justice Blatchford, then district judge, in *The Sailor Prince*, 1 Ben. 234.

That was a case of a libel by seamen to recover wages against a ship and freight money, wherein the marshal made return to the process that he had not attached the vessel, but had attached the freight money in the hands of the parties who held it. Prior to the service of process, suit had been brought in the state court against the owners of the vessel, in which warrants of attachment had been issued, under which the sheriff had seized and was holding her when the marshal came to seize her. He had also served copies of the warrants on the parties who held the freight money, with notice that he attached it. But Judge Blatchford held that the seamen had a paramount lien for their wages upon the freight money, and that such lien was to be administered by the court of admiralty by the service of its process; that as against a lien of that character, the principle established in *Taylor v. Carryl* ought not to be extended; that the application of the principle of that case to an attachment issuing from a state court against a vessel only worked delay in the enforcement of a sailor's lien for wages upon her, but that the application of it to an attachment against freight money would work the entire destruction of the lien; that the possession of the freight money by the sheriff, constructive or otherwise, was not such as the possession of the vessel in *Taylor v. Carryl*, or such as prevented the marshal from levying his process upon it, so as to give the District Court jurisdiction of it in rem. The learned judge considered the cases of *Taylor v. Carryl*, *Freeman v. Howe*, and *Buck v. Colbath*; and regarded the principle proceeded on in *Taylor v. Carryl*, at best, as a rule of comity; a relinquishment by a court of admiralty of its clear jurisdiction, "in favor of a state court, which cannot enforce or displace such lien, and has no jurisdiction over it,

giving to the state court the right, for the time being, to obstruct and interfere with the lien and with the remedy of the seamen. That principle or rule of comity is, according to Taylor v. Carryl, to be sustained in regard to a vessel which has been seized by and is in the lawful custody of the sheriff under process from the state court, so long as it is in such custody, the Federal court being at liberty, when the litigation in the state court is ended, or when the possession of the sheriff is discharged, to take possession of the vessel and enforce against it admiralty liens. . . . Now, this rule of comity, thus regarded and limited and administered, may, perhaps, in ordinary cases, work no other mischief than to cause unnecessary and harsh delay in the enforcement of their rights by a class of men whose paramount and superior claims are recognized in the codes of law of all commercial countries. The state court can seize and sell only the interest of the owner in the vessel over and beyond the amount of the liens of the seamen, and can convey no absolute right of property in the whole vessel to a purchaser. Legally, the lien remains, to be enforced the moment the hand of the state officer is withdrawn from the vessel. And the vessel, in theory at least, remains in specie, so as to be subject to process for the enforcement of such lien." But that learned judge declined to extend that principle so far as to permit the state court to appropriate the money to the payment of inferior claims of creditors who had attached it by the process of the state court, as if this were done, "the lien of the seamen on such money for their wages is gone, extinguished, put out of existence, in the face of an admiralty court, by the act of a court of common law. The court of admiralty is to abnegate functions which are conferred upon it by the Constitution and laws, and to refuse to enforce a clearly admitted paramount admiralty lien, which no other court can enforce or directly destroy or supersede, because a state officer has, under process from a state court, attached a sum of money which is the subject of such lien, and is to permit the state court to apply that money to the payment of an inferior claim not founded on a lien, and thus indirectly destroy the lien practically and to all intents and purposes."

A similar question arose in *The Caroline*, 1 Lowell, 173, and it was held that it was not a good defence to a petition that freight might be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials, and that the consignee, before the libels were filed, was summoned as trustee or garnishee of the ship owner in a court of common law; that the courts of common law of Massachusetts had no power to adjust maritime liens upon a fund attached under the foreign attachment law of that State, and the consequence of giving priority to such an attachment might be the destruction of the liens; that a court of common law would be bound to guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and that the District Court might proceed to adjust the liens and might order the freight to be brought in for that.

purpose; and Lowell, J., said: "The decision in Taylor v. Carryl, as explained in Freeman v. Howe, and in Buck v. Colbath, does not operate to defeat the paramount maritime liens, but only to delay their enforcement, because the sheriff can sell only the right of the ship owner, subject to those liens; the practical effect of which I find to be that the sheriff usually waives his possession when libels are filed for maritime liens, because his title becomes of little or no market value. So that we have come back pretty much to the practice which prevailed before the leading case was decided." The views of Judge Blatchford in respect of the attachment of credits, and thereby the destruction of maritime liens were fully concurred in. And see Clifton v. Foster, 103 Mass. 233; Eddy v. O'Hara, 132 Mass. 56.

In *The E. L. Cain*, 45 Fed. Rep. 367, 370, the sheriff had attached a tug and turned it over to a receiver appointed by the state court. After that the marshal, under process upon libels filed for seamen's wages and supplies, seized the vessel, but the District Court held that the tug, "having been taken possession of by process of the state court, and by that court placed in the custody of the receiver, it could not be held by any process out of this court until discharged by order of the state court." And Simonton, J., said: "So, for the present, this court can proceed no further. But the liens set up in this court are maritime liens, which cannot be adjudicated or passed upon in the state court. Over these liens the jurisdiction of this court is exclusive. They will be protected in this court." The cause was continued until the state court had ordered a sale or in any other mode released its custody of the tug. To the same effect, Brown, J., in *The James Roy*, 59 Fed. Rep. 784.

In *The Elexena*, 53 Fed. Rep. 359, § 2186 of the Code of Virginia, providing that the sale of a vessel forfeited by proceedings in a state court for violating the oyster laws of the State "shall vest in the purchaser a clear and absolute title," was held by Hughes, J., inoperative to divest maritime liens of innocent parties attaching before the arrest of the vessel, and that the vessel might be subsequently seized in the hands of the purchaser and subjected to such liens by proceedings in the admiralty courts.

A maritime lien is not divested by a forfeiture for a breach of municipal law; *St. Jago de Cuba*, 9 Wheat. 409; nor by a sale to a bona fide purchaser without notice. *The Chusan*, 2 Story, 455; *The Bold Buccleugh*, 3 W. Rob. 220; S.C. 7 Moore P. C. 267. It is *jus in re*; and "it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear anything; but a claim against all mankind; a suit in *rem*, asserting the claim of the libellant to the thing, as against all the world." *The Young Mechanic*, 2 Curtis, 404, 412. See also *The Rock Island Bridge*, 6 Wall. 213; *The J.E.*

Rumbell, 148 U.S. 1.

We think it entirely clear that, as a state court is without jurisdiction to enforce maritime liens, so it is incapable of displacing them, and, therefore, though under the rule laid down in Taylor v. Carryl, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto; and when its jurisdiction has determined the admiralty courts may proceed.

But upon the facts disclosed in this record, was the District Court required to stay its hand until the termination of the proceedings in the state court? It is admitted that the receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels; but it is said that, as his appointment was made on July 31, before the libels were filed, when his bond was executed, approved, and filed in the office of the clerk of the court for Albany County, his title to the property related back to the time of his appointment, and that he had constructive possession as of that date, which constructive possession overreached the possession of the marshal.

Certain sections of the New York statutes (Rev. Stats. Part 3, c. 8, §§ 66,67; Code Civ. Proc. 1891, App. 1167) provide that a receiver "before entering on the duties of his appointment shall give such security to the people of the State, and in such penalty as the court shall direct;" and "such receiver shall be vested with all the estate, real and personal, of such corporation from the time of his having filed the security hereinbefore required."

The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and coordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual

nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. *Herring v. N.Y., Lake Erie &c. Railroad*, 105 N.Y. 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction *in invitum*, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.

The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, but this could not operate to divest a jurisdiction, not concurrent, to the exercise of which no actual impediment existed at the time it was invoked. As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the court which alone has cognizance to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes and into whosoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*.

The receiver accordingly properly applied to the state court for leave to contest the libels or to take such other proceedings therein as might be advisable, and was duly authorized so to do. Thereupon he made a motion in the District Court for an order directing the marshal to withdraw from the custody of the steamboats held under the admiralty process, which motion was denied on the ground that the question should be raised by answer to the libels. The receiver then appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. If the decision of that court had been adverse he could have tested its correctness on appeal, but he seems to have been unwilling to abide the result, and to have entertained the view that while the proceedings in the District Court, to which he had become a party, were pending, he could go into the state court and ask it to determine the question of jurisdiction by anticipation and by injunction prevent its decision by the tribunal to which it had authorized him to resort. Not only so, but he made an application to this court to prohibit the District Court from exercising jurisdiction. This was denied because the question involved was in due course of decision below, and the receiver thereafter obtained the injunction under consideration. Apart from the legal effect of this submission to the jurisdiction of the District Court, we cannot say that we are favorably impressed with this course of proceeding, and the less so since in the original application to the state court on July 31 it was averred that there was serious danger of the vessels "being libelled in the admiralty courts of the United States for such claims as constituted maritime liens, including the claims for services and supplies rendered to said vessels."

We are of opinion that the state court had no jurisdiction in personam over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction; and that the judgment under review was in effect an unlawful interference with proceedings in that court.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion. . . .

[The dissenting opinion of Mr. Justice Brewer, in which Mr. Justice White concurred, is omitted.]

The Judicial Code of the United States, 1911.

An Act to codify, revise, and amend the laws relating to the judiciary, March 3, 1911, chapter 231, sections 24 and 256.

36 Statutes at Large 1087, 1091, 1160.

Sec. 24. The district courts shall have original jurisdiction as follows: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy; where the common law is competent to give it.

Chapter II.

The Scope of Admiralty Jurisdiction.

Section 1.

The Waters Within Admiralty Jurisdiction.

Nathaniel S. Waring and Peter Dalman, Owners of the Steamboat De Soto, Her Tackle, Apparel, and Furniture, Appellants, v. Thomas Clarke, Late Master of the Steamboat Luda, and Agent of P. T. Marionoux and T. J. Abel, Owners of said Steamboat Luda, Her Tackle, Apparel, Furniture, and Machinery, Appellees.

Supreme Court of the United States, 1847.

5 Howard 441.

The Statement of the case is omitted. The facts are sufficiently stated in the opinion.

Mr. Justice Wayne delivered the opinion of the court.

This is a libel in rem, to recover damages for injuries arising from a collision, alleged to have happened within the ebb and flow of the tide in the Mississippi river, about ninety-five miles above New Orleans.

The decree of the Circuit Court is resisted upon the merits, and also upon the ground that the case is not within the admiralty and maritime jurisdiction of the courts of the United States.

We will first consider the point of jurisdiction.

The learned counsel for the appellants, Mr. Reverdy Johnson, contended, that, even if the evidence proved that the collision took place within the ebb and flow of the tide, the court had not jurisdiction, because the locality is *infra corpus comitatus*.

Two grounds were taken to maintain that position.

1. That the grant in the constitution of "all cases of admiralty and maritime jurisdiction" was limited to what were cases of admiralty and maritime jurisdiction in England when our Revolutionary war began, or when the constitution was adopted, and that a collision between ships within the ebb and flow of the tide, *infra corpus comitatus*, was not one of them.

2. That the distinguishing limitation of admiralty jurisdiction, and decisive test against it in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And as auxiliary to this ground it was urged, that the clause in the ninth section of the Judiciary Act of 1789 (1 Statutes at Large, 77), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," took away such cases from the admiralty jurisdiction of the courts of the United States. . . .

It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers,

where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be, in the sense in which it is used by the common law judges in England, *infra corpus comitatus*. It is this point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction.

We do not think that either of the grounds taken can be maintained. But before giving our reasons for this conclusion, it will be well for us to state the cases in which the instance court in England exercised jurisdiction when our constitution was adopted.

In cases to enforce judgments of foreign admiralty courts, when the person or his goods are within the jurisdiction. Mariners' wages, except when the contract was under seal, or made out of the customary way of such contracts. Bottomry, in certain cases only, and under many restrictions. Salvage, when the property shipwrecked was not cast ashore. Cases between the several owners of ships, when they disputed among themselves about the policy or advantage of sending her upon a particular voyage. In cases of goods, and the proceeds of goods piratically taken, which will be arrested by a warrant from the court, as belonging to the crown and as *droits* of the admiralty. And in cases of collision and injuries to property or persons on the high seas.

It may as well be said by us, at once, that, in cases of this last class, it has frequently been adjudicated in the English common law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the open coast; and that any branch of the sea within the *fauces terrae*, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 and 15 Richard II. and 2 Henry IV., to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising *infra corpus comitatus*. So sternly has the admiralty been excluded from what we believe to have been its ancient jurisdiction in England, that a prohibition within a few years has been issued in a case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the river Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. *The Public Opinion*, 2 Kagg. 398.

It has not, however, been the undisputed rule, nor allowed to be the correct interpretation of the statutes of Richard. It has always been contended by the advocates of the admiralty, that ports, creeks, and rivers are within its jurisdiction, and not within

those statutes; meaning that the ancient jurisdiction in such localities was not excluded by the words of the statutes. Browne, however, in his Civil and Admiralty Law, vol. 2, p. 92, thinks they were within the words of the statutes; not meaning, though, to affirm the declaration of Lord Coke, that those statutes were affirmative of the common law. We think they were not. However much every true English and American lawyer may feel himself indebted to the learning of that great lawyer, and will ever be cautious of disparaging it, it is difficult for any one to read and reflect upon the part which he took in the controversy upon admiralty jurisdiction in England, without assenting to Mr. Justice Buller's remarks, in *Smart v. Wolf*, 3 Durn. & East, 348:- "With respect to what is said relative to the admiralty jurisdiction in 4th Inst. 135, I think that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction. The passage in 4th Inst. 135, disallowing the right to take stipulations, is expressly denied in 2 Lord Raym. 1826. And I may conclude with the words of Lord Holt in that case, that in this case 'the admiralty had jurisdiction, and there is neither statute nor common law to restrain them.'"

Having thus admitted, to the fullest extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken, that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States.

We have already said it cannot be maintained. It is opposed by general, and also by constitutional considerations, to which we have not heard an answer.

In the first place, those who framed the constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the States when they were colonies, than was allowed in England, from the interpretation which was given by the common law courts to the restraining statutes of Richard II. and Henry IV. The commissions to the vice-admirals in the colonies in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted. That to the governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said provinces."

In a work by Anthony Stokes, his Majesty's chief justice in Georgia, entitled, "A View of the Constitution of the British Colonies in North America and the West Indies," will be found, at page 166, the form of the commission of vice-admiral for the provinces in North America. He says, in page 150, the dates in the

commission are arbitrary, and the name of any particular province is omitted. Its language is, - "And we do hereby remit and grant unto you, the aforesaid A. B., our power and authority in and throughout our province of---- afore mentioned, &c. &c., and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of F." The extracts from both commissions are the same. We have the authority of Chief Justice Stokes, that all given in the colonies were alike. The jurisdiction given in those commissions is as large as was exercised in the ancient practice in admiralty in England. It should be observed, too, that they were given long before any difficulties occurred between the mother country and ourselves; and that they contained no power complained of by us afterwards, when it was said an attempt was made to extend admiralty powers "beyond these ancient limits." The king's authority to grant those commissions in the colonies has never been, and cannot be, denied. In all the appeals taken from the colonial courts to the High Court of Admiralty in England, no such thing was ever intimated.

Was it not known, also, that, whilst the States were colonies, vice-admiralty courts had been in all of them, - in some, as has just been said, by commissions from the crown, with additional powers conferred upon them by acts of Parliament; in others, by rights reserved in their charters, and in other colonies by their own legislation? - that, whether from either source, they exercised a jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas? - that acts of Parliament recognized their jurisdiction as original maritime jurisdiction, in all seizures for contravention of the revenue laws?

Was not a larger jurisdiction in admiralty exercised in Massachusetts, throughout her whole colonial existence, than was permitted to the admiralty in England by the prohibitions of her common law courts? Were her members in the convention which formed our constitution ignorant of it?

Were the members from Pennsylvania and South Carolina forgetful, that the extent of the admiralty jurisdiction in the colonies had been the subject of judicial inquiry in England, growing out of proceedings in the admiralty courts of both of those States in revenue cases? - that it had been decided in 1754, in the case of the Vrow Dorothea, 2 Rob. 246, - which was an appeal from the vice-admiralty judge in South Carolina to the High Court of Admiralty, and thence to the delegates, - that the jurisdiction in admiralty in the colonies for a breach of the revenue laws was in its nature maritime, and was not a jurisdiction specially conferred by the statute of William III., ch. 22, § 6; a judgment which subsequently received the assent of all the common law judges, in a reference to them from the privy council? 2 Rob.

246; 8 Wheat. 397, note. This, too, after an eminent lawyer, Mr. West, assigned as counsel to the Commissioners of Trade and Plantations, had in 1720 expressed the opinion, that the statutes of 13 and 15 Richard II., ch. 3, and 2 Henry IV., ch. 11, and 27 Elizabeth, ch. 11, were not introductive of new laws, but only declarative of the common law, and were therefore of force in the plantations; and that none of the acts of trade and navigation gave the admiralty judges in the West Indies increase of jurisdiction beyond that exercised by the High Court of Admiralty at home.

Shall it be presumed, also, that the members of the convention were altogether disregarding of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, "and the uncertainty of jurisdiction in the trial of maritime causes," which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also, there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England. . . .

But besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of "all cases of admiralty and maritime jurisdiction," as it is expressed in the constitution, to the cases of admiralty and maritime jurisdiction in England when our constitution was adopted. To do so would make the latter a part and parcel of the constitution, — as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England, — a limitation which never could have been meant, and cannot be inferred

from the words, which extend the jurisdiction of the courts of the United States "to all cases of admiralty and maritime jurisdiction." One extension of the jurisdiction of the courts of the United States exists beyond the limitation proposed, just as it existed in the colonies before they became independent States, which never has been a case of admiralty jurisdiction in England. We mean seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within the respective districts of the courts, as well as upon the high seas. And this, we have shown in a previous part of this opinion, was decided in England as early as 1754, with the subsequent assent of the common law judges, not to be a jurisdiction conferred upon the courts of admiralty in the colonies by statutes, but was a case in the colonies of admiralty jurisdiction (2 Rob. 246). And so it is treated in the ninth section of the Judiciary Act of 1789. We cannot help thinking that section - a declaration by Congress contemporary with the adoption of the constitution - very decisive against the limitation contended for by counsel in this case. Again, this court decided, as early as 1805 (2 Cranch, 405), in the case of the Sally, that the forfeiture of a vessel, under the act of Congress against the slave-trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of the La Vengeance (3 Dall. 397). Again, Congress, by an act passed the 19th of June, 1813 (3 Stat. at Large, 2), declared that a vessel employed in a fishing voyage should be answerable for the fishermen's share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is by law liable to be proceeded against for the wages of seamen or mariners in the marchant service. We shall cite no more, though we might do so, of legislative and judicial interpretations, to show that the admiralty jurisdiction of the courts of the United States is not confined to the cases of admiralty jurisdiction in England when the constitution was adopted. . . .

We will now consider the proposition, that the test against admiralty jurisdiction in England and the United States is the competency of a court of common law to give a remedy in a given case in a trial by jury; or that in all cases, except in seamen's wages, where the courts of common law have a concurrent jurisdiction with the admiralty, and can try the cause and give redress, that alone takes away the admiralty jurisdiction. It has the authority of Lord Coke to sustain it. But it was the effort and the design of Lord Coke to make locality the boundary in cases of contract, as well as in tort, that is, to limit the jurisdiction in admiralty to contracts made on the sea and to be executed on the sea; and to exclude its jurisdiction in all cases of marine contracts made on the land, though they related exclusively to marine services, principally to be executed on the sea. To that extent the admiralty courts were prohibited by the common law judges from

exercising jurisdiction, until the unreasonableness and inconvenience of the restriction forced them to relax it in the case of seamen's wages. Then it was that the common law courts began to reflect upon what jurisdiction in admiralty rested, and upon the principles upon which it would attach. With the acknowledgment of all of them ever since, it was affirmed that the subject-matter, and not locality, determined the jurisdiction in cases of contract. Passing over intermediate decisions showing the manner and the reasons given for the relaxation in the one case, and the revival of the other, for which the admiralty always contended, we will cite the case of *Menetone v. Gibbons*, 3 Durn. & East, 269, 270. Lord Kenyon and Sir Francis Buller say, in that case, the question whether the admiralty has or has not jurisdiction depends upon the subject-matter. We wish it to be remarked, however, that the manner of proceeding is another affair, with which we do not meddle now.

It was only upon the principle that the subject-matter in cases of contract determined the jurisdiction, that this court decided the case of *The Aurora*, 1 Wheat. 96, *The General Smith*, 4 Wheat. 438, and *The St. Jago de Cuba*, 9 Wheat. 409.

If, then, in both classes of civil cases of which the instance court has jurisdiction, subject-matter in the one class, and locality in the other, ascertains it, neither a jury trial nor the concurrent jurisdiction of the common law courts can be a test for jurisdiction in either class. . . .

In respect to the clause in the ninth section of the Judiciary Act, - "saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it," - we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain, - securities which a court of common law cannot give.

Having disposed of the objections to the jurisdiction of the courts of admiralty of the United States, growing out of the supposed limitation of them to the cases allowed in England and from the test of jury trial, we proceed to consider that objection to jurisdiction in this case, because the collision took place infra

corpus comitatus. We have admitted the validity of this objection in England, but on the other hand it cannot be denied that the restriction there to cases of collision happening super altum mare, or without the fauces terrae, was imposed by the statutes of Richard, contrary to what had been in England the ancient exercise of admiralty jurisdiction in ports and havens within the ebb and flow of the tide. We have seen no case, ancient or modern, from which it can correctly be inferred, that such exercise of jurisdiction was prohibited by mere force of the common law. The most that can be said in favor of the statutes of Richard being affirmative of the common law, are the assertions of Lord Coke and the prohibitions of the common law courts, subsequent to those statutes, and founded upon them, restricting the jurisdiction of the courts of admiralty to cases of collisions happening upon the high seas; contrary to what we have already said was its ancient jurisdiction in ports and havens in cases of torts and collision, and certainly in opposition to what was then, and still continues to be, the admiralty jurisdiction, in cases of collision, of every other country in Europe.

But giving to such prohibitions of the courts of common law the utmost authority claimed for them, - that is, that they are affirmances of the common law as interpretations of the statutes of Richard, - does it follow that they are to be taken as a rule in the admiralty courts of the United States in cases of collision? Must it not first be shown that the statutes of Richard were in force as such in America, and that the colonies considered and adopted that portion of the common law as applicable to their situation? Now, the statutes of Richard were never in force in any of the colonies, except as they were adopted by the legislation of some of them; and the common law only in its general principles, as they were applicable, with such portions of it as were adopted by common consent in any one of the colonies, or by statute. This being so, the rule in England for collision cases being neither obligatory here by the statutes of Richard nor by the common law, we feel ourselves permitted to look beyond them, to ascertain what the locality is which gives jurisdiction to the courts of the United States in cases of collision or tort, or what makes the subject-matter of any service or undertaking a marine contract. Are we bound to say, because it has been so said by the common law courts in England in reference to the point under discussion, that sea always means high sea, or the main sea? - that the waters flowing from it into havens, ports, and rivers are not "parcel of the sea"? - that the fact of the political division of a country into counties makes it otherwise, and takes away the jurisdiction in admiralty, in respect to all the marine means of commerce and the injuries which may be done to vessels in their passage from the sea to their ports of destination, and in their outward-bound voyages until they are upon the high sea? Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than the designation of it by the common law courts in England? Especially when the latter has in no

instance been applied by England as a limitation upon the general admiralty law in any of her colonies; and when in all of them, until the act of 2 William IV., c. 51, was passed, the commissions gave to her vice-admirals jurisdiction "throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever." Besides, the use of the word sea to fix admiralty jurisdiction, and what part of it might be within the body of a county, have not been settled points among the common law judges in England. Lord Hale differed from Lord Coke. The former, in defining what the sea is, says, - "that it is either that which lies within the body of the county or without; that arm or branch of the sea which lies within the fauces terræ is, or at least may be, within the body of a county; that part which lies not within the body of a county is called the main sea." It is difficult to reconcile the differences of opinion and of definition given by the common law courts in Lord Coke's day, and for fifty years afterwards, as to the meaning and legal application of the word sea, so as to make a practical rule to govern the decisions of cases, or to determine what were cases of admiralty jurisdiction. But there is no difficulty in making such a rule, if the construction of it, by the admiralty courts, is adopted. In that construction, it meant not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows. We think in the controversy between the courts of admiralty and common law, upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries. The conclusions of the admiralty, too, are more congenial with our geographical condition. We may very reasonably infer they were thought so on that account by the framers of the constitution when the judicial grant was expressed by them in the words, - "all cases of admiralty and maritime jurisdiction." In those words it is given by Congress to the courts, leaving to them the interpretation of what were such cases; as well the subject-matter which makes them so, as the locality which gives admiralty jurisdiction in cases of tort and collision. The grant, too, has been interpreted by this court in some cases of the first class, which leaves no doubt upon our minds as to the locality which gives jurisdiction in the other. We do not consider it an open question, but *res adjudicata* by this court. In *Peyroux et al. v. Howard & Varion*, 7 Pet. 342, the objection to the jurisdiction was overruled, upon the ground that the subject-matter of the service rendered was maritime, and performed within the ebb and flow of the tide, at New Orleans. The court say, although the current in the Mississippi at New Orleans may be so strong as not to be turned backward by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall

of the water, it may properly be said to be within the ebb and flow of the tide. The material consideration is, whether the service is essentially a maritime service and to be performed on the sea or on tide water. In the case of *The Steamboat Orleans v. Phoebus*, 11 Peters, 175, the jurisdiction of the court was denied, on the ground that the boat was not employed or intended to be employed in navigation and trade on the sea, or on tide waters. In *Steamboat Jefferson, Johnson claimant*, 10 Wheat. 428, this court says, - "In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, on the sea or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend. We say, the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment." In *United States v. Coombs*, 12 Pet. 72, where the question certified to the court directly involved what was the admiralty jurisdiction, under the grant of "all cases of admiralty and maritime jurisdiction," the language of this court is, - "The question which arises is, What is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court; and we see no reason to depart from it." Now, though none of the foregoing cases are cases of collision upon tide waters, but of contracts, services rendered essentially maritime, and in a case of wreck, - the point ruled in all of them, as to the jurisdiction of the court in tide water as far as the tide flows, was directly presented for decision in each of them. The locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening in it. Our conclusion is, that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus*; that the case before us did happen where the tide ebbed and flowed *infra corpus comitatus*, and that the court has jurisdiction to decree upon the claim of the libellant for damages....

As to the merits of this case, as they are disclosed by the evidence, we think that the *Luda* was run down, whilst she was in the accustomed channel of upward navigation, by the *De Soto*, being out of that for which she should have been steered to make the port

to which she was bound. It is a fault which makes the defendants answerable for the losses sustained from the collision. That loss will not be more than compensated by the decree of the Circuit Court. We shall direct the decree to be affirmed.

The concurring opinion of Mr. Justice Catron and the dissenting opinion of Mr. Justice Woodbury, in which Mr. Justice Daniel concurred in general and Mr. Justice Grier concurred in part, are omitted.

The Propeller Genesee Chief, Her Tackle, Apparel, and Furniture, William L. Pierce, Master, Alexander Kelsey, William H. Cheney, William Hunter, Lansing B. Swan, George R. Clark, and Elisha B. Strong, Appellants, v. Henry Fitzhugh, De Witt C. Littlejohn, and James Peck.

Supreme Court of the United States, 1851.

12 Howard 443.

The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.

Mr. Chief Justice Taney delivered the opinion of the court.

This is a case of collision on Lake Ontario. The libellants were the owners of the schooner Cuba, and the respondents and present appellants the master and owners of the propeller Genesee Chief. The libellants state that on the 6th of May, 1847, as the Cuba was on her voyage from Sandusky, in the State of Ohio, to Oswego, in the State of New York, the Genesee Chief, which was proceeding on a voyage up the lake, ran foul of her and damaged her so seriously that she shortly afterwards sunk, with her cargo on board, and they also allege that the collision was occasioned by the carelessness and mismanagement of the officers and crew of the propeller, without any fault of the officers or crew of the Cuba. The respondents deny that it was occasioned by the fault of the steamboat, and impute it to the carelessness with which the schooner was managed.

The proceeding is in rem, and in substance as well as in form, a proceeding in admiralty. It was instituted under the act of February 26, 1845, (5 Stat. at Large, 726,) extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same. The District Court decreed in favor of the libellants, and the decision was affirmed in the Circuit Court, from which last-mentioned decree this appeal has been taken.

Before, however, we can look into the merits of the dispute there is a question of jurisdiction which meets us at the threshold. When the act of Congress was passed, under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admiralty jurisdiction had come before it, seemed to imply that under the Constitution of the United States, the jurisdiction was confined to tide-waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the

inquiry whether the law in question could not be supported under the power granted to Congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us.

The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same;" and the enacting clause conforms to the title. It declares that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories, as was at the time of the passage of the law possessed and exercised by the district courts in cases of like steamboats and other vessels employed in navigation and commerce on the high seas, or tidewaters within the admiralty and maritime jurisdiction of the United States.

It is evident, therefore, from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive their authority from that article of the Constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the Constitution; and which we have no reason to suppose it deemed itself authorized to exercise.

Indeed it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. This law gives jurisdiction to a certain extent over commerce and navigation and authorizes the court to expound the laws that regulate them. But the jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution. And this act of Congress merely creates a tribunal to carry the laws into execution but does not prescribe them.

Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial

regulations. And the limits fixed by the Constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon the commercial power.

This power is as extensive upon land as upon water. The Constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can with the same propriety and upon the same construction, be extended to contracts and torts on land when the commerce is between different States. And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one State to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury. Now the judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land.

Besides, the jurisdiction established by this act of Congress does not depend on the residence of the parties. And under the admiralty powers conferred on the District Courts, they are authorized to proceed in rem or in personam in the cases mentioned in the law although the parties concerned are citizens of the same State. If the lakes and waters connecting them are within the admiralty and maritime jurisdiction, as conferred by the Constitution, then undoubtedly this authority may be lawfully exercised, because this jurisdiction depends upon the place and not upon the residence of the parties.

But if the admiralty jurisdiction is confined to tide-water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. And in cases of this description they have no jurisdiction, if the parties are citizens of the same State. This being an express limitation in the grant of judicial power, no act of Congress can enlarge it. And if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the District Courts.

If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction,

as known and understood in the United States when the Constitution was adopted.

If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.

Again. The union is formed upon the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different States; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.

The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction.

nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

At the time the Constitution of the United States was adopted and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide-waters. And in the States which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide-water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under

the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of the *Thomas Jefferson*, 10 Wheat. 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The *steamboat Orleans v. Phoebus*, 11 Pet 175, afterwards followed this case, merely as a point decided.

It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.

Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide-water river, if they took place in the body of a country. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe until recently, drawn to the one we are now discussing, except in the case of the *Thomas Jefferson*, afterwards followed in the *steamboat Orleans v. Phoebus*, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was therefore no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court.

The attention of the court was, however, drawn to this subject in the case of *Waring v. Clarke*, 5 How. 441, which was decided in 1848. The collision took place on the Mississippi River, near the bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence. But the

majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher.

But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide. For if such be the construction, then a line drawn across the river Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary as well as unjust, and would make the Constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant.

It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by Congress in 1789 when the government went into operation. For the 9th section of the Judiciary Act of 1789, by which the first courts of admiralty were established, declares that the district courts "shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

It so happened that no seizure was made, and no case calling for the exercise of admiralty power arose for a long period of time, upon any navigable water where the tide did not ebb and flow. As we have before stated, there were no navigable waters in the United States upon which commerce in the usual acceptation of the word was

carried on, except tide-water, until the valley of the Mississippi was settled and cultivated, and steamboats invented, and no case therefore came before the court during the early period of the government that required it to determine whether this jurisdiction could be extended above tide. It is perhaps to be regretted that such a case did not arise. For we are persuaded that if one had occurred and attracted the attention of the court to this point before the English definition had become the settled mode of describing the jurisdiction, and before the courts had been accustomed to adhere strictly to the English mode of pleading, in which the place is always averred to be within the ebb and flow of the tide, the definition in the act of 1789, which is so evidently the correct one, would have been adopted by the courts, and the difficulty which has now arisen would not have taken place.

This legislative definition, given at this early period of the government, is certainly entitled to great consideration. The same definition is in effect again recognized by Congress by the passage of the act which we are now considering. We have therefore the opinion of the legislative department of the government, twice deliberately expressed, upon the subject. These opinions of course are not binding on the judicial department, but they are always entitled to high respect. And in this instance we think they are founded in truth and reason; and that these laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different States or territories. It does not apply to vessels engaged in domestic commerce of a State; nor to vessels or boats not enrolled and licensed for the coasting trade under the authority of Congress. And the State courts within the limits embraced by this law exercise a concurrent jurisdiction in all cases arising within their respective territories, as broadly and independently as it is exercised by the old thirteen States, (whose rivers are tide-waters,) and where the admiralty jurisdiction has been in full force ever since the adoption of the Constitution.

The case of the Thomas Jefferson did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, stare decisis is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property nor interfere

with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it. . . .

In an omitted part of the opinion, Mr. Chief Justice Taney reviewed the evidence in the case and concluded that "there was great and inexcusable carelessness on the part of the propeller."

The decree of the Circuit Court must therefore be affirmed with costs.

[The dissenting opinion of Mr. Justice Daniel is omitted.]

The Hine v. Trevor.

Supreme Court of the United States, 1866.

4 Wallace 555.

Error to the Supreme Court of the State of Iowa; the case, as disclosed by the record, having been in substance this:

A collision occurred between the steamboats Hine and Sunshine, on the Mississippi River, at or near St. Louis, in which the latter vessel was injured. Some months afterwards, the owners of the Sunshine caused the Hine to be seized while she was lying at Davenport, Iowa, in a proceeding under the laws of that State, to subject her to sale in satisfaction of the damages sustained by their vessel. The code of Iowa, under which this seizure was made, gives a lien against any boat found in the waters of that State, for injury to person or property by said boat, officers or crew, &c; gives precedence in liens; authorizes the seizure and sale of the boat, without any process against the wrongdoer, whether owner or master, and saves the plaintiff all his common-law rights, but makes no provision to protect the owner of the vessel.

The owners of the Hine interposed a plea to the jurisdiction of the State court. The point being ruled against them, it was carried to the Supreme Court of the State, where the judgment of the lower court was affirmed; and by the present writ of error this court was called upon to reverse that decision. . . .

[The arguments of counsel are omitted.]

Mr. Justice Miller delivered the opinion of the courts.

The record distinctly raises the question, how far the jurisdiction of the District Courts of the United States in admiralty causes, arising on the navigable inland waters of this country, is exclusive, and to what extent the State courts can exercise a concurrent jurisdiction?

Nearly all the States - perhaps all whose territories are penetrated or bounded by rivers capable of floating a steamboat - have statutes authorizing their courts, by proceedings in rem, to enforce contracts or redress torts, which, if they had the same relation to the sea that they have to the waters of those rivers, would be conceded to be the subjects of admiralty jurisdiction. These statutes have been acted upon for many years, and are the sources of powers exercised largely by the State courts at the present time. The question of their conflict with the constitutional legislation of Congress, on the same subject, is now for the first time presented to this court.

We are sensible of the extent of the interests to be affected by our decision, and the importance of the principles upon which

that decision must rest, and have held the case under advisement for some time, in order that every consideration which could properly influence the result might be deliberately weighed.

There can, however, be no doubt about the judgment which we must render, unless we are prepared to overrule the entire series of decisions of this court upon the subject of admiralty jurisdiction on Western waters, commencing with the case of *The Genesee Chief*, in 1851, and terminating with that of *The Moses Taylor*, decided at the present term; for these decisions supply every element necessary to a sound judgment in the case before us.

The history of the adjudications of this court on this subject, which it becomes necessary here to review, is a very interesting one, and shows with what slowness and hesitation the court arrived at the conviction of the full powers which the Constitution and acts of Congress have vested in the Federal judiciary. Yet as each position has been reached, it has been followed by a ready acquiescence on the part of the profession and of the public interested in the navigation of the interior waters of the country, which is strong evidence that the decisions rested on sound principles, and that the jurisdiction exercised was both beneficial and acceptable to the classes affected by it.

From the organization of the government until the era of steamboat navigation, it is not strange that no question of this kind came before this court. The commerce carried on upon the inland waters prior to that time was so small, that cases were not likely to arise requiring the aid of admiralty courts. But with the vast increase of inland navigation consequent upon the use of steamboats, and the development of wealth on the borders of the rivers, which thus became the great water highways of an immense commerce, the necessity for an admiralty court, and the value of admiralty principles in settling controversies growing out of this system of transportation, began to be felt.

Accordingly we find in the case of *The Steamboat Thomas Jefferson*, reported in 10 Wheaton, 428, that an attempt was made to invoke the jurisdiction in the case of a steamboat making a voyage from Shippingport, in Kentucky, to a point some distance up the Missouri River, and back again. This court seems not to have been impressed with the importance of the principle it was called upon to decide, as, indeed, no one could then anticipate the immense interests to arise in future, which by the rulings in that case were turned away from the forum of the Federal courts. Apparently without much consideration - certainly without anything like the cogent argument and ample illustration which the subject has since received here - the court declared that no act of Congress had conferred admiralty jurisdiction in cases arising above the ebb and flow of the tide.

In the case of *The Steamboat Orleans*, in 11 Peters, 175, the

court again ruled that the District Court had no jurisdiction in admiralty, because the vessel, which was the subject of the libel, was engaged in interior navigation and trade, and not on tide-waters. The opinion on this subject, as in the case of the Thomas Jefferson, consisted of a mere announcement of the rule, without any argument or reference to authority to support it.

The case of Waring v. Clarke, 8 Howard, 441, grew out of a collision within the ebb and flow of the tide on the Mississippi river, but also *infra corpus comitatus*. The jurisdiction was maintained on the one side and denied on the other with much confidence. The court gave it a very extended consideration, and three of the judges dissented from the opinion of the court, which held that there was jurisdiction. The question of jurisdiction above tide-water was not raised, but the absence of such jurisdiction seems to be implied by the arguments of the court as well as of the dissenting judges.

The next case in order of time, The Genesee Chief, 12 Howard, 457, is by far the most important of the series, for it overrules all the previous decisions limiting the admiralty jurisdiction to tide-water, and asserts the broad doctrine that the principles of that jurisdiction, as conferred on the Federal courts by the Constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external. . . .

In an omitted part of the opinion, Mr. Justice Miller reviewed The Genesee Chief v. Fitzhugh, 12 How. 443.

Although the case arose under the act of 1845, already cited, which in its terms is expressly limited to matters arising upon the lakes and the navigable waters connecting said lakes, and which the Chief Justice said was a limitation of the powers conferred previously on the Federal courts, it established principles under which the District Courts of the United States began to exercise admiralty jurisdiction of matters arising upon all the public navigable rivers of the interior of the country.

This court also, at the same term in which the case of The Genesee Chief was decided, held in Fretz v. Bull, in which the point was raised in argument, that the Federal courts had jurisdiction according to the principles of that case in the matter of a collision on the Mississippi River above tide-water.

As soon as these decisions became generally known admiralty cases increased rapidly in the District Courts of the United States, both on the lakes and rivers of the West. Many members of the legal profession engaged in these cases, and some of the courts have from this circumstance assumed, without examination, that the jurisdiction in admiralty cases arising on the rivers of the interior of the country is founded on the act of 1845; and such is perhaps the more general impression in the West. The very learned court whose judgment we are reviewing has fallen into this mistake in the opinion which it delivered in the case before us, and it is repeated

here by counsel for the defendant in error.

But the slightest examination of the language of that act will show that this cannot be so, as it is confined, as we have already said, to cases arising "on the lakes and navigable waters connecting said lakes." The jurisdiction upon those waters is governed by that statute, but its force extends no further.

The jurisdiction thus conferred is in many respects peculiar, and its exercise is in some important particulars different under that act from the admiralty jurisdiction conferred by the act of September 24th, 1789.

1. It is limited to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade.

2. To vessels employed in commerce and navigation between ports and places in different States.

3. It grants a jury trial if either party shall demand it.

4. The jurisdiction is not exclusive, but is expressly made concurrent, with such remedies as may be given by State laws.

But the true reason why the admiralty powers of the Federal courts began now to be exercised for the first time in the inland waters was this: the decision in the case of *The Genesee Chief*, having removed the imaginary line of tide-water which had been supposed to circumscribe the jurisdiction of the admiralty courts, there existed no longer any reason why the general admiralty powers conferred on all the District Courts by the ninth section of the Judiciary Act, should not be exercised wherever there was navigation which could give rise to admiralty and maritime causes. The Congress which framed that act - the first assembled under the Constitution - seemed to recognize this more extended view of the jurisdiction in admiralty, by placing under its control cases of seizure of vessels under the laws of impost, navigation, and trade of the United States, when those seizures were made in waters navigable from the sea by vessels of ten tons burden or upwards.

The case of *The Magnolia*, 20 Howard, 296, is another important case in the line of decisions which we have been considering. It was a case of collision occurring on the Alabama River, far above the ebb and flow of the tide, on a stream whose course was wholly within the limits of the State which bears its name. This was thought to present an occasion when the doctrines announced in the case of *The Genesee Chief* might properly be reconsidered, and modified, if not overruled. Accordingly we find that the argument in favor of the main proposition decided in that case was restated with much force in the opinion of the court, and that a very elaborate opinion was delivered on behalf of three dissenting judges.

The principles established by the case of The Genesee Chief were thus reaffirmed, after a careful and full reconsideration. It was also further decided (which is pertinent to the case before us), that the jurisdiction in admiralty on the great Western rivers did not depend upon the act of February 3d, 1845, but that it was founded on the act of September 24th, 1789. That decision was made ten years ago, and the jurisdiction, thus firmly established, has been largely administered by all the District Courts of the United States ever since, without question.

At the same time, the State courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognizance; and they have in these causes administered remedies which differ in no essential respect from the remedies which have heretofore been considered as peculiar to admiralty courts. This authority has been exercised under State statutes, and not under any claim of a general common-law power in these courts to such a jurisdiction.

It is a little singular that, at this term of the court, we should, for the first time, have the question of the right of the State courts to exercise this jurisdiction, raised by two writs of error to State courts, remote from each other, the one relating to a contract to be performed on the Pacific Ocean, and the other to a collision on the Mississippi River. The first of these cases, The Moses Taylor, had been decided before the present case was submitted to our consideration.

The main point ruled in that case is, that the jurisdiction conferred by the act of 1789, on the District Courts, in civil causes of admiralty and maritime jurisdiction, is exclusive by its express terms, and that this exclusion extends to the State courts. The language of the ninth section of the act admits of no other interpretation. It says, after describing the criminal jurisdiction conferred on the District Courts, that they "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden." If the Congress of the United States has the right, in providing for the exercise of the admiralty powers, to which the Constitution declares the authority of the Federal judiciary shall extend, to make that jurisdiction exclusive, then, undoubtedly, it has done so by this act. This branch of the subject has been so fully discussed in the opinion of the court, in the case just referred to, that it is unnecessary to consider it further in this place.

It must be taken, therefore, as the settled law of this court, that wherever the District Courts of the United States have original

cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

This examination of the case, already decided by this court, establishes clearly the following propositions:

1. The admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States.

2 The original jurisdiction in admiralty exercised by the District Courts, by virtue of the act of 1789, is exclusive, not only of other Federal courts, but of the State courts also.

3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789.

4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 3d, 1845.

If the facts of the case before us in this record constitute a cause of admiralty cognizance, then the remedy, by a direct proceeding against the vessel, belonged to the Federal courts alone, and was excluded from the State tribunals.

It was a case of collision between two steamboats. The case of *The Magnolia*, to which we have before referred, was a case of this character; and many others have been decided in this court since that time. That they were admiralty causes has never been doubted.

We thus see that every principle which is necessary to a decision of this case has been already established by this court in previous cases. They lead unavoidably to the conclusion, that the State courts of Iowa acted without jurisdiction; that the law of that State attempting to confer this jurisdiction is void, because it is in conflict with the act of Congress of September 24th, 1789, and that this act is well authorized by the Constitution of the United States. Unless we are prepared to retract the principles established by the entire series of decisions of this court on that subject, from and including the case of *The Genesee Chief*, down to that of *The Moses Taylor*, decided at this term, we cannot escape this conclusion. The succeeding cases are in reality but the necessary complement and result of the principles decided in the case of *The Genesee Chief*. The propositions laid down there, and which were indispensable to sustain the judgment in that case, bring us logically to the judgment which we must render in this

case. With the doctrines of that case on the subject of the extent of the admiralty jurisdiction we are satisfied, and should be disposed to affirm them now if they were open to controversy.

It may be well here to advert to one or two considerations to which our attention has been called, but which did not admit of notice in the course of observation which we have been pursuing without breaking the sequence of the argument.

1. It is said there is nothing in the record to show that the Hine was of ten tons burden or upwards, and that, therefore, the case is not brought within the jurisdiction of the Federal courts. The observation is made, in the opinion of the Supreme Court of Iowa, in reference to the provision of the act of 1845, which that court supposed to confer jurisdiction on the Federal courts in the present case, if it had such jurisdiction at all. We have already shown that the jurisdiction is founded on the act of 1789. That act also speaks of vessels of ten tons burden and upwards, but not in the same connection that the act of 1845 does. In the latter act it is made essential to the jurisdiction that the vessel which is the subject of the contract, or the tort, should be enrolled and licensed for the coasting trade, and should be of twenty tons burden, or upwards. In the act of 1789, it is declared that the District Courts shall have jurisdiction in admiralty of seizures for violations of certain laws, where such seizures are made on rivers navigable by vessels of ten tons burden or upwards from the sea. In the latter case, the phrase is used as describing the carrying capacity of the river where the seizure is made. In the former case, it relates to the capacity of the vessel itself.

2. It is said that the statute of Iowa may be fairly construed as coming within the clause of the ninth section of the act of 1789, which "saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it."

But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in rem. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States.

While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the older States foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him

on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the State.

Such actions may, also, be maintained in personam against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act.

But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly; for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, "any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed."

The judgment is reversed, and the case is remanded to the Supreme Court of Iowa, with directions that it be

Dismissed for want of jurisdiction. . . .

Ex parte Boyer.

Supreme Court of the United States, 1884.

109 United States 629.

The facts are stated in the opinion.

Mr. Justice Blatchford delivered the opinion of the court.

The owners of the canal-boat Brilliant and her cargo filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the steam canal-boat B and C, in a case of collision. The libel alleges that the Brilliant is a vessel of more than 20 tons burden, and was employed, at the time of the collision, in the business of commerce and navigation between ports and places in different States and Territories in the United States, upon the lakes and navigable waters connecting said lakes; that the B and C is a vessel of more than 20 tons burden, and was, at the time of the collision enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States; that, in August, 1882, the Brilliant, while bound from Morris, Illinois, to Chicago, Illinois, towed, with other canal-boats, by a steam canal-boat, and carrying the proper lights, and moving up the Illinois and Lake Michigan canal, about four miles south of the Chicago end of the canal, was, through the negligence of the B and C, struck and sunk, with her cargo, by the B and C, which was moving in the opposite direction, to the damage of the libellants \$1,500. The owners and claimants of the B and C answered the libel, giving their version of the collision and alleging that it was wholly due to the faulty navigation of the Brilliant, and that it occurred on the Illinois and Michigan canal, at a place within the body of Cook county, in the State of Illinois. In November, 1883, the district court made an interlocutory decree, finding that both parties were in fault, and decreeing that they should each pay one-half of the damages occasioned by the collision, to be thereafter ascertained and assessed by the court.

The owners of the B and C have now presented to this court a petition, praying that a writ of prohibition may issue to the judge of the said district court, prohibiting him from proceeding further in said suit. The ground alleged for the writ is the want of jurisdiction of the district court, as a court of admiralty, over the waters where the collision occurred.

The Illinois and Michigan canal is an artificial navigable water-way connecting Lake Michigan and the Chicago river with the Illinois river and the Mississippi river. By the act of Congress of March 30th, 1822, ch. 14, § Stat. 659, the use of certain public

lands of the United States was vested in the State of Illinois forever, for a canal to connect the Illinois river with the southern bend of Lake Michigan. The act declared

"That the said canal, when completed, shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through the same."

This declaration was repeated in the act of March 2d, 1827, ch. 51, 4 Stat. 234, granting more land to the State of Illinois to aid it in opening the canal. We take judicial notice of the historical fact that the canal, 96 miles long, was completed in 1848, and is 60 feet wide and 6 feet deep, and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi river to Lake Michigan and carry on inter-State commerce, although the canal is wholly within the territorial bounds of the State of Illinois. By the act of 1822, if the land granted thereby shall cease to be used for a canal suitable for navigation, the grant is to be void. It may properly be assumed that the district court found to be true the allegations of the libel, before cited, as to the character and employment of the two vessels, those allegations being put in issue by the answer.

Within the principles laid down by this court in the cases of *The Daniel Ball*, 10 Wall. 557, and *The Montello*, 20 Wall. 430, which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief*, 12 How. 443, *The Hine v. Trevor*, 4 Wall. 555, and *The Eagle*, 8 Wall. 15, we have no doubt of the jurisdiction of the district court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. *The Belfast*, 7 Wall. 624. Many of the embarrassments connected with the question of the extent of the jurisdiction of the admiralty disappeared when this court held, in the case of *The Eagle*, *ubi supra*, that all of the provisions of § 9 of the Judiciary Act of September 24th, 1789, ch. 20, 1 Stat. 77, which conferred admiralty and maritime jurisdiction upon the district courts were inoperative, except the simple clause giving to them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." That decision is carried

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out by the enactment in § 563 of the Revised Statutes, subdivision 8, that the district courts shall have jurisdiction of "all civil causes of admiralty and maritime jurisdiction," thus leaving out the inoperative provisions.

This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

The prayer of the petition is denied.
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Stapp v. Steamboat Clyde -- 1

A. C. Stapp v. Steamboat Clyde.

Supreme Court of Minnesota, 1890.

43 Minnesota Reports 192.

Appeal by plaintiff from a judgment of the district court for Hennepin county, entered pursuant to an order of Smith, J. The action was commenced by attachment pursuant to Gen. St. 1878, c. 83, to enforce a claim of \$190.65, for coal furnished, and the ground of decision was that the statute is unconstitutional, this objection having been taken by H. Trumbull, owner of the steamboat, appearing specially to object, on that ground, to the jurisdiction of the court. . . .

Vanderburgh, J. This action is brought to enforce a lien for supplies furnished the Clyde, a steamboat navigating the waters of Lake Minnetonka, in this state. The owner appeared and demurred to the complaint, which was sustained on the ground that the statute of this state authorizing such proceedings against boats and vessels is unconstitutional. Two questions are to be considered: (1) Whether, in such cases, the jurisdiction of the state courts is limited to common-law remedies in form; and (2) whether the proceedings authorized by the statute in question constitute due process of law.

1. The inland lakes lying wholly within the limits of the state are not navigable waters of the United States, and suits to enforce a lien for supplies, etc., against boats and vessels thereon are not within the admiralty jurisdiction of the district courts of the United States; and such claims are not maritime, within the meaning of the acts of congress on the subject. A maritime claim cannot be enforced in the state courts by any other than a common-law remedy, under the judiciary act of 1789, which confers exclusive jurisdiction in such cases upon the United States district courts. Section 563, subsec. 8, Rev. St. U. S. (p. 95) includes a provision "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." This saving clause, of course, has reference to cases of admiralty and maritime jurisdiction; and the suitor is given the chance, in such cases, to pursue his remedy in admiralty, or avail himself of his common-law remedy in personam, which he may do in the state courts. *Baird v. Daly*, 57 N. Y. 249. But as to claims not in their nature maritime the state jurisdiction is not impaired, and the act referred to imposes no restriction upon the power of the states to prescribe such forms of procedure for their collection as may be deemed appropriate and necessary. *Brookman v. Hamill*, 43 N. Y. 554. See *The Hine v. Trevor*, 4 Wall. 555, 1 West. Jur. 246, note; *The Belfast*, 7 Wall. 624, 644, 645. In the latter case, Justice Clifford says: "Authority does not exist in the state courts to hear and determine a suit in rem in admiralty, to enforce a maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port; and, in respect to such contracts,

it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement." Whatever may be the ultimate decision of the courts as respects the exception in favor of home ports upon navigable waters of the United States, there can be no doubt of the application of the principle just announced to the case at bar.

2. Gen. St. 1878, c. 83, authorizing actions against boats and vessels, subjects every boat or vessel used in navigating the waters of this state to a liability for debts contracted by the owner, master, agent, or consignee, for supplies furnished for the use of such boat or vessel, etc., and authorizes a complaint against such boat or vessel to be filed with the clerk of the district court of the proper county. A warrant of attachment then issues, directing the seizure of such boat, which is to be served and returned as other writs of attachment; and, upon the return of the warrant, proceedings follow against the boat or vessel as if the action had been instituted against the person on whose account the demand accrued. The master, agent, owner, or consignee may appear and answer the complaint on behalf of such boat or vessel. As respects the owner and those representing him, all of whom may appear and answer, there is no question, we think, but that the statutory provisions of this chapter are sufficient to constitute due process of law. The actual seizure and attachment of the property is presumptively notice of the proceedings to the owner, and, of course, gives jurisdiction of the subject of the controversy proceeded against. It is not necessary to determine, in this case, whether such seizure is notice to the whole world, or whether the proceedings and sale would be attended with the incidents of a suit in admiralty. It is enough, for the purposes of this case, that, as against the owner, it is competent for the legislature to provide for liens in such cases, and prescribe the procedure adopted for their enforcement. Wap. Proc. in Rem., § 65, and cases. It is for the legislature to determine, in such cases, the manner in which notice should be given to the parties in interest. "It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend," and that "it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of." *Happy v. Mosher*, 48 N.Y. 313; *Miller v. Town of Corinna*, 42 Minn. 391, (44 N.W. Rep. 127.)

Judgment reversed.

Section 2.

The Craft Subject to Admiralty Jurisdiction.

Tucker v. Alexandroff.

Supreme Court of the United States, 1902.

183 United States 424.

This was a writ of habeas corpus issued upon the petition of Alexandroff, to inquire into the cause of his detention by Robert C. Motherwell, keeper of the Philadelphia County Prison, and Captain Vladimir Behr, master of the Russian cruiser Variag.

The petition set forth that the petitioner was illegally detained upon a commissioner's warrant, issued upon the affidavit of Captain Behr, to the effect that he was a duly engaged seaman of the Russian cruiser Variag, whose term of service had not expired; and that he had on or before April 25, 1900, deserted from said vessel, without any intention of returning thereto. Petitioner further averred that on May 24, 1900, he had declared his intention before the proper authorities to become a citizen of the United States, and to renounce his allegiance to the Emperor of Russia, of whom he was then a subject; that he had never deserted the Variag and had "never set his foot on that vessel as a seaman thereof."

In return to the writ the superintendent of the county prison produced the body of Alexandroff, with a copy of the commitment by a United States commissioner, stating that he had been "charged" on oath with desertion from the Variag, and "apprehended" upon a warrant issued by the commissioner at the request of the vice-consul, in accordance with the terms of a treaty between the United States and Russia. There was no statement that an examination had been had before the commissioner, and the warrant did not commit him for examination, but "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag, or until he shall be discharged by the due course of law." . . .

Upon a hearing upon the writ, the return thereto and the evidence, the District Court was of opinion, first, that the Variag was not, at the time the petitioner left the service, a Russian ship of war, but simply an unfinished vessel intended for a Russian cruiser; second, that petitioner had not become a member of her crew; that the vessel had no crew in the sense intended by the treaty, inasmuch as the men assigned to that duty had not yet begun that service and might never be called upon to perform it; third, that no such documentary evidence of petitioner's enlistment as a member of the crew, as was required by the treaty, had been offered.

It was accordingly ordered that the prisoner be discharged from custody. 103 Fed. Rep. 198.

An appeal was taken from this order to the Circuit Court of Appeals, in which court the district attorney entered his appearance and filed a suggestion that, under the facts of the case, the relator should be remanded to the county prison to await the order of Captain Behr, the master of the Variag.

Upon a hearing in the Court of Appeals, the order of the District Court was affirmed. 107 Fed. Rep. 137. Whereupon William R. Tucker, vice-consul of Russia at Philadelphia, applied for and was granted a writ of certiorari from this court.

Mr. Justice Brown, after stating the case, delivered the opinion of the court. . . .

The facts were, in substance, that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man the Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched in October or November, 1899, and at the time Alexandroff deserted was lying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intentions of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian cruiser Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia.

The vice-consul, who prosecutes this appeal on behalf of the Russian government, relies chiefly upon Art. IX of the treaty of December, 1832, which reads as follows (8 Stat. 444): "The said Consuls, Vice-consuls and Commercial Agents are authorized to require the assistance of the local authorities, for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused." . . .

What, then, are the stipulations to which we must look for the solution of the question involved in this case? They are found in

the ninth article of the treaty, which authorizes the arrest and surrender of "deserters from the ships of war and merchant vessels of their country." It is insisted, however, that this article is no proper foundation for the arrest of Alexandroff for three reasons: First, that the Variag was not a Russian ship of war; second, that Alexandroff was not a deserter from such ship; and, third, that his membership of such crew was not proven by the exhibition of registers of vessels, the rolls of the crew, or by other official documents. The case depends upon the answers to these questions.

1. At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a ship in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron - an ordinary piece of personal property - as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China*, 7 Wall. 53; *Thorp v. Hammond*, 12 Wall. 408; *Workman v. New York City*, 179 U.S. 552; *The Little Charles*, 1 Brock. 347, 354; *The John G. Stevens*, 170 U.S. 113, 120; *Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U.S. 406. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. We have had frequent occasion to notice the distinction between a vessel before and after she is launched. In *The Jefferson, People's Ferry Company v. Beers*, 20 How. 393, it was held that the admiralty jurisdiction did not extend to cases where a lien was claimed for work done and materials used in the construction of a vessel; while the cases holding that for repairs or alterations, supplies or materials, furnished after she is launched, suit may be brought in a court of admiralty, are too numerous for citation.

So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either in rem against herself or in personam against her owners, upon contracts or for torts, while if, in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit in rem for damages. *The Blenheim*,

2 W. Rob. 421; The Vianna, Swab. 405; The Andalusian, 2 P. D. 231; The Glengarry, 2 P. D. 235; The George Roper, 8 P. D. 119; Baker v. Power, 14 Fed. Rep. 483.

Inasmuch as the Variag had been launched and was lying in the stream at the time of Alexandroff's desertion, we think she was a ship within the meaning of the treaty. . . .

[Only so much of the opinion is given as deals with the question whether the Variag was a ship within the meaning of the treaty.]

We are of opinion that this case is within the treaty, and the judgments of both courts below are therefore reversed, and the case remanded to the District Court for the Eastern District of Pennsylvania for further proceedings consistent with this opinion.

[The dissenting opinion of Mr. Justice Gray, in which Mr. Chief Justice Fuller and Justices Harlan and White concurred, is omitted.]

A Raft of Cypress Logs.

District Court of the United States,
Western District of Tennessee. 1876.

1 Flippin 543.

Libel claimed for services as seamen and mariners employed in navigating a raft of cypress logs from New Madrid, Mo., to Memphis, Tenn., on the Mississippi river, and contained the usual averments as to length of service, good conduct and amount due. Claimants excepted upon the ground that the services were not maritime and that this court had no jurisdiction. . . .

Brown, J. Locality is the test of jurisdiction only in cases of tort, and the mere fact that the services in question were rendered upon navigable waters is clearly insufficient. In actions of contract the agreement sued upon must be maritime in its character; it must pertain in some way to the navigation of a vessel, having carrying capacity and employed as an instrument of travel, trade or commerce, though its form, size and means of propulsion are immaterial. The Gen. Class, Brown's Ad. R. 334.

If the service does not require some degree of maritime skill, it must contribute in some way to the navigation or equipment of a vessel, or to the necessities or comfort of its passengers. It is at least doubtful whether mere landsmen, such as barbers, musicians, surgeons or clerks, though employed upon vessels, can maintain suits in admiralty for their wages. 5 Pars. on Shipping, 184.

It is unnecessary here to consider whether a raft may not, for some purposes be the subject of admiralty jurisdiction.

By the Roman law the word "ship" apparently included everything which floated upon the waters and was accessory to commerce.

"Navim accipere debemus sive marinam, sive fluviatilem, sive in aliquo stagno naviget sive schedia sit." (Dig. de exercit. act) Again "Navigii appellatione, etiam ratis continenter." (Dig. de fluminibus, L. I., Sec. 14.) The word "schedia" seems to have represented what we term a "float", while "ratis" answers properly to our word "raft".

Under the French law the definition is almost equally broad. Says Emerigon, Assurances, ch. 4, sec. 7, par. 1, "The word ship (navire) includes every vessel of timber work able to float and to be carried upon the water. Boats and the smallest barks are comprehended in the same definition, even rafts are included."

"But", says Dufour, Droit Maritime, Vol. 1, page 115, "these definitions must be accepted with caution. They are in fact true

only in a certain sense and in certain given situations. Thus, they would be correct in the point of view of the law of 1791, which forbids, save in case of superior force, the lading or un-lading of ships outside the limits of harbors where custom houses are established." The author then proceeds to show, from opinions of the Court of Cassation, that those only are ships within the meaning of Art. 190 of the Code of Commerce, which have "an equipment, a crew, a special service, a particular industry." Such only are subject to legal process, or affected by the liens of commerce.

So De Fresquet (*Des Abordages Maritimes*,) defines ships as "every construction designed for the carriage of passengers or freight in navigation," and in enumerating those collisions which are not considered as maritime by the Commercial Code, mention such as occur "with cribs of timber (*trains de bois*) floating upon a river." P. 6.

With the single exception of the case of *A Raft of Spars*, (Abbott's Admiralty, 485) I know of no English or American authority holding that courts of admiralty have jurisdiction over rafts. In this case, the District Court of Southern New York sustained a libel in rem to recover for salvage services in rescuing a raft of spars, drifting out to sea through the Narrows of New York harbor. No authorities are cited, and the learned judge briefly states it as his opinion that the service was clearly an act of salvage. By a great weight of authority, however, salvage, in the sense in which the term is used in the maritime law, can only be claimed for the rescue of a ship or its cargo, or portions of the same.

In the case of *Nicholson v. Chapman*, 2 H. Black, 254, it was held that a person, who, finding a quantity of timber loosened from the bank of a navigable river, and carried by the tide to a considerable distance, conveyed it to a place of safety, had no lien for his trouble or expense, and was liable to an action of trover upon demand of the owner, though nothing was tendered him by way of compensation. The case was clearly distinguished from cases of salvage, and it was held that the finder did not even have a common law lien for his services. In the similar case of *A Raft of Timber*, 2 W. Rob. 251, it was held the High Court of Admiralty had no jurisdiction.

The question was also elaborately considered by Mr. Chief Justice Taney, in the case of *Tome v. Four Cribs of Timber*, Taxey, 533, in which it was held that a libel would not lie for the rescue of a raft of lumber, driven from its anchorage by a high wind and tide; and following *Nicholson v. Chapman*, that the person rescuing it acquired no lien, had no right to retain it from the owner, and that his only remedy was an action at law to recover the value of the services rendered. In the language of the learned justice, "They are not vehicles intended for the navigation of the

only in a certain sense and in certain given situations. Thus, they would be correct in the point of view of the law of 1791, which forbids, save in case of superior force, the lading or un-lading of ships outside the limits of harbors where custom houses are established." The author then proceeds to show, from opinions of the Court of Cassation, that those only are ships within the meaning of Art. 190 of the Code of Commerce, which have "an equipment, a crew, a special service, a particular industry." Such only are subject to legal process, or affected by the liens of commerce.

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A Raft of Cypress Logs -- 3

sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of commerce; they are piles of lumber and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport them to their destined ports, and any assistance rendered these rafts, even when in danger of being broken up or swept down the river, is not a salvage service in the sense in which that word is used in courts of admiralty."

In the recent case of the *W. H. Clark*, 5 Bissell, 295, Judge Hopkins, of the Western District of Wisconsin, intimated his opinion that a raft could not be held liable in admiralty for a collision, though the question did not necessarily arise in that case.

Passing it by, then, as unnecessary to the determination of the question here involved, I find no case favoring the theory insisted upon by libellants, that raftsmen are seamen within the definition of the maritime law, or entitled to sue in this court for their wages. All the cases cited by their learned counsel are of small crafts engaged in petty commerce, and although, in some instances, other work was done, such as the laying of stone, it was regarded by the court as incidental and subsidiary to the navigation of the vessel, and the libellant was permitted to recover upon the ground the principal service was one requiring maritime skill. *The Mary, Sprague*, 204; *The Canton*, Id. 437; *The May Queen*, Id. 588; *The Highlander*, Id. 510.

As observed by Judge Sprague, in the case of *The Canton*, a small vessel carrying stone to Boston, "they must have steered, furled and reefed the sails, and brought the vessel to anchor. They must have been able to haul, reef and steer, an ordinary criterion of seamanship. They ought also to have known the rules of navigation in regard to collisions, and had they negligently run afoul of another vessel the owner would have been held responsible for the damage."

While some previous knowledge may be useful, if not necessary, to the proper steering of a raft, it is rather the knowledge of the currents and eddies of a particular locality than maritime skill, properly so-called. Admit that a raftsman may in any case sue in rem for his wages, and it follows, logically, that he may do so whatever be the size of the raft or the distance it is transported. Indeed, it is difficult to see why he might not also attach for the navigation of unconnected logs, and courts of admiralty thus be thrown open to the log-drivers of Maine and Michigan, whose business is to "run" logs down streams, navigable for that purpose, to booms prepared to receive them. Again, if a raft be a vessel to the extent claimed, are not the laborers who make it up and the dealers who furnish its crew with provisions also entitled to a lien as material men?

The Act of May 3, 1802, 1 Brightly's Digest, 304, providing that persons navigating the Mississippi river in rafts shall be considered seamen so far as to be entitled to the relief extended by law to sick and disabled seamen has no bearing upon the case, as the act, by its terms, applies only to rafts navigated to New Orleans. This section, moreover, seems to have been repealed. Two sections have been reenacted in the revised statutes, while the remainder of the act falls within the terms of the general repealing section of the revision, § 5596, and even if the act were still in force and applied to the raft in question, it does not necessarily follow that the raftsmen would be such seamen as to be entitled to sue in rem in admiralty. I should deem it inequitable to subject property of this nature to the tacit liens of the maritime law, particularly if it had passed into the hands of an innocent purchaser.

The libel does not set forth a maritime contract, and it must be dismissed, but without costs, the want of jurisdiction appearing upon the face of the pleading.

Seabrook v. A Raft of Railroad Cross-Ties.

District Court of the United States, District of South Carolina
1889.

40 Federal Reporter 596.

Simonton, J. The libelant is the owner of a steam-dredge used in mining phosphate rock from the bed of navigable streams. While at anchor in the stream of Stono river, a navigable salt-water river, on 13th September last, his dredge was run into by a raft floating down the stream with the tide, and injured. He brings this libel in rem. An exception is taken to the jurisdiction. Will a libel in rem lie against a raft for collision on navigable waters? The precise question has not been decided in any case reported. Chief Justice Taney, in *Tome v. Four Cribbs of Lumber*, Taney, 533, was of the opinion that rafts anchored in a stream, although it be a public, navigable river, are not the subject-matter of admiralty jurisdiction, when the right of property or possession alone is concerned. In that case he refused to allow salvage for saving rafts. But his decision went off on the custom of the Chesapeake. See *Fifty Thousand Feet of Timber*, 2 Low. 64. In *Jones v. The Coal Barges*, 3 Wall. Jr. 53, - a libel for collision, - Justice Grier held, with respect to coal-barges: "Mere open chests or boxes of small comparative value, which are floated by the stream, and sold for lumber at the end of their voyage. A remedy in rem against such a vessel, either for its contracts or its torts, would not only be worthless, but ridiculous; and the application of the maritime law to the cargo and hands employed to navigate her would be equally so. * * * Every mode of remedy and doctrine of the maritime law affecting ships and mariners may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat-boats." Since this decision, however, other judges have had wider views of the jurisdiction of admiralty. In *The General Cass*, 1 Brown, Adm. 334, a scow - a mere float or lighter - was held to come within the jurisdiction of the court. In *The Pioneer*, 30 Fed. Rep. 206, a steam-dredge was held subject to a maritime lien for supplies. In *Disbrow v. The Walsh Bros.*, 36 Fed. Rep. 607, a barge without sails or rudder, used for transporting brick, on which men are employed for loading, carrying, and delivering brick, is held subject to a lien for wages of the men in this service. In *The Hezekiah Baldwin*, a canal-boat used as a floating elevator, having no motive power of its own, or capacity for cargo, is held maritime property. 8 Ben. 556. In this circuit, Judge Bond held that flats on which machinery for digging phosphate in navigable streams and the lighters attached to them, were vessels, and that the hands employed on them had a lien for wages, and material-men a lien for supplies. *Miller & Kelly v. Dredges*, MS. Circuit Court S. C. 1884. So also, with respect to salvage, other judges entertain different views from the late chief justice. In *Fifty Thousand Feet of*

Timber, 2 Low. 64, Judge Lowell held that a salvage service is performed when a raft of lumber is saved from peril on navigable waters, and that a claim for such service may be made in a court of admiralty. He quotes Judge Betts, A Raft of Spars, 1 Abb. Adm. 485. Judge Pardee, in Muntz v. A Raft of Timber, 15 Fed. Rep. 555-557, held that a raft of timber is subject to the jurisdiction of the admiralty court in the matter of salvage; reserving, however, the question whether it can commit a maritime tort. In Gastrel v. A Cypress Raft, 2 Woods, 213, it was held that admiralty has not jurisdiction to try title to logs because they have been formed into a raft; but on examination of that case it will be seen that the raft was made up of logs cut on a piece of land, the title to which was in dispute, and that the libel was filed in order to determine the title to this land. The logs were in New Orleans, their navigation was over, and they were really nothing but a pile of timber. The cases are collected and commented upon in The F. & P. M. No. 2, 33 Fed. Rep. 512. The result is that, while there have been obiter dicta on the point, there is no direct decision. Such being the state of the authorities, we can safely proceed on general principles.

That a raft is a water-craft distinctly appears in section 4233, Rev. St. rule 12: "Coal-boats, trading-boats, rafts, or other water-craft." In U.S. v. One Raft of Timber, 13 Fed. Rep. 796, Judge Bond held that a raft was a vessel, under sections 4233, 4234, and must carry lights. "The true criterion by which to determine whether any water-craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion." The General Cass, 1 Brown, Adm. 334. The raft in this case was of cross-ties, and was used as the cheapest and most convenient mode of bringing them to market. It was made up of several small rafts, 36 in number, technically known as "bulls". Each bull was made up of cross-ties three or four deep, securely and compactly joined together, and fastened in a crib, so as to be immovable; and then all the bulls were united by fastenings, making one body, - the raft, - in the shape most suited for navigating the streams which it must pass. It was manned with a pilot, who was in command, a crew of four men, and a cook. The pilot and crew, during the voyage, - many days in duration, - lived on the raft, on which was constructed a small shelter. The raft had come from the Edisto river, and, pursuing its way towards the sea, had used the many navigable streams forming the inland navigation of this coast. Necessarily, it was constructed to withstand the buffeting of the waves and winds, and the strain of passing over shallow places. Its locomotion depended almost altogether upon the tides; but poles and large oars, known as "sweeps" were used constantly, as well in the propulsion of as in giving direction to, the raft. Rafts like this are in constant use. Sometimes they bring down only the timber or lumber which forms the raft;

at others, cargo in the shape of cross-ties or fire-wood is brought. Their proper navigation requires vigilance, experience, and skill. Courts of admiralty have jurisdiction in rem in cases of collision between vessels on navigable waters. "The word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation by water." Rev. St. § 3. "Navigium" - vessel - is a general word used for any kind of navigation. Ben. Adm. §§ 216, 218. The first vessels were rafts.. The raft is the parent of the modern ship. Encyclopaedia Britannica, art. "Ship". "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them." Per Field, J., The Rock Island Bridge, 6 Wall. 213. In my opinion, this raft fulfills the definition of the subject of maritime lien, and the libel will lie. . . .

Charles Barnes Co. v. One Dredge Boat.

District Court of the United States, Eastern District
of Kentucky, 1909.

169 Federal Reporter 895.

Cochran, District Judge. This is a libel for supplies or material to the amount of \$344.38 furnished to a pumpboat, the property at the time of the Independent Coal Company. The supplies or material furnished were used in equipping it.

'This cause is before me on a motion for an order of sale under rules 10 and 11 of the general admiralty rules. This is objected to by defendant on the ground that this court is without jurisdiction of the cause. It is not contended that otherwise it is not proper to sustain the motion and make the order of sale. It is claimed that this court is without jurisdiction on two grounds. One of them is that the pumpboat sued is not a vessel, and hence not within the jurisdiction of admiralty. I will consider and dispose of this ground before taking up the other. Is, then, the pumpboat a vessel? What is a vessel?

In the case of Cope v. Vallette Dry Dock Company, 119 U.S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, Mr. Justice Bradley said that the terms "ships and vessels" are used in "a very broad sense" and include "all navigable structures intended for transportation." In section 3, c. 1, tit. 1, Rev. St. (U.S. Comp. St. 1901, p.4), a vessel is said to include "every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water." That statutory definition is somewhat broader than Mr. Justice Bradley's, in that it takes in a navigable structure capable of being used for transportation; whereas, his definition is limited to one intended for transportation. And I do not see why the statutory definition should not govern. If it does, then a "vessel" may be defined to be a navigable structure capable of being used for transportation whether intended to be or actually used for that purpose. Of course, if in addition to being capable of being so used any given navigable structure is intended to be so used or is actually so used, so much the greater reason for holding that it is a vessel. So far, however, as the necessities of this case are concerned, it is not required that we should go beyond Mr. Justice Bradley's definition, and a vessel will be treated as a navigable structure intended for transportation.

Such being the case, of course, in order to a navigable structure being a vessel, it is not essential that it have on board means by which it may be propelled upon the water. The earliest kind of vessel, to wit, the sailing vessel, did not have such means, as it was propelled by the wind, which was outside of it.

It simply had means by which the force of the wind could be applied to the vessel. So frequently navigable structures intended for transportation have been held to be vessels, though without means of propulsion aboard and yet not propelled by the wind. A scow was held to be a vessel in the following cases, to wit: The General Cass, Fed. Cas. No. 5,307; Endner v. Greco (D.C.) 3 Fed. 411. A barge was so held to be in the following cases, to wit: The Dick Keys, Fed. Cas. No. 3,898; Disbrow v. Walsh Bros. (D.C.) 36 Fed. 608; The Wilmington (D.C.) 48 Fed. 567; Ex parte Easton, 95 U.S. 68, 24 L. Ed. 373. In the Dry Dock Case, supra, Mr. Justice Bradley after referring to an English case in which was involved a "hopper" barge" used in carrying "men and mud," said:

"Perhaps this case goes as far as any case has gone in extending the meaning of the terms 'ship' or 'vessel.'"

In the case of Wood v. Two Barges (C.C.) 46 Fed. 204, certain coal barges were held not to be vessels within admiralty rule No. 2. A floating circus was held to be a vessel in the case of the W. F. Brown (D.C.) 46 Fed. 290. A canal boat was so held to be in the case of The Kate Tremaine, Fed. Cas. No. 7,622. A raft was so held to be in the case of Seabrook v. Raft R. R. Cross-Ties (D.C.) 40 Fed. 596. A dismantled steamboat was so held to be in these cases, to wit: The Old Natchez (D.C.) 9 Fed. 476; The City of Pittsburgh (D.C.) 45 Fed. 699. In the first case the structure in question was intended to be used as a wharfboat. In the other it was intended to be used as a pleasure barge for transportation of excursion parties. From these two cases must be distinguished the case of The Hendrick Hudson, Fed. Cas. No. 6,355, where a dismantled steamboat was held not to be a vessel. It was in use as a hotel or saloon.

In each of these cases where the navigable structure in question was held to be a vessel, it was intended to be, if not actually used for transportation. The thing transported, however, was aboard of the structure temporarily. It came and departed. Must, then, the transportation which the navigable structure is intended to effect be of something that is temporarily aboard in order that the structure may be held to be a vessel? Or is a navigable structure that is intended to be used in transporting something that is permanently aboard of it a vessel? I see no reason in principle why the length of time the thing is to be aboard the structure and transported by it should have any bearing on the question whether it is or not a vessel. It has therefore been held in a number of cases that a steam dredge is a vessel. Such structure transports, and is intended to transport permanently, the shovel and the steam outfit with which it does its work. It is true that it transports temporarily the crew that operates it and the coal from which the steam is generated; but the ground upon which it has been held to be a vessel is not because of such temporary transportation. It has been so held in the following cases, to wit: The Alabama (D.C.) 19 Fed. 544; The Alabama (C.C.) 22 Fed. 449; The Pioneer (D.C.) 30 Fed.

206; Aitcheson v. Endless Chain Dredge (D.C.) 40 Fed. 253; The Atlantic (D.C.) 53 Fed. 609; The Starbuck (D.C.) 61 Fed. 502; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; The International (D.C.) 83 Fed. 840; McRae v. Bowers Dredging Co. (C.C.) 86 Fed. 344; Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (D.C.) 148 Fed. 290.

The cases of The Alabama (D.C.) 19 Fed. 544, and The Alabama (C.C.) 22 Fed. 449, present the same case; one being the decision in the court of original jurisdiction, and the other the decision in the appellate court. In that case and the case of The Starbuck (D.C.) 61 Fed. 502, there was involved not simply the dredge, but the dredge and its scows. In both cases they were treated as a unit, and the scows were regarded as affecting somewhat the character of the dredge. In The Alabama Case on appeal Judge Pardee said:

"The parties to this case have treated the dredge and scows as one thing, one plant, built and operated as one, as one complete whole carrying on one business, and having but one purpose. If the parties are right, in thus treating the dredgeboat and scows as one craft or thing, then it seems clear that the purpose and business of that craft is largely navigation and water transportation."

And again he said:

"The dredgeboat by itself might not be up to the test."

In The Starbuck Case Judge Butler said:

"That a dredge and her scows are to be treated as one concern and are subject to the admiralty jurisdiction has been several times decided, and I think rightly."

In the case of In re Hydraulic Steam Dredge No. 1, 80 Fed. 545, 25 C. C. A. 628, Judge Jenkins seems to think that such is the only basis on which a steam dredge can be held to be a vessel. He there said:

"The decisions holding that a steam dredge is within the admiralty jurisdiction may perhaps be rested upon the ground that a dredge is not only a floating structure upon the waters, but, as stated by Judge Pardee in The Alabama (C.C.) 22 Fed. 449, is accompanied by a scow, and that the scow and the barge are to be deemed one movable thing upon the waters, engaged in a common enterprise, and carrying the excavated earth by water transportation, and so engaged in navigation and related to commerce. Judge Pardee observes, however, that 'the dredgeboat by itself might not be up to the test.'"

But a consideration of the other dredgeboat cases cited will

show that it by itself is regarded as being up to the test, and no good reason can be urged why it should not be so regarded.

In the case of Pile Driver E. O. A. (D.C.) 69 Fed. 1005, Judge Swan, in referring to The Pioneer Case, which was the next dredge-boat case to arise after The Alabama Case, which seems to have been the first, said:

"The case of The Pioneer (D.C.) 30 Fed. 206, which sustains a lien upon a dredge because it was capable of use in navigation without its machinery, although its use was to transport the shovel and machinery with which it was equipped, is irreconcilable with the cases of The Hendrick Hudson, 3 Ben. 419, Fed. Cas. No. 6,355; The Pulaski (D.C.) 33 Fed. 383; Ruddiman v. A Scow Platform (D.C.) 38 Fed. 158; The Big Jim (D.C.) 61 Fed. 503."

The cases referred to are really not irreconcilable with the Pioneer Case. I will not, however, take the time to show this, as the cases are so numerous which hold that a dredgeboat apart from its scow is a vessel that it must be accepted now that it is. The only discordant notes are those of Judges Pardee, Swan, and Jenkins: Judges Pardee and Jenkins simply questioning whether a dredge in such condition is a vessel.

Within the principle of these dredgeboat cases are the cases of The Hezekiah Baldwin, Fed. Cas. No. 6,449, and The Public Bath No. 13 (D.C.) 61 Fed. 692. In The Baldwin Case a canal boat upon which had been built an elevating apparatus for hoisting grain, without motive power of its own or capacity for cargo except the permanent cargo of its elevator, was held to be a vessel; in The Public Bath Case, a bathhouse built on boats. The boats were designed to float, to uphold, and to transport the bathhouse wherever and whenever desired. It was held to be a vessel. Judge Brown said:

"The bathhouse was in effect the permanent cargo of the boats."

The conclusion to be drawn from these dredgeboat, floating elevator, and bathhouse cases therefore is that a navigable structure which transports or is intended to transport a permanent cargo, and nothing else, is a vessel. In the dredgeboat case the thing transported was to facilitate navigation, and in the elevator case to facilitate transportation. In the bathhouse case it was not to facilitate either.

Before proceeding to a consideration of the particular structure here involved, notice should be taken of certain decisions that may be thought to affect the conclusion thus reached. Of these are the dry dock cases. They are Cope v. Vallette Dry Dock (D.C.) 10 Fed. 142; Snyder v. A Floating Dry Dock, etc. (D.C.) 22 Fed. 685; Cope v. Vallette Dry Dock, 119 U.S. 625, 7 Sup. Ct. 336,

30 L. Ed. 501. The dry dock is a floating structure. It is possible that it is navigable, though as to this I have not taken the pains to ascertain from the facts presented in those cases. It is sufficient to say that it is not intended for transportation of anything.

In the case of *Woodruff v. One Covered Scow* (D.C.) 30 Fed. 269, the structure involved is described as a scow or float with a house on it nearly the size of the plant. It was used to store oars and sails of small boats landing at it and as a means of egress therefrom to the adjoining wharf and thence to the shore. It was held not to be a vessel. Judge Benedict said:

"But this structure, being stationary and never employed in the transportation of freight or passengers from place to place upon the water, cannot be held to be a ship or vessel.

In a line with this we have the case of *Ruddiman v. A Scow Platform* (D.C.) 38 Fed. 158, where it was held that a floating structure designed to be moored alongside a wharf so that carts containing refuse to be dumped into boats can be driven over it from the wharf was not a vessel. Judge Brown, distinguishing the case from the floating elevator case, *supra*, said:

"But in that case not only was the structure designed for the uses of commerce, but it was her constant business to move from place to place, as a vessel, in her peculiar work; in both respects differing from the present case. This structure though, as I have said, capable of being moved, was designed to be comparatively permanent. By its nature, build, design, and use, it belongs, I think, to that considerable class of cases, such as dry docks, floating saloons, bathhouses, floating hotels, floating boathouses, and floating bridges, all of which have been held not to be vessels within the maritime law."

This brings us to two cases cited on behalf of defendant which come closer to the dredgeboat, floating elevator, and bathhouse cases than any yet considered. They are the cases of *The Big Jim* (D.C.) 61 Fed. 503, and *Pile Driver E. O. A.* (D.C.) 69 Fed. 1005. The structure involved in *The Big Jim* Case is called a marine pump. When at work it rested on piles driven in the ground under the water, and its work was to suck mud from the bottom of the water or from scows alongside and force it on the adjacent land. It was capable of being towed from place to place where its services were needed and has been so towed. It was held not to be a vessel. As to this case it is to be noted that it was decided by Judge Butler, who held in *The Starbuck* Case that a dredge was a vessel, and seems to have been influenced in so holding by the fact that it was accompanied by a scow, and the dredge and scow were one thing. The structure involved in the *Pile Driver E. O. A.* Case was a floating platform which carried a derrick engine and pile-driving apparatus and was furnished with a wheel by which to propel

itself about the bay or harbor. It was held not to be a vessel. It seems to me that this decision is unsound. It is in direct conflict as to principle involved with the dredgeboat cases. Judge Swan recognized this in distinguishing The Alabama Cases, supra, because the dredge was accompanied by scows, and in holding that The Pioneer Case, where the dredge was not so accompanied, was incorrectly decided.

In conflict with this decision is the case of Lawrence v. Flatboat (D.C.) 84 Fed. 200, affirmed on appeal by the Circuit Court of Appeals of the Fifth Circuit in the case of Southern Log & Cart Supply Co. v. Lawrence, 86 Fed. 908, 30 C. C. A. 480, where it was held that a flatboat with a pile driver and its engine erected thereon, mainly used in constructing bulkheads for the erection of channel lights, which also transported material used in the work and was towed by a tug, was a vessel.

I therefore conclude that a navigable structure intended for the transportation of a permanent cargo that has to be towed in order to navigate is a "vessel," and that admiralty has jurisdiction of claims against and liens upon such a structure.

This brings us to the question as to the character of the structure involved here. I would note first the name by which it goes. It is called a "pumpboat". It is so called in the deed of assignment under which B. F. Graziani claims it as assignee of the Independent Coal Company. This indicates that to some extent it has been regarded by those who have had to do with it as a boat. A small vessel is one of the definitions of the word "boat". Again, I notice that in the deed of assignment referred to it is treated as having not only "machinery and tackle", but "sails, furniture, and apparel." It states that amongst other things thereby assigned are a "pumpboat, its machinery, sails, furniture, and apparel." In the affidavits filed bearing on the nature of the structure there is no reference made to the sails, furniture, and apparel of the pumpboat, except the affidavit filed on behalf of defendant, which states that it has no sails.

The plaintiff has filed three affidavits; the affidavits of its president and two boat builders, one of whom inspected the boat in question with a view of purchasing it at sale hereunder. The defendant has filed eight affidavits; the affidavits of the present claimant, Mr. Graziani, the assignee of the Independent Coal Company, former owner of it, of the president of said company, and six other men, all of whom have had such connection with the structure in question as to fit them to describe it correctly. In some particulars there is a sharp conflict between the two sets of affidavits hard to account for. According to plaintiff's affiants, the structure has a scow bow, scow stern, a deck fore, and a deck aft, and a cock pit in the center covered by cargo box. According to defendant's affiants, not one of these things is true of the structure. The boat is square in front and rear and has no decks

or cock pit. A photograph was promised me so that I might determine myself, but it has not been forthcoming. The conflict, however, is not material. It is agreed that it is equipped with a double engine, a boiler, pumps and pipes connecting the boiler and pumps, and two capstans, a steam one in front and hand one in rear. It is used for the purpose of pumping water from coal barges and is navigable, i.e., it can be shoved with poles or drawn by ropes or towed. According to plaintiff's affiants, the sole object of the steam engines and capstans is to propel the structure to such places as it may be desired to move it. This is done by means of an anchor or other thing to tie to. It is conceded by defendant's affiants that it can be propelled in this way, but it is denied that this is what the engines and capstans are for. It is claimed that their purpose is, by connecting with barges desired to be pumped by means of ropes, they can be drawn to it, and that this is the sole use that has been made of them. At first the hand capstan was made use of, and, this not working satisfactorily, the steam engines and capstans were added. It would seem that, if this apparatus can be made use of to draw barges to the pumpboat, it can also be made use of in drawing the pumpboat to the barges.

The pumpboat was constructed by said coal company and has never been used by any one but it, and it has used it in its coal harbor in the Ohio river at Ludlow, Ky., in pumping out its coal barges. In doing this work it has been either at one end of the fleet or the other and has been moved from one end to the other with poles or by drawing it with ropes. It is capable of being towed to any place on the Ohio river where its services might be needed.

The conclusion I draw from all this is that the pumpboat in question is a navigable structure intended for transportation of a permanent cargo, to wit, its engines, boiler, capstans, pumps, and pipes, in order to do the work of pumping where needed, and that therefore it is a "vessel" and subject to admiralty jurisdiction. . . .

The motion for an order of sale is sustained.

South Florida Dredging Co. v. American Steel Dredge No. 77.

District Court of the United States, Southern District of
Florida, 1923.

286 Federal Reporter 454.

Clayton, District Judge. To recover for supplies furnished and repairs made to the American Steel Dredge No. 77, the South Florida Dredging Company, a corporation, libeled the dredge.

The libelant contracted with the owners of the dredge to construct an inland canal for the purpose of drainage. Incidentally a roadbed was to be constructed, of the earth removed from the canal, along the side of the canal. At or about the time of the making of the contract mentioned the owner of the dredge entered into another definite contract with the libelant, whereby such owner agreed that the dredging company, libelant, should have the use of the dredge, and also that the dredging company, libelant should make necessary repairs to the dredge in order to fit it for the use, furnishing the requisite supplies or materials and work, and that upon the completion of the canal the owners of the dredge should pay the libelant the sum of \$2,500 for such supplies and work. It is not admitted that the canal ever became navigable, but it is admitted that when the canal was completed the dredge was floated out of its mouth into the bay near Cape Sable, where the vessel was found when libeled, and it was then in navigable waters. The evidence sustains the insistence that the canal was dug for drainage purposes only.

The owners of the dredge refused to pay the stipulated sum, and this libel was brought against the dredge. The respondent excepts to the libel, upon the ground that no maritime lien has been created upon the vessel - that the facts do not constitute a case cognizable in admiralty.

It is manifest that the owners of the dredge became bound to pay the agreed sum of \$2,500 for materials and repairs furnished and made to the dredge. However, this is not an action for damages on account of the breach of a contract, or for supplies and work and labor done. Nor is this a proceeding to enforce a lien created by the contract. On the contrary, the libelant asserts that it has a lien by virtue of maritime law, contending that a maritime lien attached when the craft became water-borne and was found in the navigable water.

In the argument the libelant conceded, and correctly so, that there is no maritime lien, unless such lien attached to the vessel when it became afloat in the navigable water. But the fact that it did become water-borne after the completion of the drainage canal cannot create a maritime lien, for such lien can arise only

from the use of a vessel in commerce by water or in navigation. Such a lien attaches by operation of law only on appropriate facts showing such use of the vessel. The rights of the libellant and the duties of the respondent, so far as the case here is concerned, arise from the facts pertaining to such commerce and navigation and not otherwise. In no proper sense can it be said that any rights and duties growing out of the circumstances of this case should be regarded as directly or immediately connected with navigation or commerce by water. A review of the opinions and the supporting reasoning of a few of the adjudged cases bearing on the subject is convincing that the libellant has no maritime lien. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *North Pacific Steamship Co. v. Hall Bros. Co.*, 249 U.S. 119, 126, 39 Sup. Ct. 221, 63 L. Ed. 510; *The Iosco*, Fed. Cas. No. 7,060; *Edwards v. Elliott*, 21 Wall. 532, 554, 555, 22 L. Ed. 487; *Pacific Surety Co. v. Leatham & Smith Towing Co.*, 151 Fed. 440, 80 C. C. A. 670; and the other cases cited in *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245.

Manifestly, the dredge was not a ship or vessel within the admiralty jurisdiction; and jurisdiction cannot be asserted to enforce a contract relating to the dredge where such contract is not maritime in its nature, or the services rendered and supplies furnished thereunder had no immediate relation to commerce by water or to navigation. *Bouker Contract Co. v. Proceeds of Sale of Dredge Mach. (D.C.)* 168 Fed. 428; *Hydraulic Steam Dredge No. 1*, 60 Fed. 545, 25 C. C. A. 628, 639, 640; *The Steamboat Orleans*, 11 Pet. (36 U. S.) 175, 9 L. Ed. 677.

It follows that the exceptions to the libel must be sustained, and the libel dismissed, for this court has no jurisdiction of the subject-matter of the controversy.

In the Matter of the Claim of Aksel E. Reinhardt, Respondent
v. Newport Flying Service Corporation et al., Appellants.

Court of Appeals of New York, 1921.

232 New York Reports 115.

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 22, 1921, affirming an award of the state industrial commission made under the Workmen's Compensation Law. . . .

The arguments of counsel are omitted.

Cardozo, J. Claimant was employed in the care and management of a hydro-aeroplane, which was moored in navigable waters at Gravesend Bay, Brooklyn. The plane traveled between Brooklyn, New York, and Miami, Florida. While moored in these navigable waters, it began to drag anchor and drift toward the beach, where it was in danger of being wrecked. Claimant waded into the water to turn the plane about, and was struck by the propeller. The question to be determined is whether he was injured by a vessel. If he was, the jurisdiction of the admiralty excludes the jurisdiction of the commission (*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149). If he was not, employment and injury suffice to justify an award. The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. Riding at anchor is a new craft which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the Courts of Common Law (1 Holdsworth, *History of English Law*, 321, 322; Mears, *Admiralty Jurisdiction*, 2 *Anglo-American Legal Essays*, 354).

We think the craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of the admiralty. Any structure used, or capable of being used, for transportation upon water, is a vessel (U.S. Compiled Statutes, title 1, ch. 1, sec. 3; *Chas. Barnes Co. v. One Dredge Boat*, 169 Fed. Rep. 895). All that remains is to ascertain the uses and capacities of the structure to be classified. The conclusion might be more dubious if the word "vessel" had been interpreted grudgingly and narrowly. The fact is that it has been interpreted liberally and broadly. It includes a canal boat drawn by horses (*The Robert W. Parsons*, 191 U. S. 17, 30); a bathhouse upon floats (*The Public Bath*, No. 13, 61 Fed. Rep. 692); a raft (*The Mary*, 123 Fed. Redp. 609); a scow (*The Sunbeam*, 195 Fed. Rep. 468; *Geo. Leary Const. Co. v. Matson*, 272 Fed. Rep. 461); a dredge (*Chas. Barnes Co. v. One Dredge Boat*, supra; *Saylor v. Taylor*, 77 Fed. Rep. 476; *Ellis v. U.S.*, 206 U.S. 246, 259); a temporarily sunken drillboat (*Eastern S. S. Corp. v. Great Lakes D & D. Co.* 256 Fed. Rep. 497); anything upon the water where movement is pre-dominant rather than fixity or permanence (*Cope v. Vallette Dry*

Dock Co., 119 U. S. 625; Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. Rep. 763, 774; The Mac, 7 P.D. 126; The Mudlark, 1911 P. 116; The Whitton, 1896 P. 42, 57, affd., 1897 A. C. 337). A hydro-aeroplane while in the air, is not subject to the admiralty (Crawford Bros., No. 2, 215 Fed. Rep. 269), or so at least we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction. A hydro-aeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation. Such a plane is, indeed, two things: a seaplane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air (Crawford Bros., No. 2, supra). To the extent that it is the former, it is a vessel, for the medium through which it travels is the water. If a seaplane, incapable of flight, breaks its moorings and causes injury to man or ship, there will be a remedy against the offending res. If, moving upon the water, it becomes disabled, and is rescued on the high seas by a ship, it will be subject to a lien for salvage. We think the jurisdiction of the admiralty is not less where the structure found afloat is seaplane and aeroplane combined. It is true that the primary function is then movement in the air, and that the function of movement in the water is auxiliary and secondary. That is, indeed, a reason why the jurisdiction of the admiralty should be excluded when the activities proper to the primary function are the occasion of the mischief. It is no reason for the exclusion of jurisdiction when the mischief is traceable to the function that is auxiliary and secondary. Collision does not cease to be collision and a peril of the sea because the structure is amphibious. We cannot even say that the chance that the peril will be encountered is so remote as to be negligible. The records of the navy department show that there have been times in transatlantic flights, when planes, abandoning the air, moved for days upon the water. The cause might be lack of fuel or other disability. Even in the absence of such causes, there must always, for at least some space, be movement upon the water before there is ascent into the air. Jurisdiction cannot vary as the distance is short or longer. That would require us to say that the plane by keeping to the water, could transform itself into a vessel, but would leave us helpless to define the point at which transformation would be suffered. From such embarrassments of definition there is but one avenue of escape. It is found in the conclusion that the plane is a vessel, and hence within the jurisdiction of the admiralty, when it is in the fulfilment of its function as a traveler through water, and has put aside its functions and capacities as a traveler through air.

The conclusion to which we are thus led is in accordance with the practice of the government, so far as practice has developed. The treasury department of the United States requires seaplanes or hydroplanes to be registered as vessels. The same department has held that in navigating the water they are subject to the rules

of the road. It has also held them to be vessels within the meaning of the Tariff Law (Act of October 3, 1913, sec. 4-J, subds. 5 and 6; Treasury Decision No. 36156). Rulings not dissimilar have been made by the department of commerce. A libel against a hydro-aeroplane has been filed in the United States District Court for the Southern District of New York, and process issued thereon (American Bar Assn., 1921, Report of the Special Committee on the Law of Aviation, pp. 7, 24).

The order of the Appellate Division and the award of the commission should be reversed, and the claim dismissed, with costs against the Industrial Commission in the Appellate Division and in this court.

Hiscock, Ch. J., Hogan, Pound, McLaughlin, Crane and Andrews, JJ., concur.

Ordered accordingly.

Chapter III.

The Subject Matter of Admiralty Jurisdiction.

Section 1.

Maritime Titles, Possession, and Partition.

Samuel Ward, Claimant of the Bark Mopang, Appellant, v. William B. Peck, Jacob Badger, Freeman Kingsley, and Humphrey Devereux, Libellants.

Supreme Court of the United States, 1855.

18 Howard 267.

This was an appeal from the circuit court of the United States for the eastern district of Louisiana.

The circumstances of the case are stated in the opinion of the court. . . .

Mr. Justice Grier delivered the opinion of the court.

The pleadings in this case present but the single question of the title or ownership of the Bark Mopang.

Originally, the court of admiralty in England entertained jurisdiction of petitory as well as mere possessory actions. Since the Restoration, that court, through the jealous interference of courts of law, had ceased to pronounce directly on questions of ownership or property. Petitory suits were silently abandoned, and, if in a possessory action a question of mere property arose, especially of a more complicated nature, it declined to interfere.

This "submission to authority rather than reason" has continued till the statute of 3 and 4 Vict. c. 65, § 4, restored to the admiralty plenary jurisdiction of such questions. See case of *The Aurora*, 3 Rob. 133, 136, and the *Warrior*, 2 Dodson, 288, 2 Brown Civ. & Ad. 430.

In this country, where the courts of admiralty have not been subjected to such jealous restraints, the ancient jurisdiction over petitory suits or causes of property has been retained. In the case of *The Tilton*, (5 Mason, 465,) Mr. Justice Story has examined this question with his usual learning and ability. The authority of that case has never been questioned in our courts. See *Taylor v. Royal Saxon*, 1 Wall, 322. In the case of the *New England Ins. Co. v. Brig Sarah Anne*, 13 Pet. 387, in this court, the only question was the title or ownership of the brig, yet the cause was entertained without any expression of doubt as to jurisdiction.

The following agreed statement of facts presents the merits of this case:-

"That the libellants are the owners of the said Bark 'Mopang,' unless their title has been divested by the sale made by the master under the following circumstances: The bark sailed from New Orleans on or about the 29th November, 1846, for Tampico and other Mexican

ports. That, on or about the 6th of December thereafter, she struck aground, was abandoned by her officers and crew on the north breakers off the bar of Tampico; that she floated over the bar, and was boarded by one Clifton, who refused to deliver her to the master; that a claim for salvage was made; that by agreement between the master and Clifton, the vessel was sold to the claimant, Ward, on the _____. It is admitted that the sale to Ward was unauthorized by the circumstances in which the master was placed.

"The libellants had a valued policy upon the vessel taken out at New Orleans. On the 9th day of January, 1847, they gave notice of abandonment to the underwriters as for a total loss, who refused to accept the same. They were sued for a total loss by libellants. Judgment found for defendant."

This statement amounts to an admission of want of title in the claimant. The abandonment by her owners to the underwriters could not affect the title of the claimant, by way of ratification or estoppel. The insurance is but a wager between the parties to it, on the safety of the vessel. By the rule of the contract the ship may be abandoned, and the whole insurance claimed, when the damages exceed half the value.

Nothing but extreme necessity can justify the sale of the vessel by the master. The abandonment was based on the damage done to the vessel at the time of the accident. If accepted, the master became the agent of the insurer; and whether accepted or not, his act, without authority, can receive no ratification from allegations or admissions made by any party in a dispute on the contract of assurance, where the inquiry as to the act of the master was irrelevant. The defendant, having obtained possession unlawfully, was a trespasser, and can no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy; moreover, if the circumstances would have justified a sale by the master, no abandonment was necessary. It cannot, therefore, by any possible implication, amount to a confirmation of such sale.

The judgment of the circuit court is affirmed. . . .

[The dissenting opinion of Mr. Justice Daniel is omitted,]

Wood et al. v. Two Barges et al.

Circuit Court of the United States, Eastern District of Louisiana,
1891.

46 Federal Reporter 204.

Pardee, J. Suit was commenced in the district court by filing a sworn libel. . . .

[The text of the libel is omitted.]

Admiralty process issued, commanding the marshal to take into his possession two certain barges, which was executed; whereupon James Sweeney, claiming to be the sole owner of the said barges, appeared and gave bond for the release of the said barges, and thereafter filed an exception to the jurisdiction of the court. It does not appear that any process in personam issued.

The district court ordered the exception aforesaid to be referred to the merits, and thereupon James Sweeney, claimant, filed an answer, admitting that the libelants were the owners of the two empty coal-boats, numbered 137 and 205, which had been used as coal-boats on the Mississippi river, that they had come from Pittsburg, and been unloaded, but denying all knowledge of any sale to Fawcett & Sons, but alleging that the same were sold to the claimant. He answered, further, that he had purchased from the libelants at their place of business and office said empty coal-boats at the price and sum of \$100; that the numbers and location of said boats were given to him, with instructions to take the same, and that he took possession of and removed the same on the day of the purchase; that said boats were only worth \$100; that he is the lawful owner of them, having purchased, taken possession, and removed the same in good faith, and having tendered the purchase price. The facts seem to be that the libelants had in possession as agents two empty coal-boats for sale; that application was made to them on behalf of Sweeney to purchase empty coal-barges. The price and location of the two in question were given, and Sweeney was informed that he could have them if suitable. Thereupon Sweeney sent his tug-boat, took possession of the barges, and removed them to his own landing. About the same time the agent of Thomas Fawcett & Sons made an arrangement or contract with libelants to buy empty coal-barges, and particularly the two herein involved. Immediately upon this transaction being communicated to the libelants' office, notice was sent to Sweeney, informing him that the two barges had been sold to Fawcett. Sweeney's reply was: "You are too late; why didn't you tell us in time? The tug has gone after them, and got them already," - which seems to have been true. Five days after Sweeney got possession, Schneidau & Co. libelants sent a written order to Sweeney to deliver the barges, which was refused.

On hearing of the case the district court gave judgment dismissing the libel, on the ground that the suit, "being a possessory action, wherein ownership is claimed by both parties, the proceeding in rem cannot be entertained."

Under the facts, as shown by the evidence in this case, the controversy is one for the possession and ownership of two empty coal-barges. The twentieth admiralty rule provides:

"In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and the delivery of the possession only. * * * the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit."

By a very liberal construction the libel in this cause may be considered as brought under and according to the twentieth rule. The appearance and answer of claimant may be considered as a waiver of the monition required by said rule, and the question of jurisdiction is thus presented, to-wit: Are these two empty coal-barges ships, within the meaning and proper construction of rule 20, so that they can be proceeded against as required by said rule? The evidence in the case shows that coal-barges are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, especially made for the transportation of coal down the Mississippi river and its tributaries. They are usually sold with the coal, and when the coal is unloaded they are broken up for old lumber and fire-wood. Sometimes, when in good condition, and if such boats are in demand, they are towed back up the river, and used once more. They have no motive or propelling power, no master nor crew, and none of the usual paraphernalia of a ship, nothing coming under the head of tackle, apparel, and furniture; no name even, being generally designated by number. They are not permitted to be enrolled or registered under any law of the United States, nor have they any license. It is only by a violent presumption that they can be classed in any way as ships. The decisions of the circuit and district courts with regard to admiralty jurisdiction over things of this character are apparently not uniform. In considering the adjudged cases, attention should be paid to the character of the particular case over which the admiralty jurisdiction is asserted or denied. Keeping this distinction in view, the adjudged cases sustains the proposition, in which I concur, that, for the exercise of jurisdiction in possessory or petitory actions, barges such as are here involved cannot be classed as ships, and, as such, by themselves, considered within and under the admiralty jurisdiction. That they can be held, under proper circumstances, within the admiralty jurisdiction in cases of certain maritime contracts, - towage, for instance, - in salvage cases, or in connection with a maritime tort, is not disputed; but, as for that matter, other articles of property under proper circumstances

may be the subject of a maritime contract, or be subject to salvage services, and thus brought within the admiralty jurisdiction; and many things, not pretending to be ships, even constructions on land, may be brought within the admiralty jurisdiction in connection with maritime torts.

The learned proctor for libelants in this case has made some effort to show that this is a case of maritime tort, and not a possessory action, but the facts do not sustain any such view of the case. Even if claimant Sweeney had taken fraudulent possession of these empty barges, it is doubtful whether a tort, within the jurisdiction of the admiralty, would have been committed. The evidence, however, leaves no doubt of the fact that Sweeney's original possession was in good faith, and with the consent of libelants' agent. His refusal to return the barges when demanded cannot be considered a maritime tort.

For these reasons the same decree will be entered in this court as in the district court, with costs of both courts to be taxed, and for which execution may issue after five days from the signing of this decree.

528 Pieces of Mahogany.

District Court of the United States, District of Massachusetts,
1874.

2 Lowell 323.

The libel alleged that certain mahogany, of which the five hundred and twenty-eight pieces were a part, was shipped at St. Domingo, in August, 1874, on the American brig Surprise, F. L. Norton, master, to be carried to Genoa, and there delivered, in accordance with the terms of two certain bills of lading, to the libellant, who was the owner thereof; that the master put into Yarmouth, Nova Scotia, and there, without right, sold the cargo, and became himself the purchaser; that said Norton had shipped several parts of said cargo to different ports for sale, and among others to Boston, and was about to ship the same hence to London; that the libellant believes said Norton is about to convert the cargo to his own use; that the libellant is willing to pay the freight and other charges, if any, due said Norton, but denies that any thing is due under the circumstances. The prayer was for a restoration of said cargo, upon payment of whatever may be due thereon.

The question of jurisdiction was submitted to the court, without formal pleadings, and was argued by H. C. Hutchins & H. H. Currier, for the libellant, and C. S. Lincolns, for the claimant of the cargo, who was said to be not the master himself, but a purchaser from him.

Lowell, J. The libellant's case has been excepted to in the outset in a somewhat informal way, by consent of parties, in order to test the jurisdiction of the court. Few decisions have been found by counsel or by me in which a restitution has been ordered by the admiralty of goods found separated from a vessel in circumstances like those set forth in this libel. Undoubtedly, such titles are usually tried in the State courts, excepting when they concern ships, which, in this country have been held to be within the cognizance of the admiralty, and which have lately been put on the same footing in England. At the hearing I was much disposed to doubt whether the admiralty replevin, so to call it, extended fully to cargoes, or what had lately been cargoes, as well as to ships; but, upon further reflection, I am of opinion that the suit may be maintained.

The admiralty has authority to seize and restore to the true owner all goods, or their proceeds, wrongly taken at sea, whether by simple robbery, or under color of a capture as prize of war, whenever and wherever and in whosoever possession such goods or their proceeds may be found within the territorial jurisdiction of the admiralty court whose power is invoked in the premises: The

Amiable Nancy, 3 Wheat. 546; Rex v. Broom, 12 Mod. 135; The Hercules, 2 Dodson, 353; 1 Kent, Com. 379. So, in salvage, the owner of goods upon which there is a lien for salvage may reclaim them in the admiralty, submitting to the court the question of salvage, and offering to pay the amount. In Post v. Jones, 19 How. 150, the master of a whale-ship wrecked in the Arctic Ocean had sold her catchings to the claimants: and the owners of a part of the cargo proceeded in rem against the oil and whalebone, praying to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to salvage and freight. The supreme court sustained the libel, and ordered the circuit court to divide the proceeds according to the mode pointed out in the opinion.

In the two classes of cases that I have mentioned, the courts of admiralty have a peculiar, and in many respects exclusive, authority. A court of common law cannot deal directly with questions of prize, and probably not with salvage, as I have had occasion to show in another case. But, upon the whole, I do not see that this consideration will serve to distinguish all those cases from the present. Over some of them the other courts would have had a concurrent jurisdiction; as, for example, the title to a ship or cargo, not involving a point of prize or salvage, but of simple spoliation; and possibly of salvage, if a sufficient tender had been made.

The case of Post v. Jones, *ubi supra*, bears a strong analogy to this. There, as here, the owners of cargo alleged that the master had sold it in his own wrong, and they reclaimed it; and though some salvage was admitted to be due, yet it hardly seems that, if the case had involved only freight, the jurisdiction would have been lost, since the court has the same jurisdiction of affreightment that it has of salvage, though it is not so nearly exclusive.

A manuscript report of a case before Judge Benedict has been handed me, in which the owner of a cargo which had been put on board a ship for conveyance to South America, and afterwards unladen again in port in consequence of damage by fire, brought a libel, and alleged facts to prove that the libellant was not bound to permit the ship to carry forward the cargo under the circumstances. The learned judge so found, and ordered the cargo to be restored. No question was raised about the jurisdiction.

Judge Betts has expressed the opinion that a person deprived of his property on the high seas, whether with the connivance of the master or agent having charge of it, or not, and without regard to any marine tort having been committed, was entitled to a remedy in the admiralty, because the transaction is of a maritime character: *Am. Ins. Co. v. Johnson*, Blatch. & How. 26. If this opinion is sound, it must follow that the jurisdiction would not be ousted by the fact that the cargo had been converted on shore

rather than at sea, because, in matters of contract or of title, the place where an act was done is immaterial to the jurisdiction.

It is one of the equitable features of admiralty practice, that the party who would usually be the defendant may often bring the matter before the courts, as in *Post v. Jones*, where the persons, who would have been respondents in an ordinary salvage suit, were permitted to assume the character of libellants. In short, I am unable to see that *Post v. Jones*, and other like cases, can rest on any less broad foundation than this, that where the possession of movable property has been changed, against the right of the true owner, either by a maritime tort or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty, not only in personam, which is not doubted, but also in rem.

The reasons for the adoption of the practice may have been that such cases almost always involve maritime question, and that the remedy in admiralty is more convenient and more adequate, its powers and proceedings being largely equitable. If the owner of the oil in *Post v. Jones* had been obliged to recover his property, by a proceeding at common law, one party or the other would have run great risk of losing what the supreme court found to be his equitable right. If the sale had been pronounced void, the owner might, perhaps, have recovered judgment on the strength of his legal title, without payment of freight or salvage; or, if the court found that freight or salvage were due and had not been tendered, or insufficiently tendered, they might have been obliged to find against the general owner, notwithstanding his title, on the ground of an undischarged lien in the defendant.

Finding this case to be of a maritime character, and considering the analogies presented by the cases cited, I am of opinion that the jurisdiction is successfully maintained in rem.

Jurisdiction sustained. Case to stand for answer.

The Nellie T.

Circuit Court of Appeals of the United States,
Second Circuit, 1916.

235 Federal Reporter 117.

Appeal from the District Court of the United States for the
Eastern District of New York. . . .

Ward, Circuit Judge. This libel is filed against the scow Nellie T. and her owner, alleging that the libelant is charterer for a term beginning January 15, 1914, and ending December 31, 1916, with an option for a further term of two years; that on November 15, 1915, the owner withdrew the scow temporarily from the possession of the libelant to make certain repairs, as required by the charter party, and upon their completion refused to return her to it. The relief prayed for is that the scow may be ordered to be returned to the libelant, and the owner ordered to pay him the damages he sustained by being deprived of the use of the scow in the meantime.

The owner filed exceptions to the libel on the ground that the court had no jurisdiction to entertain a libel for possession by a time charterer. The District Judge sustained the exceptions and dismissed the libel, from which decree this appeal is taken. The opinion of the District Judge is as follows:

"There seems to be no warrant in admiralty for the maintenance by a time charterer of an action against the owner for possession of the vessel. Exceptions sustained."

As the allegations of the libel must be taken to be true, we have the question whether a charterer under a charter demising a vessel, because that is what the libel plainly describes, and entitled to the possession may maintain a possessory suit in the admiralty. It is strange that no case can be found in the books in which such a suit has been considered. Still petitory and possessory suits instituted by vessel owners are rare. A suit which involved similar considerations was maintained in the case of a sheriff from whose possession a vessel had been taken. It is true that in it the sheriff's claim was defeated, because he had levied upon the vessel as belonging to the defendant in an action at law in the state court, whereas she belonged to another person who was the claimant in the admiralty suit. However, the jurisdiction to entertain such a possessory suit was not questioned. The Bonnie Doone (D.C.) 36 Fed. 770.

The libelant's right is not an equitable one which courts in admiralty may not enforce (The Eclipse, 135 U.S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; Wenberg v. A Cargo D.C. 15 Fed. 285), but is

legal, and we see no reason why it is not within the admiralty jurisdiction. The difference between the title of an owner of a vessel and that of a charterer, owner pro hac vice, is but in degree. A right to present possession is as good as an absolute title as against the owner or anybody else who wrongfully disturbs it. A charter is a maritime contract, and when it has been executed by delivery of the vessel no equitable powers are needed by the court for the enforcement of the charterer's right to possession. A possessory suit is in the nature of a common-law action of replevin.

We do not pass upon the merits, and in order that the court below may do so the decree is reversed.

John Kynoch v. The Propeller S. C. Ives, William C. Neilson,
Claimant.

District Court of the United States, Northern District of Ohio,
1856.

1 Newberry 205.

This libel was filed August 6th, 1856, and sets forth that on the 9th day of May, 1856, the claimant, Wm. C. Neilson, being the owner of the propeller S. C. Ives (then called the Dick Tinto), entered into a contract for the sale to the libelant, of one-half of said propeller, her steam pump, submarine armors, &c. . . .

The libel further alleged that as a part of the consideration of said contract, it was agreed that Kynoch should have the sole charge and management of the propeller, and that she should be employed in the business of wrecking: that the propeller had been fitted out according to the contract, payment tendered by the libelant, and possession and a conveyance of a moiety demanded, but that said Neilson refused to make any conveyance or give possession, declaring it to be his intention to send the propeller on a voyage to the St. Clair river, beyond the reach of libelant.

The libel, therefore, prayed process against the propeller, and a decree for the possession, offering to give bonds pendente lite for her safe return to abide the decree, and also for a motion to Neilson to show cause why he should not be required to perform, all and singular, the undertakings to his agreement.

To this libel, exceptions to the jurisdiction of the court were filed by Willey & Cary, proctors for claimants, on a preliminary hearing of which the court refused to grant possession to the libelant, but ordered possession to be redelivered to the claimant Neilson, on his entering into the usual stipulation, with sureties, &c. . . .

The arguments of counsel are omitted.

Willson, J. - The libel in this case, partakes much of the character of a bill in chancery, which seeks to enforce the specific performance of a contract, for the purchase of property. It also seeks the further object of obtaining, for the libelant, the possession and control of the propeller S. C. Ives.

The only question in the case, is, has this court jurisdiction of the subject matter of the suit? . . .

It has long been settled that a court of admiralty will not hold an equitable title sufficient to justify its interposition against a legal title to obtain possession, although it may sometimes

deem such an equitable interest sufficient to restrain it from interference with an existing possession under it. The province of the admiralty is to carry into effect the declarations of the maritime law. Titles to ships and vessels depend chiefly upon the maritime law, as recognized and enforced in the common law. It is laid down by Dodolphin, and also by Brown and in Clerk's Praxes, that suits in admiralty touching property in ships, are of two kinds; one called petitory suits, in which the mere title to the property is litigated and sought to be enforced, independently of any possession which has accompanied or sanctioned that title; the other, called possessory suits, which seek to restore to the owner the possession, of which he has been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property.

I am aware, that so far as the question of jurisdiction is concerned, this distinction between petitory and possessory suits has never obtained recognition by the courts in this country. The early decision of Judge Story in the case of *De Lovio v. Boit*, 2 Gal., furnished an authority which has been acted upon with confidence by the courts ever since. And this distinction has lately been substantially abolished even in England by the 3 and 4 Victoria, entitled "An act to improve the practice and extend the jurisdiction of the high Court of Admiralty" in England. But with all this growing liberality and modern favor towards the jurisdiction of the courts, it has never been held or claimed anywhere, that in contests between part owners of a ship for possession or disputes about title, the admiralty would entertain jurisdiction to support an equitable title for either purpose. Possession must follow the legal title, and that title lies at the foundation of the jurisdiction. It belongs to other tribunals to establish the legal title, and when that is done, such title brings with it all its incidents in controversies between part owners in courts of admiralty.

Upon the first proposition, therefore, I hold that the libellant, not having had possession of the propeller, cannot, upon a mere equitable title, come into this court and ask possession and control of the vessel.

✓ In the second place, can the demand made in this libel for the specific performance of the contract in question, be enforced in the admiralty?

✓ Courts of admiralty have no general jurisdiction to administer relief as courts of equity. If a maritime contract is broken, the admiralty, concurrent with courts of law, can only give damages for the breach of it; whereas the chancery may compel the party, in some cases, to a specific performance. A court of admiralty has no more power to decree such specific performance, than it has to set aside the contract for fraud, or correct a mistake, or decree the

execution of a trust. These are matters properly subject to the cognizance of courts of equity and not of the admiralty. Both courts have their origin in the polity of the civil law. From the time the Rhodian Code was incorporated into the Pandects, the maritime law has ever been declared in written ordinances and codes of maritime regulations. The admiralty courts had no power to modify or change them. On the contrary the Praetors of Rome exercised jurisdiction in cases where there was no written law to govern them, and granted relief where, by the enforcement of the written law, equity and good conscience would be perverted. In the Pandects it is said: "Jus autem civil, est, quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus praetorium est, quod Praetores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis propter utilitatem publicam; quod et honorium dicitur, ad honorem praetorum sic nominatum."

Such departure from written ordinances and codes of maritime regulations was never known in courts of admiralty, although, as to form, their course of proceeding has always been in accordance with the Roman law.

But the decisions of our own courts are decisive of the question. In the case of *Andrews & Shepherd v. Essex Fire and Marine Ins. Co.*, 3 Mason R. 16, Mr. Justice Story broadly declares that courts of admiralty cannot entertain a libel for specific performance, or to correct a mistake, or to grant relief against fraud. Courts of admiralty, he says, "have jurisdiction over maritime contracts when executed, but not over those leading to the execution of maritime contracts. If there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party refused to perform it, the admiralty cannot take jurisdiction and enforce its performance. But if the contract be maritime and executed, the jurisdiction attaches; and the admiralty may then administer relief upon it according to equity and good conscience. The law looks to the proximate, and not to the remote cause, as the source of jurisdiction, and deals with it only when it has assumed its final shape as a maritime contract.

Such being the rules of law governing the admiralty jurisdiction of this court, it follows that we have not cognizance of the subject matter of this suit in a proceeding in rem. . . .

The exceptions to the jurisdiction of the court are sustained, and the libel dismissed without prejudice.

Chirurg v. Knickerbocker Steam Towage Co.

District Court of the United States, District of Maine, 1909.

174 Federal Reporter 188.

Hale, District Judge. These are possessory actions to recover possession of the steamers Delta, Bismarck, and Ralph Ross, and now come before the court on exceptions by the libelant to the answer of the respondent. The three several actions may be treated as one case.

The libel alleges:

(1) Ownership of the several steamers.

(2) That the Knickerbocker Steam Towage Company has exclusive possession of the steamers, and refuses to permit the libelant to take possession, and intends to send the steamers to sea without libelant's consent.

The answer is substantially as follows:

(1) It denies the ownership of the libelant.

(2) It admits that the respondent has possession of the steamers, that it refuses to permit the libelant to take possession of them, that it intends to send them to sea, and that its employment of the steamers is without the consent of the libelant.

(3) It admits the jurisdiction of the court, but denies that the allegations of the libel are true.

(4) It sets out in substance that prior to November 27, 1901, these steamers had been owned by Ross & Howell, who had been engaged in a general towing business upon the Penobscot river, and that at said time, and ever since, the respondent was, and has been, engaged in the same business upon the Penobscot and Kennebec rivers.

(5) That on November 27, 1901, Ross & Howell made an agreement with the respondent for the sale to the respondent on January 1, 1902, of these steamers, with certain other property, for \$35,000, with the stipulation that Walter Ross, of Ross & Howell, should be employed as manager of the respondent's business on the Penobscot river; that thereafter, on February 5, 1902, the agreement was carried out, and the consideration for the purchase was paid by a promissory note; that one James T. Morse was president of and a director in the respondent corporation; that bills of sale were made to him as trustee, for the sole and exclusive benefit of the respondent corporation, he having no personal or beneficial interest in the purchase of the property.

(6) That, immediately after the purchase by the respondent, it took possession of the steamers, and has been in full, exclusive, and unquestioned use, possession, and management thereof ever since, and has received the earnings without accounting to any one, and with the full knowledge, consent, and approval of James T. Morse, who never claimed to have any personal or beneficial interest in the vessels, but acknowledged that they were the property of the respondent.

(7) That the libelant well knew that James T. Morse had no interest or ownership in the steamers, other than to hold the record title to them in trust for the respondent; yet with that knowledge, and in collusion with Morse, on May 18, 1908, the libelant conspired to defraud the towage company, by corruptly making bills of sale to himself of all the steamers, for the fraudulent purpose of enabling him to take possession of them, and compel the respondent to pay him a large sum of money, in order to obtain their redelivery, and to remove the cloud upon the title; that, although the bills of sale were made May 18, 1908, the libelant did not file them in the custom house at Bangor, where the steamers were enrolled until December 9, 1908; and that the respondent was not notified of the execution or record of the bills of sale until March 23, 1909.

(8) That all the bills of sale from James T. Morse to the libelant were fraudulent and void, and never conveyed any title to the libelant, but merely created a cloud on the record title of the steamers, and that the bills of sale were invalid, and were not executed in accordance with the laws of the United States.

By the exceptions, the libelant raises the contention that the allegations of the answer are not pertinent to any material issue, for the reason that they state matters of an equitable nature, not cognizable in an admiralty court.

1. Does the answer state a defense not cognizable in a court of admiralty?

I have stated the substance of the answer. It sets out by defensive allegations, propounded in a clear and orderly manner, and in compliance with the admiralty rules, that since February, 1902, the respondent has been in full and exclusive possession and management of the steamers in question; that its title came by purchase from Ross & Howell, who, as well as the respondent, were engaged in the towage business in Maine, and who had in November, 1901, made an agreement for sale; that this agreement was consummated a little more than two months later by an actual sale and delivery of the boats to the respondent and payment for them; that the bills of sale from Ross & Howell were made to run to one James T. Morse, then president of and director in the respondent corporation; that, in taking such bills of sale, Morse acted for the sole

and exclusive benefit of the respondent, and had no personal interest in the purchase; that in May, 1908, Morse made a colorable and fraudulent bill of sale of the steamers to the libelant, for the corrupt purpose of enabling the libelant to take possession of them, and compel the respondent to pay him a large sum of money, in order to obtain a redelivery of the steamers and remove the cloud upon the title; that this transfer was made with the full knowledge on the part of both that Morse had no interest or ownership in the steamers, and no title to convey; and that the bills of sale were not executed in accordance with the laws of the United States, and were invalid.

This, then, in a word, is the respondent's story: That it is the owner, and had the lawful possession, of the steamers; that the libelant, by fraudulent bills of sale, is seeking to defeat its ownership, and to deprive it of possession; that Morse, through whom the libelant claims, had neither title nor possession of the steamers, and did not, and could not, convey any title.

It seems clear to me that the allegations of the answer present issues of fact cognizable in the admiralty. Whether or not the bills of sale are fraudulent does not, of itself, present a question solely for the determination of a court of equity, although the removal of the cloud so created upon the record title would properly belong to such court. These are possessory actions; and the defensive allegations relate to the question of ownership, and hence the right of possession, of these steamers. While at this stage of the case it is not necessary to determine how far bills of sale of vessel property are evidence of ownership, it may be observed that the jurisdiction of this court to determine the question of ownership in actions of this nature is not confined to property subject to the laws of the United States relating to registration or enrollment. The General Cass, Fed. Cas. No. 5,307. In petitory as well as in possessory proceedings, this court must necessarily determine issues of fact involved in the question of the ownership of vessels and other classes of property over which it has jurisdiction; and it cannot be that a fraudulent holder of a bill of sale, or of a bill of lading, or of any other evidence of ownership, can apply to this court for possession, and yet prevent the court from considering the validity of the title so set up. For a fraudulent title, whether acquired by bill of sale or in any other way, is not a title. It follows, then, that under the admiralty rules the facts upon which the respondent rests its defense must be set out in such defensive allegations as appear in the answer.

2. It is true that, in the answer, the respondent alleges that the bills of sale from Ross & Howell were made and received by James T. Morse as trustee, for the sole and exclusive benefit of the respondent; and it is urged by the learned proctor for the libelant that, when a trust is set up, some equitable question must be involved.

It has been held in maritime courts that, if the libelant states a trust as the foundation of his suit, he states himself out of court. In *Andrews et al. v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6, 16 Fed. Cas. No. 374, Judge Story said:

"Courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud." *Kellum et. al. v. Emerson*, Fed. Cas. No. 7,669; *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249; *The Ernest and Alice*, Fed. Cas. No. 3,735; *The C. C. Trowbridge* (D.C.) 14 Fed. 874.

It is well settled, as a general rule, that in possessory actions a court of admiralty will not take cognizance of a merely equitable right as against a claimant in possession under a legal title. *The G. Rusens* (D.C.) 23 Fed. 403. It may decline to enforce a legal title against a meritorious equitable title, accompanied by possession. As a rule, it will not take jurisdiction to try out titles to vessels, where only conflicting equitable claims are involved, as between mortgagor and mortgagee. *The William D. Rice*, Fed. Cas. No. 17,691; *The John Jay*, 17 How. 399, 15 L. Ed. 95. But in *Davis v. Child*, Fed. Cas. No. 3,628, it was said by Judge Ware:

"This court may take notice of an equitable title when it comes up incidentally, especially when it is alleged in the way of defense."

In *The Daisy* (D.C.) 29 Fed. 300, Judge Nelson held:

"An agent, who by fraud or mistake obtains the insertion of his own name as part owner of a vessel in the bill of sale, will be estopped from setting up this title as against his principal in a suit for possession, if the latter is in point of fact the real owner."

In *Wenberg v. A Cargo of Mineral Phosphate* (D.C.) 15 Fed. 285, 287, Judge Addison Brown said:

"Where the libelant is in fact the legal owner, he may enforce his legal right in this court in a petitory suit against those who have by wrong dispossessed him of his property and undertaken to transfer it to others." *The Taranto*, Fed. Cas. No. 13, 751; *Thurber v. The Fannie*, Fed. Cas. No. 14,014; *The Friendship*, Fed. Cas. No. 5,123; *The Tilton*, Fed. Cas. No. 14,054.

To recur again to the allegations of the answer, it may be said that, if we eliminate the question of the bills of sale being fraudulent, still the answer sets up that the towage company is in possession under an equitable ownership of a meritorious character; and such equitable ownership clearly arises, as Judge Ware says,

"incidentally" and "in the way of defense." It arises, also, in a judicial inquiry into matters where the admiralty has unquestioned jurisdiction. If the court should hold that the respondent has no standing in this court, for the reason that its answer sets up matters determinable only by a court of equity, the result might be that the libellant, having only a fraudulent or colorable title to a vessel or other property over which this court has jurisdiction, could be heard in "courts, proceeding ex aequo et bono," while the respondent, having at least a meritorious equitable title, could not be heard in defense; and this is repugnant to the whole idea of admiralty proceedings, and cannot be tolerated. It must be remembered, too, that these matters are now before me on the pleadings; and, in advance of the hearing, the court cannot determine precisely what questions will be presented by the evidence. It is not now necessary to decide whether the ownership of vessel property can pass from the vendor to the vendee by parol, accompanied by delivery, or to conclude in any way as to the nature or validity of the title of either party.

My decision is merely that, under the pleadings, a case is stated of which this court, as a court of admiralty, must take cognizance.

The exceptions to the answer are overruled.

The Ship Annie H. Smith.

District Court of the United States, Southern District of New York, 1878.

10 Benedict 110.

Choate, J. This is a suit of licitation and partition brought by the owners of a moiety of the ship Annie H. Smith, against the ship and the owners of the other moiety. The libel prays a sale of the ship under the decree of the Court and the distribution of the proceeds among the owners. That the Courts of Admiralty have jurisdiction of such a suit, seems to be settled by authority, so far as this country is concerned. There are three reported cases in which the Court has entertained such a suit, and granted the relief here prayed for. They are the case of the sloop Hope in the District Court of South Carolina in 1793 (Bee's Rep. 2), the case of The Seneca in the Circuit Court for the Eastern District of Pennsylvania in 1829 (18 Amer. Jur. 486), and the case of The Vincennes in the District Court of Maine, in 1851 (cited 2 Parsons on Shipping and Adm., 343). These decisions have received the emphatic approval of eminent text writers as being in accordance with the principles of the maritime law. (Story on Partnership, § 438; Benedict's Admiralty 2d Ed., § 274; 2 Parsons A. & S. 343; Dunlap's Adm. Pr., p. 67; 2 Kent Com., 370.)

In the case of The Seneca, Judge Hopkinson, of the District Court, denied the relief on the ground that the Court had not jurisdiction, and the English Court of Admiralty has also declined to exercise this power, but the great weight of authority is in favor of the jurisdiction; and in cases where the relief is shown to be necessary, (the sale by decree of the Court seems to be the only practicable means of restoring the ship to its proper use as a vehicle of commerce, and therefore highly beneficial to those public interests which are peculiarly the care of the Admiralty.) The fact that the power is not exercised in England may be accounted for, perhaps, by the well known restrictions to which the jurisdiction of the English Admiralty Courts was subjected in early times through the jealousy and the greater power of the other Courts. This power of sale, so far as the cases have gone, has only been exercised where the owners are equally divided in respect to the employment of the ship or appointment of the master. Where they are unequally divided, the rights of the majority and minority owners respectively are for the most part well settled. The majority in interest have the right to employ the ship in navigation, notwithstanding the objection and protest of the minority and their refusal to join in the adventure, but in such a case the minority may require security for the safe return of the vessel. If the majority in interest unreasonably refuse to employ the ship, it has been suggested that a sale may be enforced. (Willings v. Blight, 2 Pet. Adm. 290.)

Of the cases where a sale has been decreed upon a disagreement between equal moiety part owners, the case of *The Seneca* is the only one reported with sufficient fullness to show the particular circumstances under which the power was exercised, and the views of the Court as to the reasons and grounds for the exercise of the power to decree a sale as between the equal part owners, which reasons and grounds must, of course, limit and control the action of the court, in ordering or refusing a sale in each case presented to it. In the case of *The Seneca*, the respondent was owner of one-half of the vessel, was in possession of her, and had made several voyages in her as master, to the dissatisfaction of the owners of the other half, whose interest the libellants had purchased; and he had projected another voyage, and insisted on fitting her out at great expense, and upon going in her as master. The libellants on the other hand had refused to incur any expense for the outfit of the vessel for a voyage to be conducted by the respondent. They had appointed or attempted to appoint another master, and were ready and willing to employ the ship. It is obvious that the disagreement between the part owners in that case was such in its nature and effect, under the circumstances in which the vessel was placed, that it operated effectually to prevent the present use or employment of the vessel at all in navigation. The parties being equal in their right to control the employment of the ship and the appointment of the master, the effect of the disagreement was, as Mr. Justice Washington distinctly points out (p. 492), that "the vessel must remain unemployed, since neither owner can otherwise than tortiously send her to sea against the will of the other."

I think, also, that it is clear from the report of the case, that it was the opinion of that learned judge, that the power of the court to interfere and order a sale depends upon this as an essential and controlling element; that in the situation of the parties and the ship, as existing when the suit is brought, the ship cannot rightfully be sent to sea by either party. And it also appears from the authorities upon which he relies as supporting his opinion, that such is the ground or one of the chief grounds upon which the power to sell rests, as the same has been declared or recognized in the foreign maritime codes to which he refers. Thus he cites with approval, the following statement of the provisions of the Roman Marine Code: "(1.) That the opinion and decision of the majority in interest of the owners concerning the employment of the vessel is to govern, and, therefore, they may on any probable design, freight out or send the ship to sea, though against the will of the minority. (2.) But if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since, in such a case, the minority can neither employ her themselves, nor force the majority to do so, the vessel may be valued and sold. (3.) If the interest of the owners be equal, and they differ about the employment of the vessel, one-half being in favor of employing her, and the other opposed to it, in that case the willing owner may

send her out." He also cites the 6th Article of the Marine Code of France, said to have been published as early as 1681, as follows: "No person can constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage." And he also cites and accepts as just and reasonable, Valin's commentary on this rule, as follows: "The case excepted in this article is where the opinions of the parties are equally divided on the undertaking of some voyage, upon which we may remark, that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such or such a voyage, there being no doubt in that case, that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage; but solely of the case of two opinions equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety; whether that moiety proposes, on its part, another voyage, or confines itself to a disapproval of it, provided, nevertheless, that it gives plausible reasons for its conduct; otherwise this would have the air of an absolute refusal to permit the vessel to be navigated, which justice could not tolerate, being contrary to the object of the vessel, to the original intention of the parties, and the interests of commerce." The particular point of disagreement in the case of The Seneca, was, as to who should go as master; and Mr. Justice Washington held that although not expressly mentioned in these foreign codes, the case was within their reason, because a disagreement as to the master operated as effectually as a disagreement as to the voyage to be undertaken, to prevent the ship from being sent to sea; and he held further, that if the moiety objecting to a master, honestly entertained an objection to him, on the ground of their want of confidence in his skill or integrity, they did assign a plausible reason for their conduct. From this case, therefore, and the authorities on which it rests, may be deduced these rules, as governing and limiting the exercise of this power of sale on the application of a moiety of the owners: first, that the disagreement must be such as prevents the present employment of the ship in navigation; and, secondly, that the objecting moiety asking for a sale, must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds. . . .

Turning now to the facts of this particular case, it will be seen that the libellants' case does not come in either particular within the rule thus established by the case of The Seneca; the disagreement between these part owners does not operate to prevent the present employment of the ship, nor do the libellants, the party objecting to the employment of the ship proposed by the other moiety, either propose any other employment, or allege or show any plausible grounds for objection to that proposed by the other party....

The facts are set forth in detail in an omitted part of the opinion.

Libel dismissed with costs.

The Schooner Ocean Belle.

District Court of the United States, Southern District of New York, 1872.

6 Benedict 253.

Blatchford, J. The libel in this case, filed in December, 1869, styles itself a libel "in a cause of possession and sale." It prays for no process against the vessel or against any person. On the filing of the libel, a monition commanding an attachment of the vessel was issued. Under it, the vessel was attached. A claim to the vessel was filed on behalf of the owners of eleven-sixteenths of her. She was discharged from arrest, on a bond in the sum of \$4,500, conditioned to abide the decree of the Court.

The libel states, that it is brought against the vessel, and against all persons lawfully intervening for their interest in her, and especially against Richards, Adams & Co., owners of two-sixteenths of her; that the libellants are the owners of five-sixteenths of her, having owned four-sixteenths since the 30th of December, 1864, and one-sixteenth since the 3d of November, 1865; that they bought the four-sixteenths when she was new, and paid for it a proportional part of \$14,000, and that they paid for the one-sixteenth a proportional part of \$12,000; that, by mismanagement, she has depreciated in value; that, although, since December, 1864, nearly \$4,000 of repairs have been put upon her, she is not now worth more than \$6,500; that her depreciation is also due to the fact that she has been controlled by parties who now have but a nominal interest in her, and who have never owned more than two-sixteenths of her, and to the fact that her owners have always been at variance as to what voyages she should make, who should command her, and what repairs, if any, should be put upon her; that, for the past three years, from year to year, she has lost money to her owners; that, in no one year during the past three years, has she earned enough, over and above expenses, to pay interest, to say nothing of necessary insurance; that, during the year 1866, the libellants advanced considerable money to pay her expenses; that, in September, 1866, they paid for her repairs, when she put into Newport in distress, and have never been repaid therefor; that she is now unfit for sea, requiring to be refitted as to her sails and rigging, and to have other repairs, at a cost of not less than \$2,000; that their interest in the vessel, bought for \$4,250, is not worth more than \$2,000, and they have offered to sell it to Richards, Adams & Co. for that sum, which offer has been refused; that the value of the vessel is every day depreciating; that, for five years, she has made but one or two successful voyages; that, under her present ownership and management, she never will make successful voyages; that, unless this Court shall intervene to protect the libellants, their whole interest will quickly be lost to them; that they have frequently offered their co-owners either to

buy or sell, on the same terms, whether as buyers or sellers, but no result has been reached, or can be; that the ownership of the vessel is, the libellants five-sixteenths, which is the largest belonging to any single individual or firm, one Emery, formerly master of the vessel, three-sixteenths, one Farwell, one-sixteenth, one Locker, one-sixteenth, one Barnes, one-sixteenth, one Caldwell, one-sixteenth, one Nickerson, two-sixteenths, and Richards, Adams & Co., ship's husbands and agents of the vessel, two-sixteenths, but only nominally, they having transferred it to another; that the vessel is about to sail on a voyage, but whither the libellants do not know; and that they have protested against her further use and employment.

The prayer of the libel is for a decree, that the vessel be sold, for the benefit of her creditors and owners, the proceeds to be applied, first, to the payment of all her just debts, and the balance to be then distributed among her owners; that, until such decree and sale, the libellants be given possession of the vessel, to be used by them prudently and with discretion, they offering to give a bond, in double the amount of the value of all adverse interests in the vessel, to use her with care and prudence, and to render just accounts of all her earnings and expenses, and to do such other things as the Court shall impose, in the condition of the bond; and that, in case the vessel shall be given over to the use and possession of owners other than the libellants, a bond be required of them, in double the value of the interest of the libellants in the vessel, and also in double the further amount of the indebtedness of the vessel to the libellants for moneys advanced and that such bond shall indemnify the libellants against further loss, and guarantee to them the payment of moneys expended on account of the vessel, such expenses to be assessed by a commissioner of the Court.

The claimants of eleven-sixteenths of the vessel except to the libel on these grounds: (1) It does not state a cause of action cognizable in this Court; (2) This Court has no power, under the statements in the libel, to take the possession of the vessel from the claimants, or to deliver it to the libellants; (3) This Court has no jurisdiction to order the sale of the vessel to pay her debts; (4) The libellants do not set up any facts that entitle them to the interference of the Court. They also answer the libel, taking issue on its material allegations, and praying for its dismissal.

The main prayer of the libel is for a sale of the vessel. There is an incidental prayer, that, until the sale, possession of the vessel be given to the libellants; and that, if possession be given to the other owners, a bond of a certain character be required from them.

The Court has no power to order a sale of this vessel, on the facts set out in the libel, to pay the debts and distribute the residue

of the proceeds, on the demand of the owners of five-sixteenths of her, and against the will of the owners of the rest, except, perhaps, as the result of a failure of the owners of the eleven-sixteenths to give security for the safe return of the vessel. Such power of sale has never been established in this country. A power of sale has been exercised where the dispute was between the owners of equal moieties, as to undertaking a particular voyage or adventure, as in *Davis v. Brig Seneca* (13 Amer. Jurist, 486), and in *The Vincennes* (cited in 2 Parsons on Shipping and Adm. 343). The power is thus expressly limited by Judge Story, in his *Treatise on Partnership* (§ 439), and in his opinion in *Steamboat Orleans v. Phoebus* (11 Peters, 175, 183). In that opinion he says, speaking for the Court: "The jurisdiction of Courts of Admiralty, in cases of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the Admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all."

Nor has this Court any power to take the vessel out of the possession of the majority owners, and put her into the possession of the minority owners. As the majority intend to employ her on a voyage, they have a right to select the voyage, and to keep possession of the vessel, while she is employed, subject only to the requirement of giving bond for her safe return, if such bond is required.

The bond asked for by the libel, in case the vessel is left in the possession of the other owners, is one which this Court has no power to require, except so far as the libel may be regarded as asking for a bond for the safe return of the vessel. The Court has no jurisdiction in matters of account between part owners of a vessel (*Steamboat Orleans v. Phoebus*, 11 Peters, 175, 182; *Grant v. Poillon*, 20 Howard, 162; *Ward v. Thompson*, 22 Id. 330). It follows, therefore, that it cannot require the other owners to give a bond to the libellants to cover the past indebtedness of the vessel to the libellants, or to indemnify the libellants against future loss in the employment of the vessel. Besides, such a proceeding would be substantially to permit the libellants to libel the vessel in respect for a claim alleged to be due by her to them as owners, and that for a claim the amount of which cannot be ascertained, except as the result of an accounting among all the owners.

The libel does not ask for security for the safe return of the vessel, nor has it any prayer for general relief. The exceptions are allowed, so far as the second and third grounds of exception are concerned. The first and fourth will be allowed, and the libel will be dismissed, unless the libellants shall apply for leave to amend their libel, so as to make it one praying for security for the safe return of the vessel. • 625

The Emma B.

District Court of the United States, District of New Jersey,
1906.

140 Federal Reporter 771.

Cross, District Judge. This is a case of licitation or sale for partition. The libelant and respondent each admittedly owns a one-half part of the schooner Emma B. The libel alleges that the owners are unable to agree with reference to her employment, and that there is an irreconcilable diversity of opinion between them in respect thereto, and asks that the schooner be sold and the proceeds divided, and that an accounting may be taken between the libelant and the respondent of the earnings and expenses of the said schooner during the period mentioned in the libel, and that the proceeds of the sale of said vessel may be distributed, as the interest of the parties may appear upon such accounting.

The respondent has filed several exceptions to the libel, the chief of which, and the only one, relied upon on the argument is expressed in the following language:

"That the said libel demands an accounting between said libelant and respondent; whereas this court is without jurisdiction in admiralty to order such accounting."

It was not questioned, and could not seriously be questioned, that this court has jurisdiction in admiralty to decree the sale of a vessel and distribute the proceeds of its sale, where two equal joint owners thereof are unable to agree, and have irreconcilably disagreed as to its employment. This being admitted, the jurisdiction of the court as to the principal phase of the case is admitted, assuming, of course, that the allegations of the libel are true. But, granting this, the respondent still claims that this court has no jurisdiction in respect to the accounting asked for by the libel, and cites *The Orleans v. Phoebus*, 11 Pet. 175, 9 L. Ed. 677, and *Ward v. Thompson*, 22 How. 333, 16 L. Ed. 249, in support of his position.

It is undoubtedly established that a court of admiralty has no jurisdiction of accounts as such, and will not take jurisdiction of a cause solely for the purpose of decreeing an accounting; but I do not find any case which holds that where jurisdiction is acquired on valid grounds, and the accounting is merely incidental to the main relief that such accounting will be denied. Indeed, it seems to be recognized in many cases that an accounting incidental to the main question is not only permissible, but may even be essential to the proper administration of justice; nor do I think the cases cited by the proctor of the respondent are to the contrary. If the vessel were sold, and the proceeds of sale distributed, without an

accounting, great injustice might and probably would be done - injustice, too, which might have been avoided, and could only have been avoided, by an accounting. An accounting at some later date, and in some other court and proceeding, might be utterly inefficient to do justice between the parties; for, once the funds were distributed, they might not again be brought within the control of the court, or, being expended, the mulcted party might not be able to respond to the decree of the court. Justice, therefore, seems to demand that an accounting should be had between the parties in this proceeding. A case very similar to the one in hand is *The John E. Mulford* (D.C.) 18 Fed. 455. In that case the same claim was made that is made here, and in the course of his opinion Judge Brown says:

"If, as is claimed by the libellant, this defendant has a considerable sum in his hands as the proceeds of these earnings, it would be a very imperfect administration of justice to decree to the defendant the full half of the proceeds of the vessel in the registry, without any account of the excess of her earnings belonging to the libellant already in this claimant's possession, and to turn the libellant over to a future and possibly ineffectual action in another court to recover these earnings. There is no want of power, as I understand, in this court, as a court of admiralty, to take such an account as an incident to the principal cause, of which it has undoubted jurisdiction, when justice requires such an account in order to make a just distribution of a fund in the registry of the court."

The following cases also recognize the same principle: *The L. B. Goldsmith*, Fed. Cas. No. 8,152; *Davis v. Child et al.*, Fed. Cas. No. 3,628; *Tunno et al v. The Betsina*, Fed. Cas. No. 14,236; *The H. E. Willard* (C.C.) 52 Fed. 587. See, also, *Benedict on Admiralty*, § 263a; *Hughes on Admiralty*, § 189.

No case has been brought to my attention, nor have I found any parallel with the one at bar, where such relief has been denied. It seems clear to me that admiralty has undoubted jurisdiction of this case, under the circumstances alleged, and, having such jurisdiction, it can and ought, under the circumstances, to decree an accounting between the parties as incidental to the main relief.

The exceptions will be overruled, with costs, and the respondent directed to answer any parts of the libel excepted to, not already answered.

Section 2.
Maritime Torts.

The Plymouth.

Supreme Court of the United States, 1865.

3 Wallace 20.

The steam-propeller *Falcon*, employed by its owners in navigating our great northern lakes, anchored beside the wharf of Hough & Kershaw, in Chicago River; "navigable water." Upon the wharf large packing-houses were built, and these, at the time were filled with valuable stores. Owing to the negligence of those in charge of the *Falcon*, the vessel took fire; and the flames, stretching themselves to the wharf and packing-houses, set these last on fire, which with their stores were wholly consumed. Hough & Kershaw filed, accordingly, in the District Court for the Northern District of Illinois, a libel in admiralty, for cause of damage, civil and maritime, against the owners of the *Falcon*, and attached a vessel of theirs called the *Plymouth*.

The District Court, regarding the case as not one for the Admiralty, dismissed the libel for want of jurisdiction. The Circuit Court, on appeal, considered that the dismissal was rightly made. The case was now here for review. . . .

[The arguments of counsel are omitted.]

Mr. Justice Nelson delivered the opinion of the court:

The court below dismissed the libel for want of jurisdiction; and that question is the only one that has been argued in this court.

It will be observed, that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality, - the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.

In the case of *Thomas v. Lane*, 2 Sumner, 9, Mr. Justice Story, in a case where the imprisonment was stated in the libel to be on shore, observed: "In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide." Since the case of

the Genesee Chief, navigable waters may be substituted for tide waters. This view of the jurisdiction over maritime torts has not been denied.

But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of materialmen, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have, at most, but a very remote resemblance. *Thomas v. Lane*, 2 Sumner 2; *The Huntress*, per Ware, J., Davies, 85; *United States v. Magill*, 1 Wash. C. C. 463; 4 Dall. 345, 2d ed.; *Plummer v. Webb*, 4 Mason 383-4; 1 Kent 367 and n.

They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel - on the high seas, or navigable waters- and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words the cause of damage, in technical language, whatever else attended it, must have been there complete.

Much stress has been given to the fact, by the learned counsel who would support the jurisdiction, in his argument, that the vessel which communicated the fire to the wharf and buildings, was a maritime instrument, or agent, and, hence, characterized the nature of the tort. In other words, that this characterized it as a maritime tort, and, of course, of admiralty cognizance.

But this, we think, is a misapprehension. The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their

authority. It is upon this principle that the defendants are liable, if at all, to the libellants for the damages sustained. The circumstance that the agents were in the employment of the owners on board the vessel, and that the negligence occurred, while so employed, and which occasioned the damage, gives to the libellants the right of action. But, if they had been employed upon any other structure in the river - on a raft, or floating platform, for work, on the river, and the fire had been communicated to the wharf and buildings on account of their negligence while so engaged, the right of action would have been the same. The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.

A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. The fact, therefore, of its having taken place on board the propeller Falcon, in the present case, is not an element that imparts any peculiar character to the nature of the tort complained of. This is so in cases of collision, in which the offending vessel may be attached and proceeded against as one of the remedies for the wrong done. The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality - the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters - the Chicago River; and, as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable water, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage, as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet, the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, already given: the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends - on the high seas or navigable waters.

The learned counsel, who argued this case for the appellants with great care and research, admitted that it was one of first impression; that he could find no case in the books like it. The reason is apparent, for it is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed. The remedy for the injury belongs to the courts of common law.

Decree Affirmed.

Hermann v. Port Blakely Mill Co.

District Court of the United States, Northern District of
California, 1895.

69 Federal Reporter 646.

Morrow, District Judge. This is a libel in personam to recover damages for injuries alleged to have been sustained on board of the American ship Kate Davenport, while said vessel was being loaded with lumber at a wharf in Port Blakely, state of Washington. It appears from the allegations of the libel that the libelant was employed, in the month of January, 1895, in the capacity of mate on the Kate Davenport; that the vessel proceeded, with the libelant on board, to Port Blakely, there to load lumber; that on the 20th of January, 1895, while the vessel was lying at a wharf in said port, owned by the defendant, and was being loaded with lumber, the libelant was in the hold of the vessel, with several of the crew, engaged in receiving the lumber which was being loaded; that the manner of loading was to slide the lumber down a chute into the hold, and, as each piece was slid down, warning was given, to notify those in the hold, to enable them to escape from the descending lumber; that this warning was relied upon by the libelant in order to get out of the way of the lumber coming into the hold as aforesaid; that the defendant so carelessly, negligently, and improperly slid down a piece of lumber, without giving any warning or notification, to those in the hold, that the same was coming down the chute, that said piece of lumber struck the libelant, breaking his right leg, thereby seriously injuring him, to his damage in the sum of \$10,000. Exceptions are filed to the libel upon two grounds: (1) That the court has no jurisdiction of the tort alleged in the libel; (2) that, upon the face of the allegations of the libel, it appears that the wrong of which libelant complains was the act of a fellow servant in a common employment, for which the defendant is not, in law, liable.

Taking these exceptions up in their order, it was urged upon the argument that the court has no jurisdiction of the tort alleged, for the reason that it originated on land, - that is to say, on the wharf from which the lumber was being loaded, - and not on the water; that, to give a court of admiralty jurisdiction over torts, not only the injury must take place on water, but the whole tort, from its incipency to its conclusion, must occur on the water; and that where the tort has its origin on land, although it is consummated, and the injury sustained, on water, a court of admiralty can have no jurisdiction of the wrong. "It has been uniformly held *** that the American admiralty has a general maritime jurisdiction, embracing all maritime causes of action, as well matters of contract as matters of tort; that in matters of tort the jurisdiction depends upon the locality, and embraces all damages and injuries upon the sea." Ben. Adm. § 261, p. 149 (2d Ed.). To the same effect are

the following cases: The Plymouth, 3 Wall. 20; The Rock Island Bridge, 6 Wall. 213; The Neil Cochran, 1 Brown, Adm. 162, Fed. Cas. No. 10,087; The Ottawa, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; The Mary Stewart, 10 Fed. 137; The Arkansas, 17 Fed. 383; The Professor Morse, 23 Fed. 803; The H. S. Pickands, 42 Fed. 239; The John C. Sweeney, 55 Fed. 540; The Mary Garrett, 63 Fed. 1009.

While this statement of the rule as found in the text-books and authorities is certain enough for all ordinary purposes of general admiralty jurisdiction, it is not sufficiently explicit in its application to a case like the present, where the tort is claimed to have occurred partly on land and partly on water. I have not been cited, nor have I been able to find, any case where precisely the same point as is here raised was involved. While there have been dicta in favor of the jurisdiction of the admiralty court, as claimed by the libelant in this case, the question has never come up squarely for decision, so far as I am advised. In The Plymouth, 3 Wall. 20, the origin of the wrong was on the water, but the substance and consummation on land. It was held that the admiralty courts of this country were without jurisdiction where the substance and consummation of the injury had happened on land, and the fact that the tort had originated on the water made no difference. . . .

Applying this reasoning to the case at bar, - although the facts alleged in the libel present a counter proposition to that involved in The Plymouth, in this, that in the latter case the origin of the tort was on water, while in the case at bar it is alleged to have been on land, - it would seem to be strong argument in favor of the jurisdiction of the court. For, if it is the locality where the substance and consummation of the tort happened which is the ultimate test of admiralty jurisdiction, and not the origin, the case at bar clearly comes within the rule. . . .

The Maud Webster, 8 Ben. 547, was a case where a libel in rem had been filed against the schooner for injuries sustained to a derrick and other articles belonging to the libelant by reason of a collision between the schooner and the derrick. The derrick was being used to construct a pier for a lighthouse to be erected at the Middle Ground, Stratford Shoals, in Long Island Sound, a place entirely surrounded by water. A cross libel was filed by the owners of the schooner against the owner of the derrick. The court entertained jurisdiction of the cross libel, as being for an injury to a vessel afloat, but dismissed it on its merits, holding that there was no fault on the part of the owner of the derrick. But it declined to take jurisdiction of the libel in rem of the owner of the derrick, on the ground that, although the origin of the wrong was on the water, yet the consummation and substance of the injury was on the land. The learned judge said:

"In this case, the schooner which did the injury to Howell's property was on the water, was afloat and engaged in navigation;

but Howell's property was a part of the soil of the earth, or was affixed to it, and was wholly on land. In a case of tort, there can be no jurisdiction in the admiralty unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters."

In commenting on the case of *The Ottawa*, 1 Brown, Adm. 356, Fed. Cas. No. 10,616, as authority for his decision, Judge Blatchford says, further:

"Although the criterion of admiralty jurisdiction in cases of tort is locality, yet, as was correctly remarked in that case, the place or locality of the injury is the place or locality of the thing injured, and not of the agent by which the injury is done."

In *Leonard v. Decker*, 22 Fed. 741, it appeared that two canal boats had been damaged while moored to a pier. The pier was somewhat out of repair, by reason of some piles or fenders having been torn away, leaving the bolts which had secured them exposed, and projecting outward and beyond the side of the pier. The bolts were under water, except when the tide was low. The canal boats were injured by mooring alongside the concealed bolts, without notice of the obstructions, or of the danger from them. Judge Brown said:

"Counsel for respondents has submitted an elaborate argument against the jurisdiction of the district court in this case, on the ground that the tort is not a maritime one, since the bolts that did the injury were attached to the pier, and belonged to the land, and not to the water. Among the cases cited are the well-known cases supporting the counter proposition that injuries done by vessels to wharves, or objects upon wharves, bridges, etc., are not maritime torts, and hence not within the jurisdiction of the district court. *The Plymouth*, 3 Wall. 20; *The Neil Cochran*, 1 Brown, Adm. 162 (Fed. Cas. No. 10,087); *The Ottawa*, 1 Brown, Adm. 356 (Fed. Cas. No. 10,616); *The Maud Webster*, 8 Ben. 547 (Fed. Cas. No. 9,302). Without entering at length into a discussion of these and other cases cited, which I have carefully examined, I need only say that they do not seem to me to sustain the contention of the respondents, but, on the other hand, to be entirely consistent with, and to recognize, the jurisdiction of this court over torts like the present, and that upon two distinct grounds: First, that the bolts which caused the injuries were an obstruction to navigation; and, second, because the damage done was inflicted upon a vessel afloat, and because the place where the injury is consummated, and the damage actually received, is regarded as the locus of the tort."

After quoting from the case of *The Maud Webster*, supra, the learned judge continues:

"In all the above cases the decision is made to turn, not upon

the place where the negligence, as the cause of the damage, originates, but upon the place where the injury is received and consummated. It must appear that the damage, as the substantial cause of action arising out of the negligence, 'is complete within the locality upon which the jurisdiction depends, namely, upon the high seas or navigable waters.' The Plymouth, 3 Wall. 36. The canal boats, in this case, were moored alongside the wharf, for the purpose of discharging their cargoes, a work which is maritime, and one of the necessary incidents of navigation, and the vessels were afloat upon navigable waters. The whole damage and injury were received by them in this situation. The locus of the damage was upon navigable waters. That was, therefore, the locus of the tort; and, as that tort was upon the water, it was within the admiralty jurisdiction."

This case differs from the case at bar in that the injury there sustained not only originated on the land, but was done by the land itself, the pier being deemed an extension or continuation of the shore; but it is clear authority for the proposition that it is the locus of the damage, and not the locus of the origin of the tort, which is the real test of admiralty jurisdiction over torts.

In the case of City of Milwaukee v. The Curtis, The Camden, and The Welcome, 37 Fed. 705, a libel in rem was filed by the city of Milwaukee against the vessels named, for injuries to a bridge. The libel was dismissed for want of jurisdiction. The proposition involved there was counter to that in the case at bar. It was for an injury to land, and not for an injury originating on land. Nevertheless, the remarks of Judge Jenkins as to the locality of the damage being conclusive of the question of admiralty jurisdiction are in point. He says:

"In cases of tort, locality is the test of jurisdiction in the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury. Ex parte Phenix Ins. Co., 118 U.S. 610, 7 Sup. Ct. 25. Within this settled principle, a tort is maritime, and within the jurisdiction of the admiralty, when the injury is to a vessel afloat, although the negligence causing the injury originated on land. The Rock Island Bridge, 6 Wall. 213; Leonard v. Decker, 22 Fed. 741. In the former case it was ruled that an action in personam would lie against the owners of the bridge, because the injury was consummate upon navigable waters, being inflicted upon a movable thing engaged in navigation, but that a proceeding in rem against the bridge was not maintainable, because a maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the

high seas or navigable waters. And so an injury happening, through default of the master, to one upon a vessel discharging cargo at a wharf to which she was securely moored, is within the admiralty jurisdiction (*Leathers v. Blessing*, 105 U.S. 626), but otherwise if the injury occurred to one upon the wharf (*The Mary Stewart* 10 Fed. 137). In the latter case there is an inadvertent remark to the effect that both the wrong and the injury must occur upon the water, - a proposition not sustained by authority. It suffices if the damage - the substantial cause of action arising out of the wrong - is complete upon navigable waters. *The Plymouth*, supra."

Counsel for respondent relies greatly upon *The Mary Stewart*, supra, and particularly upon the remarks criticised by Judge Jenkins in the case just quoted, as indicating that the tort must be complete on the water before a court of admiralty will take jurisdiction. That was a case involving the proposition counter to the one in the case at bar, viz. the tort there originated on the water, but the consummation and the injury were sustained on land. The facts of the case were, briefly, that one, an employee of the stevedore engaged in loading the vessel, was injured, while standing on the wharf, by a bale of cotton, which was being hoisted aboard the ship, but which fell before it reached the ship's rail. It was contended that a court of admiralty could not take jurisdiction. The district judge correctly held that jurisdiction could not attach, but, in sustaining this contention, went a little further than the facts justified him. He said:

"It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of tort, the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. *The Plymouth*, 3 Wall. 20. This springs from the well-known principle that there are two essential ingredients to a cause of action, viz. a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage - the other necessary ingredient - must also happen on water. Now, the injury in the case at bar happened on the land."

This language must, of course, be taken subject to the facts of that case, and to the question of law which the learned judge was then considering. I do not think that he meant to lay it down as a general principle that "the wrong must originate on the water," for that would be to make the test of admiralty jurisdiction depend upon the locality where the tort originated, - a proposition not countenanced by a single authority or dictum. I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial

cause of action, otherwise it would be "damnum absque injuria."

With reference to other cases cited by counsel for respondent, they may be disposed of with the statement that, discarding scattered and isolated expressions, and reading the opinions cited as a whole, they rather make for than against the jurisdiction of admiralty. While, as previously stated, I have been unable to find any case on "all fours" with the one at bar, yet there are many authorities upon the counter proposition - viz. where the tort has its origin on water, but is consummated, and the injury sustained, on land - which seem to me to furnish convincing authority for the jurisdiction of the court in this case. In those cases, where the facts showed that the tort originated on water, but was consummated, and the injury sustained, on land, it is held that courts of admiralty have no jurisdiction. The authorities even go further, and hold that where the tort originates on water, and results in injury to land, as wharves, piers, bridges, etc. (e.g. a vessel colliding with a wharf, etc.), libels for damages sustained by such wharves, etc., will not be entertained in admiralty, because the injury took place, to all intents and purposes, on land, and not on water, and the fact that the agent causing the injury was afloat made no difference. The *Plymouth*, supra; The *Neil Cochran*, supra; The *Ottawa*, supra; The *Arkansas*, 17 Fed. 383; The professor *Morse*, 23 Fed. 803; The *John C. Sweeney*, 55 Fed. 540; The *Mary Stewart*, supra; The *H.S. Pickands*, 42 Fed. 239; The *Mary Garrett*, 63 Fed. 1009; The *Rock Island Bridge*, 6 Wall. 213. But it is held, on the other hand, that if a vessel sustain injury by colliding with wharves, piers, etc., they may maintain an action in personam against the owners thereof, the damage having been sustained on water. *Greenwood v. Town of Westport*, 53 Fed. 824; *Id.*, 60 Fed. 561; *Hill v. Board*, 45 Fed. 260. The central idea found running through all these cases is, so far as jurisdiction over torts is concerned, that the admiralty law looks to the place where the injury was suffered, and not to the locality of the agent causing the injury. If this be the correct doctrine with respect to cases where the tort originates on water, but results in damage to land or on land, I see no valid reason why the same test of jurisdiction is not applicable to cases where the tort originates on land, but results in damage on the water. Applying this criterion to the case at bar, it will be readily conceded to be conclusive in favor of the question of jurisdiction. . . .

[In an omitted part of the opinion the court considered the second exception.]

. . . The exceptions are therefore overruled.

The Blackheath.

Supreme Court of the United States, 1904.

195 United States 361.

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from the District Court on the question of jurisdiction, which is certified. The case is a libel in rem against a British vessel for the destruction of a beacon, Number 7, Mobile ship-channel lights, caused by the alleged negligent running into the beacon by the vessel. The beacon stood fifteen or twenty feet from the channel of Mobile river, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. There is no question that it was attached to the realty and that it was a part of it by the ordinary criteria of the common law. On this ground the District Court declined jurisdiction and dismissed the libel. The Blackheath, 122 Fed. Rep. 112.

In *The Plymouth*, 3 Wall. 20, where a libel was brought by the owners of a wharf burned by a fire negligently started on a vessel, the jurisdiction was denied by this court. See also *Ex parte Phoenix Ins. Co.*, 118 U.S. 610. In two later cases there are dicta denying the jurisdiction equally when a building on shore is damaged by a vessel running into it. *Johnson v. Chicago and Pacific Elevator Co.*, 119 U.S. 338; *Homer Ramsdell Transportation Co. v. La Compagnie Générale Transatlantique*, 182 U.S. 406, 411. And there are a number of decisions of District and other courts since *The Plymouth*, which more or less accord with the conclusion of the court below. 62 C.C.A. 287, 290. It would be simple, if simplicity were the only thing to be considered, to confine the admiralty jurisdiction, in respect of damage to property, to damage done to property afloat. That distinction sounds like a logical consequence of the rule determining the admiralty cognizance of torts by place.

On the other hand, it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France. Or, if that is in some degree precluded, it ought at least to be possible for Congress to authorize the admiralty to give redress for damage by a ship, in a case like this, to instruments and aids of navigation prepared and owned by the Government. But Congress cannot enlarge the constitutional grant of power, and therefore if it could permit a libel to be maintained, one can be maintained now. We are called on by the appellees to say that the remedy for any case of damage to a fixture is outside the constitutional grant.

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history. As to principle, it is clear that if the beacon had been in fault and had hurt the ship a libel could have been maintained against a private owner, although not in rem. *Philadelphia, Wilmington & Baltimore R. R. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209; *Atlee v. Packet Co.*, 21 Wall. 389; *Panama Railroad v. Napier shipping Co.*, 166 U.S. 280. Compare *The Rock Island Bridge*, 6 Wall. 213. But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. *The Arkansas*, 17 Fed. Rep. 383, 387; *The F. & P.M. No. 2*, 33 Fed. Rep. 511, 515; *Hughes*, Adm. 183. And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea.

As to history, while as is well known the admiralty jurisdiction of this country has not been limited by the local traditions of England, *The Lottawanna*, 21 Wall. 558, 574, et seq., the traditions of England favor it in a case like this. The admiral's authority was not excluded by attachment even to the main shore. From before the time of Rowgton's Articles he could hold inquest over nuisances there to navigation and order their abatement. Art. 7, 1 Black Book (Twiss), 224; Clerke's Praxis; 1 Select Pleas in Adm., 6 Seld. Soc. Publ. xlv, lxxx; Articles of Feb. 18, 1633, *Exton, Maritime Dicaeology*, pp. 262, 263; 2 Hale de Port., c. 7, p. 88, in Harg. Law Tracts; Zouch, in Malynes, *Lex Merc.*, 3d ed., 122; *Com. Dig. Admiralty*, E. 13. See *Benedict Adm.*, 3d ed. § 151; *De Lovio v. Boit*, 2 Gall. 398, 470, 471, note. Coke mentions that "of latter times by the letters patents granted to the lord admiral he hath power to erect beacons, seamarks and signs for the sea, &c." 4 Inst. 148, 149. To the French admiral, it is expressly stated, belonged "*Contrainte et pugnicion, tant en criminel, que en civil*." in this matter. 1 Black Book, 445, 446. See *Crosse v. Diggs*, 1 Sid. 158. Spelman says: "The place absolutely subject to the jurisdiction of the admiraltie, is the sea, which seemeth to comprehend publick rivers, fresh waters, creekes, and surrounded places whatsoever within the ebbing and flowing of the sea at the highest water." *Eng. Works*, 2d ed. 226. Finally, by the articles of February 18, 1633, all the judges of England agreed that the admiralty jurisdiction extended to "injuries there which concern navigation upon the sea." *Exton, Maritime Dicaeology*, ad fin., pp. 262, 263. And "if libel be founded upon one single continued act, which was principally upon the sea, though part was upon land, a prohibition will not go." *Com. Dig. Admiralty*, F. 5; 1 Roll. Abr. 533, pl. 13

What the early law seems most to have looked to as fixing the liability of the ship was the motion of the vessel, which was

treated as giving it the character of a responsible cause. Bracton recognizes this as an extravagance, but admits the fact, for the common law. 122a, 136b. 1 Select Pleas of the Crown, 1 Seld. Soc. Pub. 84. The same was true in the admiralty. Rowghton, ubi, sup. art. 50; 2 Rot. Parl. 345, 346, 372a, b; 3 Rot. Parl. 94a, 120b, 121a; 4 Rot. Parl. 12a, b, 492b, 493. The responsibility of the moving cause took the form of deodand when it occasioned death, like the steam engine in Regina v. Eastern Counties Ry., 10 M. & W. 58, and innumerable early instances, but it was not confined to such cases. 2 Black Book (Twiss.), 379. But compare 1 Select Pleas in Adm., 6 Seld. Soc. Publ. lxxi, lxxii. The principle has remained until the present day. The Malak Adhel, 2 How. 210, 234; The China, 7 Wall. 53.

The foregoing references seem to us enough to show that to maintain jurisdiction in this case is no innovation even upon the old English law. But a very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand.

In the case of The Plymouth there was nothing maritime in the nature of the tort for which the vessel was attached. The fact that the fire originated on a vessel gave no character to the result, and that circumstance is mentioned in the judgment of the court, and is contrasted with collision, although the consideration is not adhered to as the sole ground for the decree. It has been given weight in other cases. Campbell v. H. Hackfeld & Co., 62 C. C. A. 274; The Queen v. Judge of City of London Court, (1892) 1 Q.B. 273, 294; Benedict, Admiralty, 3d ed. § 308. Moreover, the damage was done wholly upon the mainland. It never has been decided that every fixture in the midst of the sea was governed by the same rule. The contrary has been supposed in some American cases, The Arkansas, 17 Fed. Rep. 383, 387; The F. & P.M. No. 2, 33 Fed. Rep. 511, 515, and is indicated by the English books cited above. It is unnecessary to determine the relative weight of the different elements of distinction between The Plymouth and the case at bar. It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering The Plymouth or any other authority binding on this court. As to the present English law, see The Uhla, L.R. 2 Ad. & Ec. 29, note; The Swift, (1901) L. R. Prob. 168.

Decree reversed.

[The concurring opinion of Mr. Justice Brown is omitted.]

Southern Lighterage & Wrecking Co. v. United States.

District Court of the United States, Eastern District of
Louisiana, New Orleans Division, 1921.

284 Federal Reporter 978.

Foster, District Judge. In this case a libel was filed against the United States, to recover damages caused to a cluster of piling in the Mississippi river, at the foot of Eganias street, in the city of New Orleans, by a collision with said piling by the steamship Oscaloosa, operated by the Emergency Fleet Corporation.

An exception is filed to the jurisdiction of the court to entertain the case in admiralty. It is well settled that admiralty has no jurisdiction over a case arising from the collision of a vessel with a wharf, or the piers of a bridge or any structure connected with land, although it is partly in water. It is also settled that admiralty has jurisdiction over a case arising from a collision between a vessel and a buoy, or a lighthouse connected with the bottom of a river, on the theory that they are aids to navigation.

It is the contention of libelant that the clusters of piling in the river are aids to navigation similar to a buoy and are not intended to act as a wharf. I do not think the case comes within the exception, and the piling must be held to be in the nature of a wharf, or a structure intended to facilitate commerce on land. They do not mark the channel as a buoy would, and if they serve any purpose at all it is for the mooring of vessels or the keeping of them in deep water when unloading cargo, in which case they would come under the general rule. If they were put there for the purpose of protecting the bank, or protecting something that might be moored between them and the bank, I think the same rule would apply.

The exception will be maintained, and the libel dismissed, without prejudice to any action libelant may have at law.

Postal Telegraph Cable Co. v. P. Sanford Ross, Inc.

District Court of the United States, Eastern District of New York, 1915.

221 Federal Reporter 105.

Chatfield, District Judge. The libelant alleges, and the proof upon the trial shows, that a dredge of the respondent, operating in the Arthur Kill, between Staten Island and New Jersey, broke apart and dragged from its place several hundred feet of insulated telegraph cable which the libelant maintained across the Kill at that point. The dredge was then working toward the south from the Baltimore & Ohio Bridge, and operated by carrying out and dropping a heavy anchor, some hundred feet to the south, toward which, as the dredge excavated the bottom of the channel, progress would gradually be made by moving the spuds of the dredge itself. At the same time the anchor would be slowly pulled into the dredge, and at uncertain intervals, would have to be taken up and relocated at the extremity of the chain cable by which it was held.

The captain of the dredge, on the casual statement of the government inspector, had the anchor upon this particular occasion dropped at the north side of Bayway street, assuming that the cable, which crossed at that point, went out from the south side of the street.

It is unnecessary to state the details about the finding and repairing of the cable, nor of the movements of the dredge and the anchor, from which it appears that, when the anchor was finally taken in, the broken part of the cable had slipped through the flukes thereof and was never recovered. Some dispute arose as to whether the captain of the dredge was informed of the accident and asked to draw in the anchor chain, but this dispute does not appear to be material.

The telegraph company had installed this cable by drawing it across the channel so that it lay upon the bottom and was affixed on each side to a post on the shore. The land cables were attached to the ends of the submarine portion and ran up the poles. A sign was placed to indicate the cable crossing, and there is no issue presented through lack of knowledge that the cable was in the neighborhood. The respondent would therefore seem to be responsible for the injury, and to have negligently failed to determine the exact location of the cable, so as to avoid it, even though the captain of the dredge endeavored to see that his anchor did not interfere with the cable, and had in a usually reliable way sought to ascertain how far the anchor might be carried to the south without danger therefrom.

The principal question in the case arises from the objection

to the jurisdiction of the court, upon the theory that the cable was a land structure, and that no maritime damage occurred of which jurisdiction can be had by an admiralty court.

The libelant has cited certain English cases in which damages to a submarine cable were considered in admiralty under the doctrine of the English law by which the locality determines jurisdiction. It also cites the case of *Stephens v. Western Union Telegraph Co.*, 22 Fed. Cas. 1301, and *The City of Richmond* (D.C.) 43 Fed. 85, in which causes of action for injury by a cable negligently maintained were sustained, and cross-libels for injury to the cable were dismissed, without question as to the jurisdiction of admiralty. See also, the cases of *Ladd v. Foster* (D.C.) 31 Fed. 827, *Albina Ferry Co. v. The Imperial* (D.C.) 58 Fed. 614, 3L.R.A. 234, and *The Anita Berwind* (D.C.) 107 Fed. 721, where recovery was allowed in admiralty for damages to a vessel by cables.

In the case of *The William H. Bailey* (D.C.) 100 Fed. 115, an action for damages for cutting a cable fouled by an anchor was considered, and decree given. The statute (Act Feb. 29, 1888, 25 Stat. c. 17, § 3 (Comp. St. 1913, § 10089) forbidding the cutting of a cable, except to save life or limb, was relied upon as one of the grounds of liability, but no question of jurisdiction was raised.

On the other hand, the claimant has cited the cases of *The Plymouth*, 70 U.S. (3 Wall.) 20, 18 L. Ed. 125, *The Blackheath*, 195 U.S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, *Cleveland Terminal R.R. v. Steamship Co.*, 208 U.S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215, and the many cases cited in those opinions, as well as the case of *The Poughkeepsie* and *The Homer Ramsdell* (D.C.) 162 Fed. 494, as authority for the proposition that injury by a vessel, or from fire on a vessel, to a structure upon land, or connected with the land in such a way that the actual accident does not occur within the physical limits of the admiralty jurisdiction, gives no right of action in admiralty. It argues that no action can be maintained from the mere fact that a boat or its appliances was the instrument through which the force was transmitted which caused the injury at the place where it occurred.

The case of *The Blackheath*, supra, is always referred to, and argument drawn either way according to the facts of the particular case under observation. The cable in the present case was attached at each end to the land and rested upon the bottom, and a submarine cable is not a boat or an appliance of navigation, so as to come under the *Blackheath* decision in all respects.

The cases above cited, in which jurisdiction has been assumed for such an accident, seem to have been based upon the theory that the location of the cable was within the limits of navigable waters; that the injury had to do with the operations of navigation, that

the cable itself was connected with the subject of navigation when occupying some portion of the navigable channel, and that the injured object (the cable) was not a structure on the land, nor affixed thereto as a part thereof.

The result of the force exerted by the anchor must have been to have raised the cable from the bed of the channel and to have dragged it along through the water. The accident, therefore, occurred within the physical limits of admiralty jurisdiction, it was occasioned by the operations of the anchor and the handling of the boat, and the cable itself is akin rather to matters connected with the ocean than to those of the land, although it was supported at each end upon the shore, and, for the purpose of transmitting an electric current, has no closer relation per se to navigation than would a wire crossing over a stream, in the air, and which was employed to transmit news as to ships, etc. The cable is further like a beacon or buoy, in that it is merely located at the spot, even though attached to the land at each end.

Assuming that no jurisdiction in admiralty exists under the United States Constitution over the actual sustaining of damage (and apart from the cause), unless the object damaged be on the water, or within its body, rather than on land, that is, a part of the land (*The Plymouth*, supra), let us consider whether this cable was a fixture so attached to the land as to be a part thereof, and in that sense a "structure" on shore.

If the telegraph company had maintained some wires across the river, in the air, and also some wires on a bridge just over the cable, the cases cited show that any injury to the bridge, or the wires on the bridge, or in the air, would not give jurisdiction to the admiralty court, even if messages were alternately sent over the wires above and below water. If a platform for dredging had been located on piles in the water, an injury thereto by a boat would likewise occur on the land, as distinguished from the locality covered by the maritime jurisdiction (*The Poughkeepsie*, supra, and the case of *N.Y., N.H. & H. Tug Transfer No. 5 v. The R. J. Moran*, therein cited).

But suppose an injury were caused to the Atlantic cables, on the high seas, by a steamer, Could it be held that, because the cable had a landing on shore, it was a land fixture, and was not an object wholly within the maritime jurisdiction, where it lay supported by the bottom and not by its own buoyancy? If so, no damage by a boat to a sunken dry dock or vessel could lie in admiralty, if there were a shore mooring, and if it could not at the time be navigated.

The case is not analogous to those where the maritime character of the object has been entirely lost, such as the case of a boat turned into a boathouse and solidly fastened to the shore. *Woodruff v. One Covered Scow* (D.C.) 30 Fed. 269.

This case has been fully tried, subject to the objection as to the jurisdiction of the court over the cause of action, and to relegate the libelant to another court, and a new action, should not be the result, unless the court is plainly without any authority to dispose of the issue raised upon the testimony. No part of the injury occurred beyond the limits of the tidewater, nor was the connection to the shore of any sort other than to insure a permanent passage of the current. There might even be instances where such a cable would not be carried to the shore, but rather (by induction or wireless) be used to transmit vibrations as a step in signaling. If the mere fact that it does not float, and rests on the bottom, makes an object a land fixture and structure, no admiralty court could entertain a suit for injury by a boat or anchor to a grounded vessel. While the converse case, of injury by a cable suspended in the water or lying on the bottom, has been treated as an admiralty matter (see cases cited, *supra*), for there the injury occurred on the maritime object, yet the objection raised to the present case is fatal, if the injured cable was not wholly the object of admiralty jurisdiction.

Any argument drawn from the results of the situation presented of necessity begs the question, and yet full discussion is necessary to reach the primary determination. But as the court is of the opinion that a submarine cable of this sort is not a structure on the land and affixed thereto as an extension of the shore (208 U.S. at page 321, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), even though connected therewith as an aid to land commerce, it is therefore subject to maritime control.

The plea to jurisdiction must be overruled, and the libelant may have a decree.

Steele v. Thacher.

District Court of the United States, District of Maine, 1825.

1 Ware 85.

This was what, in the technical language of the admiralty, is called a cause of damage, brought by Steele for certain wrongs alleged by him to have been done by the respondent, to his son, being a minor under the age of twenty-one. The libel alleged that in February last, Capt. Thacher, master of brig Jane, at Portland, shipped John Smith Steele, the libellant's son, to go a voyage on the high seas from Portland to the West Indies; that in pursuance of this contract the said John went the voyage from Portland to Grenada, and was thus transported out of the State without the parent's consent, by which means he has lost the services and society of his son, etc. . . .

Ware, District Judge. . . .

Only that part of the opinion is given which deals with the locality of the tort.

In this case the question as to the jurisdiction must be determined by the locality of the act, whether it was done on the high seas. The act, complained of by the libellant, is the shipping his son, a minor, at Portland, and transporting him to parts beyond the sea, to wit, to Grenada, in the West Indies, without his consent. The contract was made on shore; but the contract, admitting it to be illegal, does not constitute the tort. The execution of the contract is that in which the tort consists, and that was on the high seas. If it be said that it had its inception on land, and within the body of a county, the answer has been already given, that the English cases on this point are not held to be law in this country; but where the substance of the tort is committed on the high seas, when it there has its consummation, if it be all one continued act, the jurisdiction of the admiralty will attach to the whole matter, though part of it may have taken place on land and within the body of a county. This principle seems to be reasonable in itself, and in the mass of inconsistent and contradictory authorities with which the English books abound, on the subject of admiralty jurisdiction, we can find direct authority for it, though I will not contend that it stands uncontradicted. In Comyn's Digest, tit. Admiralty, F. 5, it is said, "If the libel be founded on a single continued act which was principally on the sea, though part was on the land, a prohibition will not go." Such, precisely, is the present case. On the whole, I cannot bring my mind to doubt but that this court, sitting as a court of admiralty, has a clear and undoubted jurisdiction over the subject matter of this allegation in the libel. I might have disposed of this part of the case

by simply referring to the case of De Lovio v. Boit, 2 Gall. 392, where the whole question of the admiralty jurisdiction is discussed with an ability and learning which leaves nothing to be added to the subject. But the objection was strongly urged by the counsel for the respondent, and as the point raised in this case, was not before the court in judgment in that referred to, a respectful attention to the argument of the learned counsel required that it should be fairly examined. . . .

[The libel was dismissed for want of proof.]

The Normannia.

District Court of the United States, Southern District of
New York, 1894.

62 Federal Reporter 469.

This was a libel by Alfred B. Beers against the steamship Normannia, her engines, etc., and the Hamburg-American Packet Company, owner. . . .

Brown, District Judge. The above libel was filed against the steamship Normannia in rem, and against the Hamburg-American Packet Company, her owner, in personam. The libel alleges false representations made to the libelant by the company's agents in London just prior to his embarkation on the Normannia on August 27, 1892, and at the time of the outbreak of cholera at Hamburg; that the libelant who had previously bought a first-cabin ticket for passage by the Normannia from Southampton to New York, but who desired to surrender it in case she carried steerage passengers, through fear of contagion and quarantine, was induced to take passage on the Normannia at Southampton on August 27th, on the agents' assurance that no steerage passengers were on board; whereas in fact she had 500 steerage passengers, who had embarked at Hamburg on the 25th; that in consequence of the presence of the steerage passengers, and of the outbreak of cholera among them, the libelant was detained at quarantine 13 days, and subjected to much suffering, sickness, and subsequent loss of time, for which suitable damages are claimed....

It is urged that the alleged false representations, being no part of the contract of carriage, but subsequent to it, and made on land, are not the subject of an action in admiralty, because not maritime. I cannot sustain this objection; for the reason, that the alleged representations were not independent of the maritime contract of carriage, but were made with evident reference to it, and made for the purpose of inducing the libelant to carry out that contract; and for the reason also that the damages which are alleged to have arisen from the false representations, arose upon the sea, in the course of maritime transportation. Though the origin of the tort, i.e., the false representations, began upon land, its consummation, effect, and damage, arose upon the water; and this locus of the damage is sufficient to give the admiralty jurisdiction. The Plymouth, 3 Wall. 20; Leonard v. Decker, 22 Fed. 741, and cases there cited.

It may be doubtful, considering the decision of Mr. Justice Nelson in the case of The Eli Whitney, 1 Blatchf. 360, Fed. Cas. No. 4,345 (see, also, The Baracoa, 44 Fed. 102; The Electron, 48 Fed. 689), whether such false representations would sustain an action in rem; but this is now immaterial, since the owner being sued in personam has appeared in the action, and on the attachment of

the vessel, has procured her release on stipulation; so that the cause is now before the court as a suit in personam, for an alleged maritime tort; and as such it is maintainable if the averments of the libel as to the wrong, and as to the damage, are sustained by the evidence. . . .

In an omitted part of the opinion the court reviewed the evidence in detail and concluded:

I am constrained to find, therefore, that the London agents did not deal frankly or honestly in regard to the inquiries made of them; that trusting if the company thought it safe to send out the steamer, it would be safe for them to send off the London passengers, they suppressed their own reasonable knowledge and expectation, and put off and deluded the libellant and other inquirers with false promises, which they did not fulfill, and did not intend to fulfill; that the accidental telegram (A) received by the agents from the company did not warrant the assurances which they based upon it, as the agents had sufficient reason to know; and that afterwards when the facts became sufficiently known to the agents both at London and Southampton, the facts were not communicated as they had promised, and had opportunity to do, and as good faith required, but were intentionally suppressed. . . .

[Decree in favor of the libellant for \$400 with costs.]

Richard & Co. v. United States. -- 1

C. B. Richard & Co., Libellants, v. United States of America,
Respondent.

District Court of the United States, Southern District of New
York, 1923.

1 American Maritime Cases 721.

Mack, Circuit Judge. It is unnecessary to consider and determine more than one of several questions raised, namely, whether the conversion of goods by wrongful delivery without presentation of the order bill of lading after they have been landed, is a maritime tort. I say after they have been landed because the libel fails to state where the wrongful delivery took place. There is no presumption that the conversion was on the seas; in the absence of allegations to the contrary, the libel must be deemed to charge that the delivery was after the goods had been landed and placed in the custody of the ship's agent on land. So construed, I am of the opinion that it fails to charge a maritime tort. The tort did not consist, as libellant contends, "of wrongfully divesting the ship of the property right to possession of the goods," but as the libel charges "wrongfully depriving libellants of their possession." That wrong was committed on land; the damage occurred there.

Exception sustained; libel dismissed for want of jurisdiction.

The Georgia.

District Court of the United States, Southern District of
New York, 1923.

1 American Maritime Cases 403.

Knox, District Judge. Libel is filed under Section 10 of the Immigration Act of February 5, 1917. It charges that the steamship Georgia upon her arrival at this port upon May 1, 1919, had on board a certain alien who had come from a foreign port, and who was not prevented from landing at a place other than that designate by the Commissioner of Immigration. . . .

The exception relating to the alleged lack of this Court's jurisdiction upon the admiralty side will be overruled.

Unquestionably it is true, as asserted by claimant, that in determining a question as to the right of a libellant to prosecute for the establishment of, and the recovery upon, a lien in admiralty the lien must not only exist but must also be maritime in its nature.

Now, Section 10 of the Immigration Act provides that if, in the opinion of the Secretary of Labor, it is impracticable or inconvenient to prosecute the person, owner, master, or agent of any vessel providing a means for an alien to come to any seaport of the United States for failure to prevent the landing of such alien contrary to the statute, the penalty of \$1,000 shall be a lien upon the vessel. Therefore, the lien exists.

I take it that to allow, or to permit, the forbidden landing to take place is, so far as the ship is concerned, a statutory tort. Unless there be negligence or malfeasance of duty upon the part of the person or persons in charge of the vessel the unlawful landing could not take place, inasmuch as the alien would not be permitted to leave the ship. In other words the alien accomplishes the unlawful landing by reason of a lack of prevention thereof upon the vessel. The locality of the tort is consequently maritime.

It was said in *Holmes vs. O. & C. Ry. Co.* (1880), 5 Fed. 75, that "The jurisdiction of courts of admiralty in cases of tort depends wholly upon locality. When a tort is committed upon a public or navigable water of the United States, it is a maritime tort, within the jurisdiction of the proper admiralty court. . . . See *Leathers vs. Blessing*, 105 U.S. 626."

I conclude that this Court is possessed of jurisdiction of the instant libel.

The H. S. Pickands.

District Court of the United States, Eastern District of
Michigan, 1890.

42 Federal Reporter 239.

This was a libel in rem for personal injuries received under the following circumstances. In January, 1889, the steam-barge H. S. Pickands was lying in winter quarters at her wharf in Detroit hemmed in by the ice. She was at the time undergoing repairs, and libelant was engaged in doing some work connected with her boiler. Access to the steamer was gained by a ladder, about 12 feet in length, leading from the wharf to the bulwarks of the vessel, which had been secured at the bottom by a cleat which prevented its slipping. A few minutes before the accident, libelant himself had made use of it to board the vessel with a plank; and while there the master of the vessel, unknown to the libelant, had moved the ladder from the cleat and left it unprotected. In attempting to to on shore to procure other material to use in his work, libelant mounted the ladder, which slipped at the bottom, owing to the icy condition of the wharf, throwing libelant down upon the wharf, fracturing two of his ribs, and otherwise injuring him severely. This libel was filed to recover for his pain and suffering, his medical attendance, and his loss of time. . . .

Brown, J. I am clear in my opinion that a court of admiralty has no jurisdiction of this case. It has never been doubted since the case of *The Plymouth* 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule. *Ex parte Phenix Ins. Co.*, 118 U.S. 610, 7 Sup. Ct. Rep. 25; *The Neil Cochran*, Brown, Adm. 162; *The Ottawa*, Id. 356; *The C. Accame*, 20 Fed. Rep. 643; *The Maud Webster*, 8 Ben. 547.

In this case, not only was the damage received upon the land, but the slipping of the ladder which occasioned the injury occurred there, although the removal of the ladder which produced the slipping was done by the master while on board the vessel. It is true that in the case of *The Daylesford*, 30 Fed. Rep. 635, the libelant was allowed to recover in a case similar to this; but the question of jurisdiction appears to have escaped the attention of counsel, and is not noticed in the opinion of the court. The same remark may be made with regard to *The Caroline*, 30 Fed. Rep. 199. But in the case of *The Mary Stewart*, 10 Fed. Rep. 137, it was held that an injury done to a man standing on the wharf by a bale of cotton which was being hoisted aboard a ship loading at the wharf, and which fell before it reached the ship's rail, and struck him, was not cognizable in the admiralty, although the rope which broke was

furnished by the ship, one end of which was fastened to an engine which stood upon the wharf and furnished the hoisting power, and the other end of which passed through a pulley attached to one of the masts of the ship, and was fastened to the cotton which was being hoisted on board. This case is readily distinguishable from that of *Leathers v. Blessing*, 105 U.S. 626, in which the libelant was injured while on board the vessel by a bale of cotton falling upon him, and the jurisdiction was sustained upon the ground that the injury was received on board the vessel itself.

A decree will be entered dismissing the libel, but without costs, as the defense might have been made by way of exception to the libel. .

The Strabo.

District Court of the United States, Eastern District of New York, 1898.

90 Federal Reporter 110.

This is a libel by John J. King against the steamship Strabo for personal injuries. Heard on exceptions raising the question of jurisdiction in admiralty. . . .

Thomas, District Judge. The exceptions to the libel concede the following facts for the purpose of raising the question of the jurisdiction of this court: The libelant, employed in loading a ship lying at a dock, attempted to leave the ship by means of a ladder, by reason of the master's negligence not secured to the ship's rail, whereupon the ladder fell, and the libelant was thrown to the ground, and injured. From this statement is inferred (1) that the injured person was on the ship; (2) that the negligent omission, viz. to fasten the ladder to the ship, was suffered on the ship; (3) that the causal influence was brought to bear and took effect upon the libelant while he was on the ship; (4) that a physical injury was caused to the libelant by his fall, which was increased by his striking the dock.

Several classes of cases exist which have relevancy to the subject under consideration. The first class is where the primal cause arises on the ship, and is communicated to property on the land. Such are cases of fire, originating on the ship, and carried or spreading to the shore. *The Plymouth*, 3 Wall. 20; *In re Phoenix Ins. Co.*, 118 U.S. 610, 7 Sup. Ct. 25. In this class also fall the cases of missiles sent from the ship, and taking effect elsewhere. *U.S. v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *The Epsilon*, 6 Ben. 378, Fed. Cas. No. 4,506. Also, cases are included where some part of the ship comes in contact with the land, to the injury of persons or property thereon (*Johnson v. Elevator Co.*, 119 U.S. 388, 7 Sup. Ct. 254; *The Maud Webster*, 8 Ben. 547, Fed. Cas. No. 9,302): and herein should be gathered instances where the vessel does damage to wharves (*The C. Accame*, 20 Fed. 642; *Homer Ramadell Transp. Co. v. Compagnie Generale Transatlantique*, 63 Fed. 845, 848). Also, cases fall within this class where material discharged from a ship comes in contact with persons on land. *Anderson v. The Mary Garrett*, 63 Fed. 1009. See, also, *Price v. The Belle of the Coast*, 66 Fed. 62. In all cases arising under this first class the injured person or thing is on land when the negligent act operates upon him or it, and a court of admiralty has no jurisdiction. Another class includes cases where the primal cause arises on land, and is injuriously communicated to the ship on the water. Herein are included structures wrongfully maintained, and interrupting navigation. *Atlee v. Packet Co.*, 21 Wall. 389; *The Maud Webster*, 8 Ben. 547, Fed. Cas. No. 9,302; *Greenwood v. Town of Westport*, 60 Fed. 560; *Oregon City Transp. Co. v. Columbia St. Bridge Co.*, 53

Fed. 549; City of Boston v. Crowley, 38 Fed. 202, 204; The Arkansas, 17 Fed. 383. And herein fall cases where material discharged from land into the ship does injury to persons on the ship. Hermann v. Mill Co., 69 Fed. 646. In this class of cases, the ship, and hence a person or thing thereon, is on the water, and it has been considered that the court had jurisdiction. The H.S. Pickands, 42 Fed. 239, is different. There, a person descending from the ship by means of a ladder was thrown upon the wharf by reason of the previous negligent act of the master in removing the end of the ladder from the cleat that held it in place on the wharf, and it was adjudged that this court was without jurisdiction. In that instance the causative negligent omission was on land, but operated upon the libellant while he was on the ship, provided the ladder be deemed an incident or attachment of the ship. It differs from the cases under the first class in this: that a negligent condition initiated on shore was set in operation by the libellant attempting to leave the ship by the ladder.

It may be considered whether these decisions have been made pursuant to some rule of general application. All cases for ultimate authority refer to The Plymouth, 3 Wall. 20. There it was said:

"The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damages, in technical language, whatever else attended it, must have been there complete."

Again, "the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends, - on the high seas or navigable waters."

What construction has been placed upon these expressions in subsequent opinions? In The Mary Stewart, 10 Fed. 137, where the entire transaction was in fact on a wharf, it is said:

"There are two essential ingredients to a cause of action, viz. a wrong, and damage resulting from the wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage - the other necessary ingredient - must also happen on water."

This holding was criticised in City of Milwaukee v. The Curtis, 37 Fed. 705, where it is stated that:

"It suffices if the damage - the substantial cause of action arising out of the wrong-- is complete upon navigable waters."

Also, in *Hermann v. Mill Co.*, 69 Fed. 646, the rule stated in *The Mary Stewart* is regarded as too broad, and the learned judge interprets the law as follows:

"I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action; otherwise, it would be *damnum absque injuria*."

In *The H.S. Pickands*, *supra*, it was considered that, to confer jurisdiction on this court, the injury must have been consummated and the damage received upon the water, although the wrongful act may have been done on the ship.

In *The Maud Webster*, *supra*, the court said:

"In a case of tort, there can be no jurisdiction in the admiralty unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters."

In *Johnson v. Elevator Co.*, *supra*, it is held that this court has not jurisdiction of a tort when the substance and consummation of the wrong has taken place on land, and not on navigable water, "the cause of action not having been complete on such water."

It will be observed that more precise knowledge is derived from the nature of the cases than from the general language used. The cases usually involve a state of facts showing that the negligent act or omission arose in one locality, and was communicated to the libellant or to his property in another locality, and that the damage or actual physical injury always occurred in the locality where the wrongful act or omission took effect. But in *The H. S. Pickands*, *supra*, it appears that the negligent omission was on the dock, was communicated to the libellant on the ship, or at least on the ladder leading to the ship, and the chief physical injury resulted from his falling on the dock. While the cases wherein the jurisdiction has been contested usually show either the cause on the water, and the operation of the cause and all injury on land, or the cause on the land, and the operation of the cause and all injury on water, the language of the opinions is often broader. In *The Plymouth*, *The Maud Webster*, and *Johnson v. Elevator Co.*, the statement is that the substantial cause of action must be complete on navigable waters, or similar phraseology is used. In *City of Milwaukee v. The Curtis*, *Hermann v. Mill Co.*, and *The H.S. Pickands*, the locality of the completion of the damage or injury is emphasized as the test of the locality where the tort was committed. It does not seem that it was the intention in the latter cases to lay down the rule that the physical injury must be completed on the water to give courts of admiralty jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured. Such a rule would

imply that the first direct effect of a breach of duty upon the injured person on the ship could not create a cause of action if the injury were completed on land. Such a position should be tested.

If a ship carpenter were employed to mend a yard on a vessel lying at a dock, and, by the master's negligence, he were caused to fall, and he should fall upon the vessel or in the water, would this court have jurisdiction; but, if he should strike on the dock, would this court be without jurisdiction? If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the deck, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect, should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a cause of action is not usually defined by such a rule. It may be admitted that the act or omission which puts in force the primary hurtful agency does not constitute the cause of action; for, until such force takes effect injuriously upon the person or property of some one, there is a mere naked breach of duty, and the case is *damnum absque injuria*; but, where the breach of duty puts in motion agencies that come in actual injurious collision with the person or property of another to whom the duty was due, the cause of action at once arises, and the locality of the tort is fixed, however much the physical injury may be aggravated by subsequent occurrences, which may be regarded as continuations of the original wrongful act, and its immediate operation, and in a sense as incidents thereof.

The more consistent rule seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or property of another, on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed. Under such a rule the holdings against jurisdiction would be defensible in cases where articles hurled or discharged from a ship take effect and injure a person on shore, or where fire is communicated from the ship to the shore, or the ship itself comes in contact with persons or things on shore, or things unlawfully in the water interrupting navigation. And so as to holdings in favor of jurisdiction, where articles are cast or discharged from the land into the ship, thereby injuring it or persons or property thereon, or where the ship comes in contact, to its injury, with defective docks, or other things illegally interrupting navigation, or structure in or over the water in an unlawful condition. Such a rule would justify the decision in the cases cited, save, perhaps, that of *The H. S. Pickands*.

Let it be supposed that a man is on the deck of a vessel, and a cause arising on the shore--for instance, the moving boom of a derrick--strikes him, casting him to the land, where he receives added injury; would the admiralty be without jurisdiction? Suppose he is rigging a derrick on land, and, by a negligent act, is cast on a ship lying at the dock or in the water, and receives additional injury; would this court have jurisdiction? It seems that both inquiries should be answered in the negative. So, in *The H.S. Pickands Case*, if it could be said that the injured man was on the ship, by being on the ship's ladder, and received any actionable injury thereon, this court would have jurisdiction, although the greater injury was received from contact with the dock. But the facts in that case are not sufficiently detailed to admit of accurate inquiry. It is said above that, in addition to the breach of duty, there must be an injurious effect from it upon the person or property of a person on the water, to give this court jurisdiction. What is injurious effect? If the libel showed that only injury entitling to nominal damages were received, it may be conceded that this court would not entertain jurisdiction; but it cannot be assumed that, when a person is thrown from a ladder, there would be nothing more of injury while falling than would be compensated by nominal damages.

In the present case it has been assumed that the libelant, while stepping on the ladder, was still on the ship; and, if that inference be correct, then he received the effect of the wrongful act on the ship. The libel alleges neglect in fastening the ladder to the ship, and therefore it may be inferred that the breach of duty arose on an appliance of the ship. The libelant was thrown from the ladder, and it cannot be assumed that, through nervous shock or otherwise, he received no injury until he struck the dock. But even so, the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and, before he reached the dock, was subjected to conditions inevitably resulting in physical injury, wherever he finally struck. Therefore, may it not be concluded that a cause of action arose before the physical injury had been completed? This question does not require present decision, and is reserved, as it may be inferred that the libelant received some personal injury before striking the dock, although, upon striking, his injury was enhanced. It is intended to be decided at this time that if the libelant received any physical injury before striking the dock, although the sum of his injuries was not complete until he did reach the dock, this court has jurisdiction. In reaching this conclusion, the court has been limited by the meager statement of facts in the libel. Upon the hearing of the merits, the facts may receive such modification or change as to demand, by the force of previous authority, a different holding. The exceptions should be overruled.

Campbell v. H Hackfeld & Co., Limited.

Circuit Court of Appeals of the United States, Ninth Circuit,
1903.

125 Federal Reporter 696.

Ross, Circuit Judge. This cause comes here on appeal from a decree of the District Court for the District of Hawaii sustaining an exception of the appellee to the jurisdiction of the court over the parties or the cause of action stated in the libel, and dismissing the libel, without prejudice, for want of jurisdiction.

The libelant was a stevedore, and the libelee a corporation engaged in the business of loading and unloading vessels at Honolulu. The libel shows that in pursuance of its business the libelee on the 26th day of July, 1902, undertook to unload a cargo of coal from the Norwegian bark Aeolus, then anchored in navigable waters of the port of Honolulu, and that the libelant was one of the libelee's employes engaged in that work; that while so engaged in the hold of the vessel the libelant was, by reason of the carelessness of the libelee and of other of its employes, severely injured, for which injury he asked damages. Not only does the libel fail to allege anything against the ship, its owner, officers, or crew, but it affirmatively alleges "that the persons who were engaged in the unloading of said bark Aeolus were all employes of said defendant, and not members of the crew, or employes of said bark Aeolus, and not fellow servants of any capacity with any of the employes of said bark Aeolus.

Instances are numerous in which stevedores have maintained libels for injuries sustained by reason of defective machinery or appliances of the ship, or by reason of the negligence of its owner or of some of its officers or crew. Many of such cases are referred to in *The Anaces*, 93 Fed. 240, 34 C. C. A. 558, and in the briefs of counsel in the present case. But no case has been cited, and it is asserted by counsel that no case can be found, where a stevedore was allowed to maintain in a court of admiralty an action for damages, against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one or more of his other employes. The mere fact that no such case can be found in the books tends strongly to show that they are outside the acknowledged limit of admiralty cognizance over marine torts, for it would be little short of absurd to suppose that there have not been hundreds and hundreds of instances where stevedores have been injured in their work through the negligence of the contracting stevedore or of some of his employes. *The Plymouth*, 3 Wall. 20, 37, 18 L. Ed. 125; *The Queen v. Judge of the City of London Court*, Q. B. Div. vol. 28, 1892, pp. 273-298.

The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of

a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with nonmaritime affairs. In concluding his great opinion in the case of *De Lovio v. Boit et al.*, 2 Gall. 398, 474, Fed. Cas. No. 3,776, Judge Story said:

"On the whole, I am, without the slightest hesitation, ready to pronounce that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality. The former extends over all contracts, wheresoever they may be made or executed, or whatsoever may be the form of the stipulations, which relate to the navigation, business, or commerce of the sea."

Torts, as well as contracts, not maritime, are outside of admiralty cognizance.

It is quite true that in many of the decisions of the Supreme Court, as well as of the Circuit Courts of Appeals and of the Circuit and District Courts, the broad statement is made that in cases of tort the sole test of jurisdiction is locality; and that fact is made the basis of a criticism of the decision of the court below in the present case, found in the *Harvard Law Review* for January, 1908 (16 Harv. Law Rev. 210, 211), in which it is said that that decision

"Infringes a rule which originated in the very nature of admiralty jurisdiction, and which has been satisfactory in its practical operation. This test has been all but universally regarded as the sole one. See *The Plymouth*, supra. The single authority to the contrary is the somewhat obscurely stated dictum of a text-writer. *Benedict*, supra, 308. The principal case seems, then, at variance with the spirit of the previous cases, even though reconcilable with the points actually decided. Not only would the adoption of its doctrine unsettle a rule which has long been assumed to be law, but it would make the question of jurisdiction over torts subject to the difficulty which so often perplexes cases of contract, namely, the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems, therefore, unfortunate, as increasing complication and uncertainty in the law, without, apparently, securing any practical gain to compensate for these disadvantages."

It is expressly admitted in this article that "in every instance which has been found, however, a maritime relation such as is required by the court" below, has in fact existed.

It is expressly admitted in this article that "in every instance which has been found,

It is a cardinal rule that the language of every court must be construed with reference to the case made for decision, and should not be extended so as to embrace cases that could hardly have been within its contemplation when using the language. Take, for instance, the expression of the Supreme Court in the case of *The*

Plymouth, supra, in respect to the point in question, where it is said, "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." That language is quite as broad as, if not broader than, that used by any other court in any of the cases upon the subject, and, taken literally, would include within the jurisdiction of the admiralty court a very celebrated case that arose on the Bay of San Francisco in the year 1870, when A. P. Crittenden, a distinguished lawyer of California, was shot by Laura D. Fair on board the ferry steamer El Capitan, while making one of her trips from the Oakland Mole to her slip at San Francisco. But we think it would surprise the Supreme Court to be told that by saying, as it did in the Plymouth Case, that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance," it in effect decided that such a tort as Mrs. Fair committed on Crittenden fell within admiralty cognizance. If the language of the courts to the effect that locality is the sole test of admiralty jurisdiction in cases of tort is to be given the broad interpretation contended for by the appellant and by the Law Review referred to, then every case of battery committed by one passenger on another on board any ship anchored in navigable waters at any port or wharf is within the jurisdiction of the court having admiralty jurisdiction over the place. Such an interpretation is, in our opinion, wholly inadmissible, and such consequences very clearly show the danger of losing sight, in construing the language of a court, of the case about which it is speaking. In The Plymouth, for example, the case the court had for decision was one for damage done wholly on land, but in which the cause of damage originated on water within the admiralty jurisdiction of the trial court. There flames from a steam propeller anchored in the Chicago river set fire to some packing houses on land, and for the damage thus done it was sought to maintain a suit in the admiralty court. One of the arguments in favor of the jurisdiction was that the vessel which communicated the fire to the buildings was a maritime instrument or agent, and hence characterized the nature of the tort, and made of it a maritime tort. The court held that to be a misapprehension, and it was in answer to that contention that it said, "The jurisdiction of the admiralty over maritime torts does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality - the high seas or navigable waters - where it occurred," and immediately added the clause heretofore quoted: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In this connection, we quote a few paragraphs from the opinion of Lord Esher, Master of the Rolls, delivered in a late case in England (hereinafter further referred to), where it was sought to maintain in a court of admiralty an action in personam against a pilot in respect of a collision between two ships on the high seas, caused by his negligence:

"It is said that there is a decision of Dr. Lushington in favor of the jurisdiction, and (merely to show the danger of taking words from a judgment without looking further) I will at once grapple with it. In *The Sarah*, Lush. 549, Dr. Lushington said at page 550: 'The court has original jurisdiction, because the matter complained of is a tort committed on the high seas.' There, it is said, is a declaration by Dr. Lushington that he had jurisdiction over all torts committed on the high seas. That case was decided in 1862; but if we turn to the earlier case of *The Ida*, Lush. 6, in which the subject-matter was the willful cutting of a bark adrift, whereby she capsized a barge which contained cargo, Dr. Lushington says at page 9: 'The court, however, is still further indisposed to exercise jurisdiction on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only.' Therefore, by what he said in *The Sarah*, Lush. 549, he really did not mean every tort committed on the high seas, but only wrongful collisions; and he limited himself in *The Ida*, Lush. 6, by saying, in effect, that the jurisdiction of the admiralty had never extended to all torts on the high seas." *The Queen v. The Judge of the City of London Court*, Queen's Bench Division, vol. 28, 1892, pp. 273, 292.

In the case of *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90, the Supreme Court pointed out that it had frequently been decided by that court -

"That the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England."

And as to contracts (the case then before the court) said:

"The English rule, which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea, and to be executed thereon (making locality the test), is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions."

The locality test was there discarded as to contracts, because, as the jurisdiction conferred on the United States courts "comprehends all maritime contracts, torts, and injuries," the true criterion in the case then before the court was, not the place where the contract was made, but the nature and subject-matter of the contract - that is to say, whether it had reference to maritime service or maritime transactions.

In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find. They are not only, in our opinion, based on sound reason, but also find support in Benedict's Admiralty (3d Ed.) § 308, where that learned writer says:

"Cases of torts on the high seas, *superalium mare*, have always been held, even in England, to be within the jurisdiction of admiralty. And the jurisdiction in such cases has usually been held to depend upon locality, embracing only civil torts and injuries done on the sea, or on waters of the sea where the tide ebbs and flows. It depends upon the place where the cause of action arises, and that place must be the waters which are subject to the admiralty jurisdiction. It may, however, be doubted whether the civil jurisdiction, in such cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort."

In the case of *The Queen v. The Judge of the City of London Court*, *supra*, which is a very much stronger case in favor of the jurisdiction claimed than is the case at bar, Lord Esher, M. R., in considering on what, under the English law, does the jurisdiction of the admiralty court depend, said:

"It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespective of statute, a necessary condition for the jurisdiction of the admiralty court; but there is the further question, what is the subject-matter of that which has happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the admiralty court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things - the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made. You must consider all these things in determining whether the admiralty court has jurisdiction."

The opinion of his lordship in the case cited is a very lucid and instructive one, and will well repay perusal.

We are of opinion that the ruling of the court below was right, that it is not in conflict with any previous decision of which we are aware, and that it in no way tends to unsettle any rule of admiralty, or to introduce into that branch of the law any complication or uncertainty.

The judgment is affirmed.

Atlantic Transport Company of West Virginia v. Imbrovek.

Supreme Court of the United States, 1914.

234 United States 52.

[The arguments of counsel are omitted.]

Mr. Justice Hughes delivered the opinion of the court.

This is a libel to recover for personal injuries sustained by the libelant as a stevedore in the employ of the Atlantic Transport Company (the petitioner) which was engaged in loading the Pretoria, belonging to the Hamburg-American Steam Packet Company, while lying in the port of Baltimore. The libel was brought against both the owner of the ship and the stevedore company. It was dismissed as to the former, but a recovery against the latter was allowed by the District Court (190 Fed. Rep. 229) and sustained by the Circuit Court of Appeals (193 Fed. Rep. 1019). This writ of certiorari was granted. . . .

The principal question is whether the District Court had jurisdiction; that is, whether the cause was one 'of admiralty and maritime jurisdiction.' Const. Art. III, § 2; Rev. Stat., § 563; Judicial Code, § 24; Act of Sept. 24, 1789, c. XX, § 9, 1 Stat. 73, 76. As the injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the Circuit Court of Appeals for the Ninth Circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. *Campbell v. Hackfeld & Co.*, 125 Fed. Rep. 696.

At an early period the court of admiralty in England exercised jurisdiction 'over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas.' *De Lovio v. Boit*, 2 Gall. 398, 406, 464, 474. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done 'upon the sea, or any part thereof which is not within any county.' (4 Inst. 134.) The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions of England (*Waring v. Clarke*, 5 How. 441, 457, 458; *Insurance Company v. Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576); and the limitation with respect to torts committed within the body of any county is not applicable here. *Waring v. Clarke*, *supra*; *The Magnolia*, 20 How. 296. "In regard to torts" - said Mr. Justice Story in *Thomas v. Lane*, 2 Sumn. 1, 9 - "I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to

have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." This rule - that locality furnishes the test - has been frequently reiterated, with the substitution (under the doctrine of *The Genesee Chief*, 12 How. 443), of navigable waters for tide waters. Thus, in the case of *The Philadelphia, Wilmington & Baltimore R. R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 215, the court said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." Again, in the case of *The Plymouth*, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. - A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality - the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See *Manro v. Almeida*, 10 Wheat. 473; *Waring v. Clarke*, supra, p. 459; *The Lexington*, 6 How. 344, 394; *The Commerce*, 1 Black, 574, 579; *The Rock Island Bridge*, 6 Wall. 213, 215; *The Belfast*, 7 Wall. 624, 637; *Ex parte Easton*, 95 U.S. 68, 72; *Leathers v. Blessing*, 105 U.S. 626, 630; *Panama Railroad v. Napier Shipping Co.*, 166 U.S. 280, 285; *The Blackheath*, 195 U.S. 361, 365, 367; *Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 319; *Martin v. West*, 222 U.S. 191; *The Neil Cochran*, Fed. Cas. No. 10,087; *The Ottawa*, Fed. Cas. No. 10,616; *Holmes v. O. & C. Rwy. Co.*, 5 Fed. Rep. 75, 77; *The Arkansas*, 17 Fed. Rep. 383, 384; *The F. & P. M.* No. 2, 33 Fed. Rep. 511, 513; *The H. S. Pickands*, 42 Fed. Rep. 239, 240; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646, 647; *The Strabo*, 90 Fed. Rep. 110; 2 Story on the Constitution, § 1666. It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, c. IX, § 8, 1 Stat. 112, 113; act of March 3, 1825, c. LXV, 4 Stat. 115; Rev. Stat., §§ 5339, 5345, 5346; Criminal Code, § 272, 35 Stat. 1088, 1142; *United States v. Bevans*, 3 Wheat. 336, 387; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Rodgers*, 150 U.S. 249, 260, 261, 285; *Wynne v. United States*, 217 U.S. 234, 240.

But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of

locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occurrence has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed., § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action and thus arose by virtue of necessity.

We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history,' *The Blackheath*, supra. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' See *The George T. Kemp*, 2 Lowell, 477, 482; *The Circassian*, 1 Ben. 209; *The Windermere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954; *Norwegian Steamship Co. v. Washington*, 57 Fed. Rep. 224; *The Seguranca*, 58 Fed. Rep. 908; *The Allerton*, 93 Fed. Rep. 219; *Hughes*, Adm. 113; Benedict, Adm. 4th ed., § 207. The libelant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be

clear that the District Court sitting in admiralty was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. *Waring v. Clarke*, supra; *The Lottawanna*, supra. The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions." *Insurance Company v. Dunham*, 11 Wall. 1, 26. The Constitution provides that the judicial power shall extend 'to all cases of admiralty and maritime jurisdiction,' and the act of Congress defines the jurisdiction of the District Court, with respect to civil causes, in terms of like scope. To hold that a case of a tort committed on board a ship in navigable waters, by one who has undertaken a maritime service, against one engaged in the performance of that service, is not embraced within the constitutional grant and the jurisdictional act, would be to establish a limitation wholly without warrant.

The remaining question relates to the finding of negligence. It is urged that the neglect was that of a fellow-servant and hence that the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work. *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 386. As the question belongs to a class which under the distribution of judicial power is determinable by the Circuit Court of Appeals in last resort, we shall not undertake to discuss it at length or to restate the evidence. *Chicago Junction Rwy. Co. v. King*, 222 U. S. 222, 224; *Chicago, R. I. & Pac. Rwy. Co. v. Brown*, 229 U. S. 317, 320; *Grand Trunk Rwy. Co. v. Lindsay*, 233 U. S. 42, 50. It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified.

Affirmed.

Section 3.
Maritime Contracts.

Englisshe v. Regland.

High Court of Admiralty of England, 1547.

2 Select Pleas in the Court of Admiralty 5
(Publications of the Selden Society, Vol. XI).

. . . Therefore We, Griffin Leyson, (in common form) pronounce, decree, and declare, that the aforesaid Thomas Englisshe and Thomas Gamage, owners of the ship libellate, upon a civil and maritime contract sold the same for the sum of twenty pounds of lawful English money to Robert Regland and Thomas Muns, to be paid within a fixed time now past, and that they have failed to pay the same sum, and upon demand have unjustly refused and refuse to pay (the same); and on that account . . . (condemnation in £20 and costs in common form).

Sebra M. Bogart, William J. Wilcox, and Leonard F. Fitch,
Libellants and Appellants, v. The Steamboat John Jay, Her Tackle,
&c., George Logan, Claimant.

Supreme Court of the United States, 1854.

17 Howard 399.

[Only the opinion of the court is given.]

Mr. Justice Wayne delivered the opinion of the court.

We will confine ourselves in this opinion, to the inquiry, whether or not a court of admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them. The questions of pleading made in the case, and the other points argued, we shall not notice. The conclusion at which we have arrived makes that unnecessary.

The libellants were the owners of the steamer John Jay. They sold her to Joseph McMurray for the sum of \$6,000; \$1,000 in cash, and the residue of \$5,000 upon a credit, for which promissory notes were given, payable to their order, in three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months. On the day of sale, McMurray, the purchaser, executed in a single deed, containing the whole contract between himself and the libellants, a transfer of the boat to the latter as a security for the payment of his notes, with the proviso "that this instrument is intended to operate only as a mortgage to secure the full and just payment of the eight promissory notes given in consideration of the purchase-money of said vessel or steamboat." McMurray failed to pay the second note. Upon such failure the libel was filed. The libellants set out the contract; allege that it was to operate as a mortgage to secure the payment of McMurray's notes; state his failure to pay the second note; claim, in the fifth article of their libel, that McMurray's failure to pay had revested them with the title to the boat, and that McMurray's had become forfeited, from his non-compliance with the condition contained in the contract of sale. Their prayer is, that they may have a decree for the amount of the unpaid purchase-money, with interests and costs, and that The John Jay and her equipments may be condemned to pay the same. Afterwards, upon their appeal in the circuit court, they moved to amend their libel by inserting the words, "or that the steamboat John Jay may be decreed to be their property, and the possession be directed to be delivered to them."

To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a bona fide purchase from McMurray; and he further denies the jurisdiction of the court, upon the ground that the contract between the libellants and McMurray was not

maritime, or a case of admiralty and maritime jurisdiction. It appears that McMurray had received the possession of the boat; that she had been enrolled at the custom-house in his name; that he first sold one fourth of her to Logan, and afterwards, on the 2d December, executed a bill of sale for the whole of her to Logan, which was recorded in the custom-house; and that thereupon The John Jay was enrolled and licensed in the name of Logan.

Upon the hearing of the cause in the district court, the libel was dismissed. It was carried, by appeal, to the circuit court, and the judgment of the district court having been affirmed, it is now here upon appeal from the circuit court. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune*, 3 Hagg. Adm., 132, Sir John Nicholl, in giving his judgment, observes: "Now upon questions of mortgage, the court of admiralty has no jurisdiction; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty, which never decides on questions of property between the mortgagee and owner." ?

This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. [Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose.] There cannot be, then, any thing maritime in it. A failure to perform such a contract cannot make it maritime. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to

the mortgagee. Where there has been a failure to pay, he cannot take the ship manu forti, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment. *Thornhill v. Manning*, 7 Eng. Rep., 97, 99, 100.

Courts of admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. It is true that the policy of commerce and its exigencies in England have given to its admiralty courts a more ample jurisdiction in respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statute 3 and 4 Victoria, ch. 65. Until that shall be done in the United States, by congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been. We affirm the decree of the court below. . . .

Ship Mortgage Act, 1920. -- 1

An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes, June 5, 1920, ch. 250, sec. 30.

41 Statutes at Large 1000.

Subsection D. (b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

Subsection K. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. . . .

Subsection L. In any suit in rem in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshall may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession under the control of any person claiming a possessory common-law lien.

Subsection N. (a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this section, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This section shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels.

The Oconee.

District Court of the United States, Eastern District of Virginia,
1921.

280 Federal Reporter 927.

Groner, District Judge. Libelant, on May 3, 1921, filed its libel in this court against the steamship Oconee for necessities furnished the ship at Bremen, Germany, in February, 1921. The vessel was attached by the marshal, and, by decree subsequently entered, sold at public auction for \$25,500. Numerous petitions have been filed in the cause, among them the petition of the United States, claiming, as the holder of a preferred mortgage, priority of payment out of the fund in the registry of the court. The debt thus claimed to be secured is largely in excess of the amount of the fund, and, if allowed, will leave nothing for distribution to the libelant or the other interveners.

The Oconee was originally owned by the United States. On April 26, 1920, she was sold to E. H. Green & Co. who, on July 21, 1920, with the consent of the Shipping Board, sold her to the Oconee Steamship Company. The last-named, to secure the unpaid purchase price executed 15 negotiable promissory notes, for \$21,814.80 each, payable every 6 months, beginning October 26, 1920, and as security for these notes executed and delivered to the Shipping Board, for the account of the United States, a preferred mortgage on the whole of the vessel, which was duly recorded. Default was made in the payment of the second note, and the United States has intervened, by libel and petition in this cause, to the end that its preferred mortgage may be foreclosed, and that the indebtedness to it, evidenced by the promissory notes above mentioned, may be ascertained and paid. Exceptions, on behalf of other claimants, have been filed, in which two major questions are presented for decision:

First. "Was the enactment of the statute known as the Ship Mortgage Act of 1920, in so far as it purports to give a ship mortgage a preferred status, a valid exercise of congressional power?"

Second. "If the statute is constitutional, does the compliance therewith, which gives to a mortgage a preferred status, amount to constructive notice of the existence of the lien?"

The Ship Mortgage Act is a part of the Merchant Marine Act of June 5, 1920, 41 Stat. 1000. In order to provide an American merchant marine "sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in the time of war," and in order to encourage investment in ships and the financing of maritime ventures, Congress, in subsection C (a) of the act mentioned, provided a method whereby a mortgage on a vessel of the United

States should have a preferred status. Certain prerequisites are provided in the act to be done by the mortgagor or the mortgagee, or both, in order that the benefits of the provision may accrue - for instance: The vessel must be a vessel of the United States of 200 gross tons or upward; the mortgage must include the whole of the vessel; the mortgage must be indorsed upon the vessel's documents; it must be recorded as required, together with the time and date when the mortgage is so indorsed; an affidavit of good faith must be filed with the record; there must be no waiver therein of the preferred status, and the mortgagee must not be an alien. In the case now under consideration it is conceded that all of the requirements just named were duly complied with.

In addition to the above, certain duties are imposed by the act upon the mortgagor and master, and penalties are provided for their neglect. Thus, in section E, the mortgagor is required to retain a certified copy of the mortgage on board, "to be exhibited by the master to any person having business with the vessel which may give rise to a maritime lien," etc., and the master of the vessel is required, "upon the request of any such person," to exhibit, with the documents of the vessel, a copy of the mortgage to such person.

On behalf of the exceptants, it is now insisted that, even if the constitutionality of the act be decided affirmatively, the burden is on the United States, as claimant under the preferred mortgage, to show that the master complied with the provisions of subsection E just quoted. This proposition will be dealt with in the concluding part of the opinion.

From all of the foregoing it will be seen that the question first presented for decision here is: Did Congress exceed the powers vested in it by the Constitution in passing the so-called Ship Mortgage Act (Act June 5, 1920, subsec. C; 41 Stat. p. 1000). Article 3 (section 2) of the Constitution of the United States reads as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of Admiralty and Maritime Jurisdiction," etc.

And section 8, clause 18, of article 1, empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the government of the United States, or in any department or officer thereof. The original Judiciary Act (Act Sept. 24, 1789, § 9, 1 Stat. 76) conferred upon the federal District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of the impost, navigation - or trade of the United States -

saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Admittedly, Congress has no other power to legislate on the subject-matter than is thus conferred, and where the power is questioned the duty of the court is to see whether the grant is broad enough to embrace the specific act. Very early in the history of the country the jurisdiction of the District Court, in admiralty, to enforce payment of a mortgage upon a boat, was challenged, and by frequent adjudications by the Supreme Court that question was settled in the negative. In *The John Jay*, 17 How. 399, 15 L. Ed. 95, Judge Wayne, on behalf of the court, said:

"It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States."

And further on in the same opinion he says:

It (a mortgage) "is a contract without any of the characteristics or attendants of a maritime loan," and, "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction."

Likewise, in the case of *The J. E. Rumbell*, 148 U.S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345, which was a contest between persons furnishing repairs and supplies in the home port of the vessel, on the one hand, and the holders of a mortgage, on the other, the decision gave precedence to the supply claims by virtue of a statute of the state wherein the supplies were furnished, and in the course of the opinion Mr. Justice Gray, speaking for the court, said:

"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."

See, also, in the same connection, *The Eclipse*, 135 U.S. 599, 608, 10 Sup. Ct. 873, 34 L. Ed. 269; *People's Ferry Co. v. Beers*, 20 How. (61 U.S.) 396, 400, 15 L. Ed. 961; *The Rupert City* (D.C.) 213 Fed. 263, 273.

In the light of the decisions in these cases it cannot be doubted that, unless there exists in Congress power to change the recognized and established law on the subject, the act of 1920 must be declared unconstitutional. ✓

On behalf of the exceptants, it is insisted that Congress possesses no such power; that, when the grant of admiralty and maritime

jurisdiction was surrendered by the states to the federal Government, neither more nor less was then surrendered than was understood at the time to be embraced within those terms, or, as was said by Mr. Justice Bradley, speaking for the court, in *The Lottawanna*, 21 Wall. 558, 574, 22 L. Ed. 654:

"The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

Or, as was said by Mr. Justice Catron, speaking for the court in *People's Ferry Co. v. Beers*, *supra*:

"Its terms (admiralty jurisdiction) are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed - for what was meant by it then, it must mean now."

It is, therefore, argued that since the federal government may not exercise powers not granted, and since the courts have declared, quoad the grant in question, that only what was then embraced within the term "maritime" was granted, and have, likewise, decided that the thing which the statute now declares to be maritime was not then so regarded, it follows that the act should be pronounced beyond the power of Congress, just as much so as if it had declared a mortgage on a house to be maritime and enforceable in admiralty. *The St. Lawrence*, 1 Black, 522-527, 17 L. Ed. 180. But this position, it seems to me, finds no support either in reason or the decisions of the courts. If it be correct, this important branch of our national judicial system alone, of the entire structure, is immutable, fixed, and unalterable, responsive neither to changing conditions nor to the necessities of modern commerce, and subject to no expansion either at the instance of state or nation. That Congress, under the grant of admiralty jurisdiction, has power and authority to alter and amend the maritime law and make substantive innovations therein cannot be doubted; for, if it were otherwise, this nation, whose coast line is more extensive and whose ocean-borne commerce is the greatest in the world, would be placed alone, of the nations of the world, in a position where legislation for the improvement, enlargement and protection of these great interests would be impossible. As was pointed out by Mr. Justice Bradley in *The Lottawanna*, *supra*, 21 Wall. 577, 22 L. Ed. 654:

"It cannot be supposed that the framers of the Constitution contemplated that the law (maritime) should forever remain unalterable."

The earlier view of the limited character of the grant has gradually, but steadily, given way to an interpretation more in

harmony with modern necessities and world conditions, and the legislation in question goes no further than to establish in this country a statute of universal application in the maritime nations of Europe. Congress, recognizing that the investment of capital in shipping was necessary if the merchant flag of the nation was to be kept afloat, and recognizing, likewise, that to obtain capital provision should be made for its protection, enacted the law giving to a ship mortgage a preferred status. In doing this it doubtless ingrafted on the American maritime law a feature it did not formerly possess. Equally beyond question, it extended its terms beyond the conception of its meaning by the statesmen and lawyers of the country when the Constitution was adopted.

But in neither respect was there anything more than a reasonable recognition of the characteristics and attendants of a maritime subject. It was not experimental, because, as has been already stated, the maritime nations of the world long ago provided by statute for a similar condition. Neither can it be said to be an unlawful assumption of power by Congress, for its right to make substantive changes in the law has been recognized since the foundation of the government, and upheld by the courts. Instances in point are: The provisions in the Judiciary Act (1789), conferring jurisdiction on the District Courts in Admiralty to seizures under the impost, navigation, and trade laws; the passage of the Limited Liability Act of 1851 (Comp. St. §§ 8020-8027); the act extending the jurisdiction in admiralty to the waters of the Great Lakes (Act Feb. 26, 1845, 5 Stat. 726, c. 20); and the act of June 23, 1910 (Comp. St. §§ 7783-7787), giving a lien against a vessel for repairs furnished in her home port. Nor is judicial recognition of this power in Congress difficult to find. Thus, in *The Lottawanna*, supra, Mr. Justice Bradley said:

"Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

And in *Providence S. S. Co. v. Hill Co.*, 109 U.S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, the same learned justice says:

"Whilst the general maritime law with slight modifications is accepted as law in this country it is subject to such amendments as Congress may see fit to adopt."

And in the case of *The Scotland*, 105 U.S. 24, 26 L. Ed. 1001, the court, in passing on the limited liability statute, used this significant language (105 U.S. 29, 26 L. Ed. 1001):

"* * * This particular rule of the maritime law had never been adopted in this country until it was enacted by statute."

And in the very recent case of *Southern Pacific Co. v. Jensen*, 244 U. S. 214, 37 Sup. Ct. 528, 61 L. Ed. 1086, L. R. A. 1918C,

451, Ann. Cas. 1917E, 900, Mr. Justice McReynolds, speaking of the power derived by Congress under the Constitution to deal with the subject, says:

"Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Even in the case of *The John Jay*, which is relied upon to sustain the position of the exceptants that Congress has no such power, the court seemed to recognize the power of Congress to make a ship mortgage maritime, for, after noticing the fact that it is so in England by virtue of St. 3 and 4 Vict. 65, says (17 Hcw. 402, 15 L. Ed. 95):

"Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States as it has been."

Congress having now acted, the omission existing in the law as it formerly stood is supplied, and the act must be held within the power of Congress, and therefore constitutional. . . .

[Part of the opinion overruling other exceptions is omitted.]

Bryan Roach and Dennis Long, Composing the Firm of Roach and Long, Libellants and Appellants, v. William Chapman and Others, Claimants of the Steamer Capitol, and Daniel Edwards and Joseph Maillot, Sureties.

Supreme Court of the United States, 1859.

22 Howard 129.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Grier delivered the opinion of the court.

The libellants claim to have a lien on the steamboat Capitol, for a balance due them for machinery furnished in her construction. The boat was built at Louisville, Kentucky, and the libellants furnished the boilers and engines. Payments were made as the work progressed, and bills of exchange taken for the balance due after the vessel was completed. These were not paid. The boat left the port and the State, and was afterwards sold, and became the property of the claimants.

Among other things, the claimants pleaded to the jurisdiction of the court. This plea was sustained by the Circuit Court.

A contract for building a ship or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract.

Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of the People's Ferry Co. v. Beers, (20 How., 400).

It is said here, that the law of Kentucky creates a lien in favor of the libellants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognised by this court in *Peyroux v. Howard*, (7 Peters, 343,) be enforced in the admiralty. But (to quote the language of the court in *Orleans v. Phoebus*, 11 How., 184) "that decision does not authorize any such conclusion. In that case, the repairs of the vessel, for which the State laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the State laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States."

It is clear, therefore, that the judgment of the Circuit Court, dismissing the libel for want of jurisdiction, must be affirmed, without noticing other questions raised by the pleadings. . . .

Thames Towboat Company v. The Schooner "Francis McDonald",
Her Tackle, &c., Cummins, Claimant.

Supreme Court of the United States, 1920.

254 United States 242.

Mr. Justice McReynolds delivered the opinion of the court.

The libel was dismissed for want of jurisdiction and the cause is here on that question only.

Seeking to recover for alleged supplies furnished and repairs made to the schooner "Francis McDonald" appellant libeled the vessel in United States District Court, Southern District of New York.

Under a definite contract the Palmer Shipbuilding Company began construction of the schooner at Groton, Connecticut, and launched the hull. That company found itself unable to proceed further, thereupon appellant agreed with the owner to complete the work and for such purpose the hull was towed to its yard at New London. While lying there in the stream the materials, work and labor for which recovery is now sought were furnished. Later the vessel, so advanced, was towed to Hoboken and finished by a third company. When received by appellant the schooner was manifestly incomplete - her masts were not in, the bolts and beams and gaff were lying on deck, the forward house was not built, and she was not "in condition to carry on any service." Appellant worked on her for six weeks, and thirty or forty more days were required to finish her.

Was appellant's contract to furnish the materials, work and labor for her completion, made after the schooner was launched but while yet not sufficiently advanced to discharge the functions for which intended, within the admiralty and maritime jurisdiction? The District Court thought not and so do we.

Under decisions of this court the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is non-maritime and not within the admiralty jurisdiction. People's Ferry Co. v. Beers, 20 How. 393; Roach v. Chapman, 22 How. 129; Edwards v. Elliott, 21 Wall. 532; The Winnebago, 205 U.S. 354, 353; North Pacific S. S. Co. v. Hall Bros. Co., 249 U.S. 119, 125.

But counsel for appellant insist that there is a broad distinction between such a contract and one for work and material to finish a vessel after she has been launched and is water-borne. In support of this position they rely upon The Eliza Ladd (1875), Fed. Cases No. 4364; The Revenue Cutter (1877), Fed. Cases No. 11714; both by Judge Dady, in the United States District Court for Oregon - The Manhattan, District Court for Washington (1891), 46 Fed. Rep. 797,

which followed the District Court for Oregon; and Tucker v. Alexandroff, 183 U. S. 424, 438. The first three cases are directly in point, but are opposed by many of no less authority. Tucker v. Alexandroff must be read in the light of the particular matter under consideration - detention of a foreign seaman - and the conclusion announced, that after the vessel was launched "she was a ship within the meaning of the treaty". The court had no immediate concern with contracts for ship construction, and there was no purpose to lay down any definite rule applicable to them. On the other side the following cases are cited, and they are entitled to the greater weight: The Iosco, Fed. Cases No. 7060; The Pacific, 9 Fed. Rep. 120; The Count de Lesseps, 17 Fed. Rep. 460; The Glenmont, 32 Fed. Rep. 703, and 34 Fed. Rep. 402; The Paradox, 61 Fed. Rep. 860; McMasters v. One Dredge, 95 Fed. Rep. 832; The United Shores,, 193 Fed. Rep. 552; The Dredge A, 217 Fed. Rep. 617; The Winnebago, 205 U.S. 354, 363; North Pacific S. S. Co. v. Hall Bros. Co., 249 U.S. 119, 125.

Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. Edwards v. Elliott, 21 Wall. 532, 554, 555; The William Windom, 73 Fed. Rep. 496; Pacific Surety Co. v. Leatham & Smith Towing Co., 151 Fed. Rep. 440. And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended.

The judgment of the court below is

Affirmed.

New Bedford Dry Dock Company v. Purdy, Claimant of the Steamer
"Jack-O-Lantern."

Supreme Court of the United States, 1922.

258 United States 96.

[The arguments of counsel are omitted.]

Mr. Justice McReynolds delivered the opinion of the court.

Claiming a lien under Act of Congress approved June 23, 1910, c. 373, 36 Stat. 604,¹ and seeking to recover for work done and supplies furnished in pursuance of a contract with the owner of the "Jack-O-Lantern", appellant libeled the vessel. The libel was dismissed for lack of jurisdiction. If the agreement between the parties is maritime there was jurisdiction, otherwise there was none.

The facts are not in dispute. They were stated as follows by the District Court:

"The Jack-O-Lantern was originally a car float of the usual type, something over 200 feet long, with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or super structure, was built, inclosing most of the deck, and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type for propulsion were also installed.

"For the purpose of carrying out these changes the contract now before the court was made between the claimant and the libelant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The libelant did not install the power plant, but it did prepare the vessel for it. The scow was towed to the libelant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the libelant's yard, she was towed away."

¹Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Upon these facts it held that the contract was not one for repairs or supplies, but for original construction, and therefore non-maritime within the doctrine of *Thames Towboat Co. v. The "Francis McDonald"*, 254 U.S. 242. "In rebuilding operations the test is whether the identity of the vessel has continued, or has been extinguished." "The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the identity of the car float which was delivered to the libellant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged; but mere identity of hull is not sufficient to preserve the identity of the vessel." "The Jack-O-Lantern, with her dance hall, rooms, and power plant, self-propelled and able to maneuver, is an essentially different vessel from the car float, which furnished the hull." In support of this conclusion *McMaster v. One Dredge*, 95 Fed. 832, and *The Dredge A*, 217 Fed. 617, 629, 630, were cited.

It is not always easy to determine what constitutes repairs as opposed to original construction. A contract for the former is maritime; if for the latter, it is not. We are not disposed to enlarge the compass of the rule approved in *Thames Towboat Co. v. The "Francis McDonald"*, under which contracts for the construction of entirely new ships are classed as non-maritime, or to apply it to agreements of uncertain intentment - reasonable doubts concerning the latter should be resolved in favor of the admiralty jurisdiction. Nor do we think that in cases like the instant one any refined distinction should be made between reconstruction and repairs - the latter word as used in the statute has a broad meaning.

As pointed out in *Piedmont & Georges Creek Coal Co., v. Seaboard Fisheries Co.*, 254 U.S. 1, 11, 12, the Act of June 23, 1910, makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes."

This court has not undertaken and will not now essay to announce rigid definitions of repairs and new construction; but we do not accept the suggestion that the two things can be accurately differentiated by consideration of the ultimate use to which the vessel is to be devoted. The view expressed by Judge Hughes in *United States v. The Grace Meade*, Fed. Cas. No. 15,243, is both sound and helpful. "And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is

built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel. But where no piece of the timber of an old vessel is used without being first dislocated and then replaced, where no set of timbers are left together intact in their original positions, but all the timbers are severally taken out, refitted, and then reset, there we have a very different case. That is a case of a vessel rebuilt."

There was jurisdiction in the court below to determine and enforce the rights of the parties. Its judgment to the contrary must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

The Pinthis.

Circuit Court of Appeals of the United States, Third Circuit,
1923.

286 Federal Reporter 122.

Euffington, Circuit Judge. In this case Adolf Morner, trading as Bolinders Company, filed a libel against and attached the tank ship Pinthis, whereupon the Victory Carriers, Incorporated, claimed the vessel as owner and disputed the libel, on the ground that libelant's claim was of the same general character involved in *Thames, etc., v. The Francis McDonald*, 254 U.S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245, and, being nonmaritime, the District Court had no jurisdiction. On the other hand, the libelant contended its claim was not for the completion of the vessel, but was for "supplies or other necessities * * * to a vessel," and that the District Court took jurisdiction under 36 Stat. 604, which provides:

"That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." Comp. St. § 7783.

On final hearing the court below, citing *The Hiram R. Dixon* (D.C.) 33 Fed. 297, *The Sea Lark*, 21 Fed. Cas. No. 12,579, *Weaver v. The S. G. Owens*, 29 Fed. Cas. No. 17,310, *The Georgia* (D.C.) 32 Fed. 637, and *The Charles Spear* (D.C.) 143 Fed. 185, held the libel was not for the completion of the vessel, but for the supplies and necessities contemplated by the act quoted, assumed jurisdiction, and entered a reference to determine what items of the libel fell under the head of supplies and necessities. The reference found certain items went to the completion of the vessel, and as to this finding and the dismissal of the libel as to them no appeal was taken. As to certain other items, aggregating in value, with interest, \$5363.69, the court, holding they were supplies and necessities, entered the decree from which the claimant appeals.

The items allowed by the court were spare or extra engine parts, furnished while the hulk was lying in the water and prior to her completion, manning, and trial trip. Was the floating hulk at that time a vessel, against which the statute quoted gave a lien? The court held with the libelant, and this is alleged to be error. In so holding, we agree with the trial court, for the case of *Tucker v. Alexandroff*, 183 U.S. 438, 22 Sup. Ct. 195, 46 L. Ed. 264, determined the principle, later modified in *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245 and *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 42 Sup. Ct.

243, 66 L. Ed ---, that when launched the Pinthis became a vessel. As such she was a subject of maritime jurisdiction, and could be subjected to lien under the statute quoted above.

As to the question whether these liens went to the completion of the vessel, we note this case is not one between an owner and a ship-builder, involving the construction and application of a contract to build and complete a vessel, but is one involving the rights of a third person and the obligation of the ship to such third person. One Christiansen was furnishing and installing on the vessel a secondhand Bollinger engine. Some of the parts of this engine were broken or missing, and Christiansen ordered from the libelant, who was agent for the sale of the Bollinger engine, parts to supply those broken or missing parts. As to them the court below held they were parts which went to the completion of the vessel, and the libelant could not recover for them as supplies, under the statute, and from such holding no appeal was taken by the libelant. But in addition to these parts, which were necessary to put the secondhand engine in working order, the libelant furnished spare or reserve engine parts for the ship, which she would have on board in case of future breakage. It will thus be seen that these spare parts, while they might at some future time be used in the subsequent operation of the vessel, had no part in its present completion. The vessel was operatively complete without them; they could be taken off the vessel without disabling her engine and without lessening her complete working capacity.

Indeed, it will be apparent that, if we depart from the certainty of making a completed vessel the standard and enter the field of extras, spare parts, incidental equipment, and say that such things complete the vessel, we are giving up certainty of the standard of completion for the standard of mere speculation. Moreover, if we hold that it takes duplicate parts to complete the vessel, why may it not be contended that triplicate parts are a better and safer standard of completeness? The truth is that extra reserve parts are factors, not of completion, but of foresight and prudence in reserve equipment. An automobile is completed when it workably moves out of the shop by its own power and equipment. Prudence and foresight suggest it be equipped with extra tubes and tires; but, when the machine is equipped with such extra tires, they are not factors of original construction, but of anticipated need and prudent reserve. So viewing the extra engine parts furnished in this case, we are of opinion the court below rightly held they were not elements of original construction, but rather such supplies as the ship might reasonably place on board, in view of possible future need.

The Pinthis -- 3

As to the machine used for purifying used lubricating oil, we agree with the court below that it was not embraced in the completion of the ship, yet as an aid to economy and efficiency of operation it does fall within the range of supplies and necessities which those in control of a vessel might reasonably order.

Finding no error in the decree below, the same is affirmed.

The New Jersey Steam Navigation Company, Respondents and Appellants, v. The Merchants' Bank of Boston, Libellants.

Supreme Court of the United States, 1848.

6 Howard 344.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Nelson. This is an appeal from the Circuit Court of the United States, held in and for the District of Rhode Island, in a suit originally commenced in the District Court in admiralty, and in which the Merchants' Bank of Boston were the libellants, and the New Jersey Steam Navigation Company the respondents.

The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents running between New York and Providence, which took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about four miles off Huntington lighthouse, and between forty and fifty miles from the former city.

The District Court dismissed the libel pro forma, and entered a decree accordingly. An appeal was taken to the Circuit Court, where this decree of dismissal was reversed, and a decree entered for the libellants for the sum of \$22,224, with costs of suit.

The case is now before this court for review.

William F. Harnden, a resident of Boston, was engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose, he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of \$250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers between New York and Providence a wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown), until the 31st of December following subject to these conditions:-

1. The crate with its contents to be at all times exclusively at the risk of the said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c., to be conveyed or transported by him in said crate, or otherwise in the boats of said company.

2. That he should annex to his advertisements published in the public prints the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading:-

"Take notice. - William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

This arrangement expired on the 31st of December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question.

A few days previous to the loss of the Lexington, the libellants employed Harnden in Boston to collect from the banks in the city of New York checks and drafts to the amount of about \$46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect and send home the same in the usual way. Eighteen thousand dollars of this sum was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libellants, and was on board at the time she was lost, on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libellants to recover:-

1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made.

2. That if the suit can be maintained in the name of the libellants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and,

3. That the District Court had no jurisdiction, the contract of affreightment not being the subject of admiralty cognizance.

We shall examine these several objections in their order.

[In an omitted part of the opinion Mr. Justice Nelson considered the first and the second objections respectively.]

The remaining question is as to the jurisdiction of the court.

By the second section of the third article of the Constitution, it is declared that "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction."

The ground of objection to the jurisdiction, in this case, rests upon the assumption, that this provision had reference to the jurisdiction of the High Court of Admiralty in England, as restrained by the statutes of 13 and 15 Richard II., or as exercised in the colonies by the courts of vice-admiralty, which, as their decisions were subject to the appellate power of the High Court at home, with few exceptions, and those by act of Parliament, were confined within the same limits.

This is the foundation of the argument in support of the restricted jurisdiction, and which, it is claimed, excludes the contract in question.

Under the statutes of Richard, as expounded by the common law courts, in cases of prohibition against the admiralty, its jurisdiction over contracts was confined to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas.

If made on land, or within the body of an English county, though to be executed, or the service to be performed, upon the sea, or if made upon the sea, but to be executed upon the land, in either case it was held by the common law courts that the admiralty had no jurisdiction. In the first, because the place where the contract was made, and in the second, where it was to be performed, was within the body of the county, and, of course, within the cognizance of the common law courts, which excluded the admiralty.

It is not to be denied, therefore, if the grant of power in the Constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it, that the present suit cannot be maintained, as the District Court of Rhode Island had no jurisdiction.

But in answer to this view, and to the ground on which it rests, we have been referred to the practical construction that has been given to the Constitution by Congress in the Judiciary Act of 1789, which established the courts of admiralty, and assigned to them their jurisdiction; and also to the adjudications of this, and of the Circuit and District Courts, in admiralty cases, which not only reject the very limited jurisdiction in England, but assert and uphold a jurisdiction much more comprehensive, both in respect to contracts and torts, and which has been exercised ever since the establishment of these courts. And it is insisted, that, whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed.

We are inclined to concur in this view, and shall proceed to state some of the grounds in support of it.

By the ninth section of the Judiciary Act of 1789, which established the admiralty courts, it is declared that the District Courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

The High Court of Admiralty in England never had original jurisdiction of causes arising under the revenue laws, or laws concerning the navigation and trade of the kingdom. They belong, exclusively, to the jurisdiction of the Court of Exchequer, in which the proceedings are conducted as at common law.

That court exercises an appellate power over the decisions of the vice-admiralty courts in revenue cases in the colonies; even that power was doubted, till affirmed by the Court of Delegates, on an appeal from a decision of the vice-admiralty court in South Carolina, in 1754. Since then, it has been exercised; but this is the extent of its power over revenue cases, or cases arising under the navigation laws.

Thus it will be seen that a very wide departure from the English limit of admiralty jurisdiction took place within two years after the adoption of the Constitution; and that, too, by the Congress called upon to expound the grant with a view to the establishment of the proper tribunals to carry it into execution.

The constitutionality of this act of Congress, and, of course, the true construction of the grant in the Constitution, became a subject of discussion before this court, at a very early day, on several occasions, and received its particular consideration.

The first case that involved the question was the case of *The Vengeance*, in 1796, nine years after the adoption of the Constitution. (3 Dallas, 297)

The vessel was seized by the marshal in the port of New York, as forfeited under an act of Congress, prohibiting the exportation of arms, and libelled and condemned in the District Court. On appeal, the Circuit Court reversed the decree and dismissed the proceedings; upon which an appeal was taken to this court.

On the argument, the Attorney-General took two grounds for reversing the decree. The second was, that, even if the proceeding could be considered a civil suit, it was not a suit of admiralty and maritime jurisdiction; and therefore the Circuit Court should have remanded it to the District Court, to be tried before a jury.

He referred to the ninth section of the Judiciary Act, which declared, that "the trials of issues of fact in the District Courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury," and insisted, that a libel for a violation of the navigation laws was not a civil suit of admiralty jurisdiction; that the principles regulating the admiralty jurisdiction in this country must be such as were consistent with the common law of England at the period of the Revolution; that there admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county; that the act of exporting arms must have commenced on land, and if done part on land and part on the sea, the authorities held that the admiralty had no jurisdiction.

The court took time to consider the question, and on a subsequent day gave judgment, holding that the suit was a civil cause of admiralty and maritime jurisdiction, and therefore rightfully tried by the District Court without a jury; that the case was one coming within the general admiralty powers of the court; and, for a like reason, it was held that the appeal to the Circuit Court was regular, and properly disposed of.

It will be observed that the seizure, in this case, was in the port of New York, and within the body of the county, which extends to Sandy Hook.

The next case that came before the court was the case of The Schooner Sally, in 1805, which arose in the Maryland district, and involved the same question as in the case of the Vengeance, and was decided in the same way.

But the most important one, as it respects the question before us, was the case of The Schooner Betsey, in 1808 (4 Cranch, 443). This vessel was seized for a violation of the non-intercourse act between the United States and St. Domingo, in the port of Alexandria, in this District. She was condemned in the District Court; but on appeal the Circuit Court reversed the decree, from which an appeal was taken to this court.

Mr. Lee, who had argued the case of the Vengeance, appeared for the claimant, and requested permission to argue the point again more at large, namely, whether the case was one of admiralty and maritime jurisdiction; and in this argument will be found the ground and substance of all the arguments which have been since urged in favor of the limited construction of the admiralty power under the Constitution.

He referred to the terms of the grant in the Constitution, and denied that Congress could make cases of admiralty jurisdiction; nor could it confer on the federal courts jurisdiction of a case which was not of admiralty and maritime cognizance at the time of the adoption of the Constitution. That the seizure of a vessel

within the body of a county, for a breach of a municipal law of trade, was not of admiralty cognizance, - that it was never so considered in England, - that all seizures in that country for a violation of the revenue and navigation acts were tried by a jury, in the Court of Exchequer, according to the course of the common law, - that the High Court of Admiralty in England exercised no jurisdiction in revenue cases, - and insisted, that if the ninth section of the Judiciary Act was to be construed as including revenue cases and seizures under the navigation acts as civil causes of admiralty and maritime jurisdiction, the act was repugnant to the Constitution, and void.

The court rejected the argument, and held that the case was not distinguishable from that of the Vengeance, and which they had already determined belonged properly to the jurisdiction of the admiralty. They observed, that it was the place of seizure, and not the place of committing the offence, that determined the jurisdiction, and regarded it as clear that Congress meant to discriminate between seizures on waters navigable from the sea, and seizures on land or on waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction.

Similar objections were taken to the jurisdiction of the court in the cases of The Samuel and The Octavia (1 Wheat. 9 and 20), and received a similar answer from the court.

We have been more particular in referring to these cases, and to the arguments of counsel, because they show, -

1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the Revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after full consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the Constitution; and,

2. They affirm the practical construction given to the Constitution by Congress in the act of 1789, which, we have seen, assigns to the District Courts, in terms, a vast field of admiralty jurisdiction unknown to that court in England.

The jurisdiction in all these cases is maintained on the broad ground, that the subject-matter was of admiralty cognizance, as the causes of action arose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide; expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and therefore out of the limits of the admiralty.

In answer to an argument that was pressed, that the offence must have been committed upon land, such as in case of an

exportation of prohibited goods, the court say that it is the place of seizure, and not the place of committing the offence, that decides the jurisdiction, - a seizure upon the high seas or within tide-waters, although the tide-waters may be within the body of a county.

All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction within the words of the Constitution, and, as such, were properly assigned to the District Court, in the act of 1789, as part of its admiralty jurisdiction.

They were so regarded, as well in respect to the subject-matter as in respect to the place where the causes of action had arisen.

The clause in the act of 1789, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," was referred to on the argument in support of the restricted jurisdiction. And it was insisted that the remedy is thus saved to both parties, plaintiff and defendant, and is, in effect, an exception from the admiralty power conferred upon the District Courts of all causes in which a remedy might be had at common law.

The language is certainly peculiar, and unfortunate, if this was the object of the clause; and besides, the construction would exclude from the District Court cases which the sternest opponent of the admiralty will admit properly belonged to it.

The common law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or contract (with the exception of proceedings in rem), which, upon the construction contended for, would be transferred from the admiralty to the exclusive cognizance of these courts.

The meaning of the clause we think apparent.

By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress intended by the ninth section to invest the District Courts with this power, as courts of original jurisdiction.

The term "exclusive original cognizance" is used for this purpose, and is intended to be exclusive of the State, as well as of the other federal courts.

The saving clause was inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed.

This leaves the concurrent power where it stood at common law.

The clause has no application to seizures arising under the revenue laws, or laws of navigation, as these belong, exclusively to the District Courts. (Slocum v. Mayberry, 2 Wheat. 1; Gelston v. Hoyt, 3 1). 246.)

If the thing seized is acquitted, then the owner may prosecute the wrong-doer for the taking and detention, either in admiralty or at common law. The remedy is concurrent. (Ibid.)

2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship-carpenters and material men, for repairs and necessaries, made and furnished to ships, whether foreign or in the port of a State to which they do not belong, or in the home port, if the municipal laws of the State give a lien for the work and materials. (1 Peters's Adm. R. 227; 233, note; Bee's Adm. R. 106; 4 Wash. C. C. R. 453; 1 Payne, 620; Gilpin, D. C. R. 203, 473; 1 Wheat. 96; 4 ib. 438; 9 ib. 409; 10 ib. 428; 7 Peters, 324; 11 ib. 175.)

The principle stated in the case of *The General Smith*, 4 Wheat. 438, and which has been repeated in all the subsequent cases, is, that where repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to enforce his right. But as to repairs or necessaries in the port or State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless recognized by that law. But if the local law gives the lien, it may be enforced in admiralty.

The jurisdiction in these cases, as will be seen from the authorities referred to, appears to have been exercised by the District Courts from the time of their earliest organization, and which was affirmed by this court the first time the question came before it.

The District Court of South Carolina, in 1796, in the case of *North and Besey v. The Brig Eagle*, Bee's R. 79, maintained a libel for supplies furnished a foreign vessel, and considered the question as a very clear one at that day. See also *Pritchard v. The Lady Horatia*, p. 169, decided in 1800.

Judge Winchester, district judge of the Maryland district, maintained the jurisdiction, in a most able opinion, at a very early day. (1 Peters's Adm. R. 233, note.)

The same opinion was also entertained by Judge Peters, of the Pennsylvania district. (1 Peters, 227.)

Since then, the jurisdiction appears to have been undisputed.

We refer to these opinions, not so much for the authority they afford, though entitled to the highest respect as such, but as evidence of the line of jurisdiction exercised, at that early day, by learned admiralty lawyers, in direct contradiction to the theory, that the constitutional limit is to be determined by the jurisdiction in England. They are the opinions of men of the Revolution, engaged in administering admiralty law as understood in the country soon after the adoption of the Constitution, fresh from the discussions which every provision and grant of power in that instrument had undergone. The opinions may be well referred to as affording the highest evidence of the law on this subject in their day.

3. Another class of cases in which jurisdiction is entertained by the courts in this country on contracts, but which is denied in England, are suits for pilotage. (10 Peters, 108). It is denied in England on the ground of locality, the contract having been made within the body of a county.

We shall pursue the examination no farther. The authorities, we think, are decisive against expounding the constitutional grant according to the jurisdiction of the English admiralty, and in favor of a line of jurisdiction which fully embraces the contract in question.

Before jurisdiction can be withheld in the case, the court must not only retrace its steps, and take back several of its decided cases, but must also disapprove of the ground which has heretofore been taken, and maintained in every case, as the proper test of admiralty jurisdiction.

Some question was made on the argument founded on the circumstance, that this was a suit in personam.

The answer is, if the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person, as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance.

On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, - whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea, or tide-waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial

part of the service under the contract is to be performed beyond tide-waters, or if the contract relates exclusively to the interior navigation and trade of a State, jurisdiction is disclaimed. (10 Wheat. 428; 7 Peters, 324; 11 ib. 175; 12 ib. 72; 5 Howard, 463.)

The exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power.

It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries, and among the several States.

Contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide-waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts.

Upon the whole, without pursuing the examination farther, we are satisfied that the decision of the Circuit Court below was correct, and that its decree should be affirmed. . . .

[The concurring opinions of Justices Catron and Woodbury and the dissenting opinion of Mr. Justice Daniel are omitted.]

Fox v. Patton.

District Court of the United States, Southern District of New York, 1884.

22 Federal Reporter 746.

Brown, J. The libel alleges that in the month of February, 1881, the libelants chartered the British bark Ashur for a voyage from Saint Mary's, Georgia, to Honfleur, France; that said vessel was to make a voyage to Brazil, and thence to proceed in ballast to Saint Mary's instead of which she took a cargo of merchandise in Brazil and proceeded to New York; that by such deviation in her course and her breach of contract the libelants sustained a loss of £60 sterling; that the respondents, composing the firm of Patton, Vickers & Co., of the city of New York, representing the said bark in this city, thereupon agreed to pay to the libelants for such damage the sum of £55 sterling, which has been demanded of them and payment refused. The respondents except to the libel on the ground that it does not show any cause of action within the admiralty jurisdiction of the court. The decision must turn wholly upon the question whether the respondents' contract was or was not a maritime contract. Nothing in the libel warrants the inference that the respondents were under any legal obligation to pay the damages sustained by the breach of the charter-party. There is no allegation that the charter-party was executed by the respondents, or that they were owners of the bark, or of any part of it. Their only relation to the bark appears to have been that they were her agents in New York. This did not impose upon them any liability for her previous breaches of contract. The only foundation of this action, therefore, is the new and independent promise, on their part, alleged in the libel, to pay the libelants for the previous debt of the ship and of her owners. It does not appear whether or not the debt of the ship and of her owners was discharged, or intended to be discharged, by this new and independent promise of the respondents. If it was not discharged, the libelants' remedy against them remains still available. If the former debt was discharged, then it is a case of novation, in which the only relation of the prior debt to the new obligation is that the former furnishes the consideration of the latter. This original consideration, though in itself a maritime consideration, is not sufficient to make such a new and independent contract a maritime contract. "To be a maritime contract," says Story, J., in *Thackarey v. The Farmer*, Gilp. 524, "it is not enough that the subject-matter of it, the consideration, * * * is to be done on navigable waters." And in the case of *The Centurion*, 1 Ware, 479, Ware, J., says:

"Although the admiralty has a general jurisdiction over maritime contracts and quasi contracts, and things done on the sea, it

does not follow that the payment of a debt in every form which it may assume can be enforced in the admiralty simply because it originated in a contract, or in the performance of a service which was within the jurisdiction of the court. While the original cause or consideration subsists and is in force, the party may have his remedy in this court; but when that is extinguished, and the debt passes into a new form by what, in the civil law, is called a novation, - as when the creditor receives a bond for the sum due, or a negotiable note or bill of exchange is taken as payment, and as an extinguishment of the debt, - it will not be contended that the admiralty has jurisdiction to enforce the payment of the debt in its new form. Ramsay v. Allegre, 12 Wheat. 611."

The boundary between contracts maritime and not maritime is often difficult to determine. In this case, as the respondents were under no liability for the original debt of the ship, and as the contract has no other maritime feature than the previous maritime obligation serving as its consideration, I think the defendant's new obligation in this case is not such a one as can be deemed to be a maritime contract, so as to bring it within the jurisdiction of the admiralty. The objections are therefore sustained, and the libel dismissed.

Keyser v. Blue Star Steamship Co.

Circuit Court of Appeals of the United States, Fifth Circuit,
1899.

91 Federal Reporter 267.

The Blue Star Steamship Co. libelled Keyser in personam charging that he had chartered libellant's steamer to load a cargo of timber at Pensacola, that according to stipulation 7 of the charter party the charterer agreed to advance sufficient cash for the ship's disbursements at the port of loading, the master to give a draft on the owners to cover the same, and that the master signed and libellant's paid a draft in excess of advances actually made. This suit was brought to recover the difference. The district court decreed for libellant and respondent appealed. Respondent objected, inter-alia, that the case was not one of admiralty and maritime jurisdiction.

[The above statement of the case is substituted for the statement in the opinion. Only so much of the opinion is given as deals with the question of jurisdiction.]

McCormick, Circuit Judge. . . .

In the opinion of a majority of this court, the first ground of error, as grouped by the appellant's proctor, is not well taken. The question it presents is not without difficulty, and many of the adjudged cases tend to support the appellant's contention. Such precedents, springing originally from the jealousy of the English common-law courts in the matter of admiralty jurisdiction, and their effort to limit the same, have somewhat, especially in the earlier cases, affected decisions in this country. While exact precedents may not exist which directly support the jurisdiction of this case, it seems to us that the analogies of the better considered of the American cases, and the manifest trend of decisions in this country, do support it. The answer shows that almost if not all of the foreign trade at the port of Pensacola is in timber and lumber, by chartered foreign vessels, with reference to which business foreign exchanges are almost exclusively made, and made by means of master's drafts payable to their own order, and signed and indorsed by them on the owners of their vessels or buyers of the cargo, which are given and received at the rate at the time current; and, there being no market for them at Pensacola, they are sent on for collection. Such being the case, it may very well be that the libellant would have refused to charter the ship except upon the condition that the charterer would make and agree to observe stipulation 7, as expressed in the charter party. It is true that the mere fact of this agreement being embraced in the charter party would not of itself give

the character of a maritime contract; but its relation to the other stipulations of the charter party may be such (and, we think, appears to be such) as to connect it with the contract into which the parties were entering, - a contract of an undisputed maritime character, - and in such a manner as to authorize the parties to apply to a court of admiralty to inquire into any alleged breaches of this stipulation 7. Insurance Co. v. Dunham, 11 Wall. 1-36; Ben. Adm. §§ 257-262, 287, and cases there cited.... .

[The decree of the district court was reversed and a new trial awarded on the merits.]

The Pennsylvania.

Circuit Court of Appeals of the United States, Second Circuit,
1907.

154 Federal Reporter 9.

Appeal from the District Court of the United States for the
Southern District of New York. . . .

Wallace, Circuit Judge. The libelants, who brought this action to enforce a lien against the steamship, were defeated in the court below, and this appeal presents the question whether by their contract with the charterer of the steamship Pennsylvania, and the charterer's breach of the contract, they acquired a lien against the vessel enforceable in admiralty. It is conceded for the appellant that, if the contract was maritime in its nature, the libelants acquired a maritime lien by the charterer's breach, and the real inquiry therefore is whether the contract was in such sense maritime as to be cognizable in admiralty.

By a charter party made in June, 1904, between the owner of the Pennsylvania and the Nautical Preparatory School, the "bare ship, without crew, fuel or supplies," was let to the latter for the term of one year, and soon thereafter possession of the vessel was delivered by the owner to the charterer. The Nautical Preparatory School was a corporation of Rhode Island, organized for the "purpose of conducting a school for boys on shipboard." Prior to September, 1904, the school corporation had made contracts severally with the libelants, whereby they respectively enrolled their sons as "cadet pupils" in a school to be conducted on board the steamship for the school year beginning September 15, 1904. These contracts were induced by a prospectus circulated by the school corporation, setting forth its educational scheme and the terms and conditions of its undertaking. The prospectus represented that the vessel had been chartered, and would be equipped with a library, museum, laboratory, and gymnasium; that a corps of skilled instructors would direct the studies of the pupils in a curriculum including mathematics, history, geography, literature, and the languages, and a competent director would have charge of their physical training; that the school would maintain a naval organization and discipline, the cadets being formed into companies with officers selected from themselves, and the cadets would be instructed in naval and military drills, and in the handling and navigation of the vessel; and that the school year would comprise a nine month cruise upon the steamship to foreign countries and visits by the pupils to all places of interest in charge of the professors. The charges per school year were to be \$1,280, payable in advance, covering "tuition, board, laundry, clothing, uniforms, text-books, all expenses on shore, languages, the installation of class museums, gymnastics, and athletics, and all the many extras which swell the simple tuition charges of other schools." The libelants made

the advance payments of \$1,280 each. Prior to September 15, 1904, the pupils went on board the steamship at Providence, where she was lying in port, and remained on board about two weeks, when the school corporation, apparently because of pecuniary embarrassment, abandoned the voyage, and the pupils left the vessel.

It is not enough that the contract includes a maritime adventure among its objects, or that it was to be performed at sea. Unless it was purely maritime, it was not one of which a court of admiralty has jurisdiction. In the language of Justice Clifford, in *The Belfast*, 7 Wall. 637 (19 L. Ed. 266):

"Contracts, claims, or services, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts."

Contracts of a mixed nature are not cognizable in these courts, and that there is a sufficient reason for this is well illustrated by the present case. Here is the ordinary contract between school proprietors and patrons, with the further provisions that the school is to be located on shipboard, and the course of instruction is to include a foreign voyage and studies in nautical and naval matters. Combined with the provisions of common-law obligation are some that may relate to maritime services. How can a court of admiralty separate the liabilities and apportion the damages arising from the breach of the maritime part of the contract? Whenever the principal subject-matter of a controversy belongs to the jurisdiction of a court of common law, or of equity, the incidental matters must also be relegated to the appropriate jurisdiction, notwithstanding of themselves they might be cognizable in admiralty. *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7,669; *Grant v. Poillon*, 20 How. 162, 15 L. Ed. 871; *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235; *Hall v. Hudson*, 2 Sprague, 65, Fed. Cas. No. 5,935; *Vandewater v. Mills*, 19 How. 82, 15 L. Ed. 554.

In *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11, 233, Judge Story had occasion to consider a somewhat similar question in a case where a minor had been apprenticed by his parent for a voyage to sea, and had received improper treatment by the master of the vessel. Judge Story said:

"I cannot say that the whole contract is here of a maritime nature. There are mixed up in it obligations *ex contractu* not necessarily maritime, and so far the contract is of a special nature. In cases of a mixed nature, it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

In *Krohn v. The Julia* (C.C.) 37 Fed. 369, it was held that a contract by the master of a vessel to carry cargo, sell it, and

account for the proceeds, could not be enforced in admiralty. In *The Illinois*, 2 Flap, 383, Fed. Cas. No. 7,005, it was held that the breach of a contract for maintaining a bar for the sale of liquors upon a vessel was not the subject of admiralty cognizance. In both of these cases the contract was regarded as a common-law contract, notwithstanding it related incidentally, and to that extent materially, to the navigation of a vessel. So, in the present case, what was to be done on shipboard was merely an incident of a contract which was essentially of a common-law nature.

We entertain no doubt that the libel should have been dismissed, and the decree is therefore affirmed, with costs.

Insurance Company v. Dunham.

Supreme Court of the United States, 1870.

11 Wallace 1.

[The statement of the case and the arguments of counsel are omitted.]

Mr. Justice Bradley delivered the opinion of the court. . . .

The case . . . presents the question, whether the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain a libel in personam on a policy of marine insurance to recover for a loss.

This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the District Courts in admiralty and maritime cases has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the Judiciary Act passed at its first session, 24th of September, 1789, established the District Courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject.

Much controversey has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the

courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the high seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney, *The Steamer St. Lawrence*, 1 Black, 527, "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." "Courts of admiralty," says the same judge in another case, *The Genesee Chief*, 12 Howard, 454, "have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the locus or territory of maritime jurisdiction; that is, that place or territory where the law maritime prevails, where torts must be committed, and where business must be transacted in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide. "Are we bound to say," - says Justice Wayne, delivering the opinion of the court in *Waring v. Clarke*, 5 Howard, 462, - "Are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that sea always means high sea or main sea? . . . Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? . . . We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The Judiciary Act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burden as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of *The Genesee Chief*, 12 Howard, 443, decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney, *Id.* 457, "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few

exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, (and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction over bottomry bonds, although it involves an inconsistency with their rules in almost every other case. In *Menetone v. Gibbons*, 3 Term, 269, Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on the subject-matter." Had these views actuated the common law courts at an earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of *The New Jersey Navigation Company v. Merchants' Bank*, 6 Howard, 344, which was a libel in personam against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer *Lexington* on Long Island Sound, Justice Nelson, delivering the opinion of the court, says; *Ib.* 392: "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." (The last distinction based on tide, as we have seen, has since been abrogated.) Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship-carpenters and material-men on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England. See cases cited by Justice Nelson, 6 Howard, 390, 391. In the subsequent case of *Morewood v. Enequist*, 23 Howard, 493, decided in 1859, which was a case of charter-party and affreightment Justice Grier, who had dissented in the case of *The Lexington*, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common

law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of *The Lexington*, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either in rem or in personam." The case of *The People's Ferry Co. v. Beers*, 20 Ib. 401, being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract made on land and to be performed on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is not a maritime contract;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of *The Moses Taylor*, 4 Wallace, 411, it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of *The Belfast*, 7 Wallace, 624, it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says, 7 Ib. 637: "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality."

It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject-matter of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various District and Circuit Courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not, maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce, - jettison, abandonment, average, salvage, capture, prize, bottomry, &c.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules

and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A.D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in her majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the court of admiralty, in prohibiting its cognizance of policies of insurance half a century before, 4 Institutes, 139, the latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, proprio vigore, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent." Evans's Statutes, vol. ii, p. 226, 3d ed. The contrivances to which Lord Mansfield resorted to remedy in a measure these difficulties are stated by Mr. Justice Parke in the introduction to his work on insurance.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various

maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a previsionsal division of risk; first, amongst those engaged in the same enterprise; and, next, amongst associations of ship-owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship-owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur. 2 Pardessus, *Lois Maritimes*, 369; 6 *Id.* 303. The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century, *Id.* vol. 2, pp. 369, 370; vol. 4, p. 566; vol 5, pp. 331, 493, and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A. D. 1435; of Venice, A. D. 1468; of Florence, A. D. 1523; of Antwerp, A.D. 1537, &c. *Id.* vol. 5, pp. 493, 65; vol. 4, pp. 598, 37. Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV, issued in 1681, it forms the subject of one of the principal titles. Lib. 3, title 6. As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts. See Benedict's Admiralty, § 294, ed. 1870. The French Ordinance of 1681 touching the Marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea." Sea Laws, 256. The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called 'The Consulate of the Sea', printed at Barcelona in the year 1592." Roccus on Insurance, note 80.

It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the Admiral. Benedict, § 48. Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom." 2 Browne's Civil and Admiralty Law, 82. But the intolerance of the common law courts prohibited the exercise of it. In the early case of *Crane v. Bell*, 38 Hen. VIII, A. D. 1546, a prohibition was granted for this purpose. See 4 Institutes, 139. Mr. Browne says, very pertinently: "What is the rationale, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings" 2 Civil and Admiralty Law, 88.

Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the Convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them. Benedict, chap. IX.

The discussions that have taken place in the District and Circuit Courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of *De Lovio v. Boit*, 2 Gallison, 398, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the

first circuit. Gloucester Insurance Co. v. Younger, 2 Curtis, 332. 333. In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judge was he did not know. Hale v. Washington Insurance Co., 2 Story, 183. Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the Circuit Court will be, that the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain the libel in this case.

Answer Accordingly.

. St. Paul Fire and Marine Insurance Company v. Birrell.

District Court of the United States, District of Oregon, 1908.

164 Federal Reporter 104.

Wolverton, District Judge. Libelant seeks to recover from respondent an alleged balance for premiums on marine policies of insurance. The case made by the libel is that the parties entered into a contract, whereby, (for a certain commission on all premiums, respondent agreed to negotiate insurance in the libelant company upon vessels plying the high seas and the waterways of this state, and personally bound himself to be responsible to libelant for all premiums upon all marine insurance written by it at his instance and request, or for parties introduced by respondent to libelant; that an account should be and was opened between libelant and respondent, and respondent charged with all premiums written under said agreement. Respondent excepts to the libel upon the ground that the cause of action stated is not within the admiralty jurisdiction. It is conceded that, if respondent were the insured, this action would lie, and of this there can be no doubt. A contract of marine insurance is a maritime contract. Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90. It has been further adjudged that an engagement to pay premiums on marine insurance is a maritime contract. The Guiding Star (D.C.) 9 Fed. 521, affirmed in an opinion by Justice Matthews, Id. (C.C.) 18 Fed. 263.

(The difficulty with libelant's case here, however, is that respondent did not contract for insurance with libelant, but only to procure insurance to be contracted by others- respondent agreeing to be responsible for the premiums. Such a contract is not maritime. The test of a maritime contract as put by the Supreme Court in Insurance Co. v. Dunham, supra, and restated in numerous decisions since, is this: "The true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions" - jurisdiction being made to depend upon subject-matter, and not upon locality. (The contract relied upon by libelant is not a contract of insurance, but is, on the other hand an independent undertaking on the part of respondent to pay premiums on insurance for which he was not primarily liable. He only became liable, if at all, by virtue of a separate and distinct contract, not even remotely related to service or transactions maritime, and not cognizable in admiralty. Libelant has no better right to sue respondent in admiralty on his personal undertaking alleged than respondent would have to sue libelant there for a balance due on his services for negotiating marine insurance; and, of course, he has no such right. The contract set forth in the libel is in its nature *del credere*, and the dispute involves a balance of accounts between factor and principal. The authorities, both English and American, certainly make of this a *del credere* contract. Such a contract is said by Lord

Mansfield, in *Grove v. Dubois*, 1 T. R. 112, 115, to be "an absolute engagement to the principal from the broker, and makes him liable in the first instance." In *Leverick v. Meigs*, 1 Cow. (N.Y.) 645, 663, it is said that the legal effect of a *del credere* agreement is that a factor, for an additional premium beyond the usual commission, when he sells the goods of his principal, becomes bound to pay the price at all events. Such is the situation of these parties.

In an omitted part of the opinion the Court quoted from *Marquardt v. French*, 53 Fed. 603; *Fox v. Patton*, 22 Fed. 746; and *Minturn v. Maynard*, 17 How. 477.

For the foregoing reasons, this court is without jurisdiction in the premises, and the exceptions to the libel should be sustained and the libel dismissed.

Nash v. Bohlen.

District Court of the United States, Eastern District of New
York, 1909.

167 Federal Reporter 427.

Chatfield, District Judge. The court has already found a contract, and that the contract was broken, in that unseaworthy vessels were furnished, and that the respondent was responsible for this unseaworthy condition of his boats and the accidents resulting therefrom, even though he had attempted to take advantage of a proceeding to limit his liability with respect to anything not occurring through his own fault.

The libel in this case seems to have been prepared upon the theory that, if a maritime contract be broken, all elements of damage can be proven upon the one breach. No fault can be found with that theory; but upon the trial it developed that the libelant had set forth a single contract, and had stated as component parts of one cause of action a number of breaches, or of acts which were alleged to be each a breach of this maritime contract, and that from each breach the same damage, namely, the loss of the two cargoes of cement, had resulted.

For a time on the trial it appeared as if no relief could be granted, inasmuch as the evidence tended to show merely the making of a contract, and that damage had occurred, but that no evidence had been offered from which any particular breach of the contract could be ascertained, except that a contract to insure had not been carried out. This contract to insure, if standing entirely by itself, would be a civil and not a maritime contract, and could not be the sole basis of a cause of action in admiralty.

Considerable discussion was had as to the form of the pleadings and the various acts which were claimed to be breaches of the contract. It ultimately was established by the libelant that he was entitled to claim damages upon more than one cause of action growing out of the one maritime contract. Upon the proof the issues became clearly enough defined, so that the fault in the pleadings was removed, especially as no exceptions to those pleadings had ever been taken until the court began its analysis of the testimony up to the time when the question appeared. The court found upon the alleged breach of warranty of seaworthiness (the respondent not being a common carrier, but a carrier for hire upon private contract) for the libelant; and also found upon the facts that a contract for insurance existed, which could be satisfactorily complied with either by a policy upon each individual cargo, or a blanket policy to the full value of the carrying capacity of the vessel, with a certificate for each cargo. The question as to whether such an insurance contract could be proven in admiralty, where it was one of

the elements of a properly maritime contract, was reserved, and must be now determined in favor of the libelant. The cases of Rosenthal et al. v. The Louisiana (C.C.) 37 Fed. 264, The City of Clarksville (D.C.) 94 Fed. 201, and Keyser v. Blue Star S.S.Co., 91 Fed. 267, 33 C.C.A. 496, satisfactorily substantiate the proposition that such a contract may be introduced as an incident, and damages for the breach of such a contract awarded upon the trial of the action in admiralty. See, also, Marquardt et al. v. French (D.C.) 53 Fed. 603.

It may be said that the award upon the breach of the contract for seaworthiness alone would be sufficient to dispose of this case. But inasmuch as the contract for insurance would seem to be properly established, and inasmuch as the court has found that the contract was broken, the libelant may have a decree upon both grounds.

Isaac Wortman v. Walter S. Griffith and Another.

Circuit Court of the United States, Southern District of New York, 1856.

3 Blatchford 528.

This was a libel in personam, filed in the District Court, to recover compensation for services rendered by the libellant in repairing a steamboat. The District Court decreed for the libellant, and the respondents appealed to this Court. . . .

Nelson, J. The libellant is the owner of a ship-yard, together with apparatus, consisting of a railway-cradle and other fixtures and implements, used for the purpose of hauling up vessels out of the water, and sustaining them while they are being repaired. Certain rates of compensation are charged, regulated by the tonnage of the vessel, for hauling her up on the ways, and a per diem charge is made for the time occupied while she is under repair, in cases where the owner of the yard and apparatus is not employed to do the work, but the repairs are made by other ship-masters, as in the present instance.

The main controversy in the Court below related to the terms upon which the service was to be rendered. Judge Hall, who heard the case, settled the amount, upon his view of the evidence, at \$631.97, and I am not disposed to interfere with his conclusion. The proofs are conflicting, and not very clear either way in respect to the agreement.

The doubt I have had in the case is upon the objection raised to the jurisdiction of the Court - a point not taken in the Court below. It is claimed by the counsel for the respondents, that the agreement for the service rendered is to be regarded simply as a hiring of the yard and apparatus; and, certainly, if this be the true character of the transaction, there would be great difficulty in upholding the jurisdiction. On the other side, it is contended that the service rendered was a service in the repairs of the vessel, and was as much a part of them as the work of the ship-master, or the materials furnished by him.

There can be no doubt, that in cases where the ship-master owning the ship-yard and apparatus, is employed to make the repairs, the service in question enters into and becomes part of the contract, and is thus the appropriate subject of Admiralty jurisdiction. And the question is, whether any well-founded distinction exists between a transaction of that character and the present one. The owner of the yard and apparatus, together with his hands, superintends and conducts the operation of raising and lowering the vessel, and also of fixing her upon the ways, preparatory to the repairs. The

service requires skill and experience in the business, and is essential in the process of repair. I do not go into the question whether this is a contract made, or a service rendered, on the land or on the water. It undoubtedly partakes of both characters. But, I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to, for the purpose of ascertaining when the Admiralty has, and when it has not, jurisdiction. The nature and character of the contract and of the service have always appeared to me to be sounder guides for determining the question.

Although a distinction may be made between this case, in the aspect presented, and the case where the ship-master is employed to make the repairs, I am inclined to think that it is not a substantial one, and that, to adopt it, would be yielding to a refinement which I am always reluctant to incorporate into judicial proceedings. A distinction, to be practical, should be one of substance, and one which strikes the common sense as founded in reason and justice.

I must, therefore, overrule the point of jurisdiction, and affirm the decree.

Robert Turner v. Silas Beacham.

Circuit Court of the United States, District of Maryland, 1858.

Taney 583.

Taney, C. J. This is a libel in personam, for work done and materials and equipments furnished by Beacham, for the steamboat Susquehanna, of which the libel alleges that Turner was the owner at the time. Turner, in his answer, denies the jurisdiction of the court, and sets up a partnership ownership of the steamboat, by a company, in which he, and the libellant and sundry other persons, were partners; and for which company, he avers, the work was done; and avers that the partnership account is unsettled, and a suit is now depending in a court of equity in order to adjust it. Many witnesses have been examined on both sides; and the case, as presented by the record, is exceedingly complicated. The whole transaction appears to have been conducted in such a loose and irregular manner, that it is difficult for a court to determine what the parties intended by their contracts and proceedings.

It is not necessary, however, in the view this court takes of the subject, to go into a detailed examination of these complicated and loose proceedings; a brief summary will show the character of the case as it comes before this court. Turner, the appellant, it appears, after a consultation with one or two other persons, determined to buy this steamboat, which was then lying at Havre de Grace, and to have her fitted up as an ice-boat, to be used in keeping open the navigation of the harbor of Baltimore during the winter. The plan was, that the boat should be brought to Baltimore and fitted up for the purpose for which she was intended; and should become the property of a company who should apply for a charter from the state. The price at which it was originally proposed that she should become the property of the company was \$25,000; and afterwards, it appears to have been reduced to the original cost of the boat, and the expenses incurred in putting her in complete order, which it is said would amount altogether to fifteen or sixteen thousand dollars.

In pursuance of the plan formed by Turner and others, as before mentioned, he sent an agent to Havre de Grace, who purchased the boat for him for \$4000, and she was brought to Baltimore and registered as belonging to Turner, he taking the usual oath that he was the sole owner. The same agent was employed by Turner to employ workmen and mechanics to put her in order, for the purposes for which she was intended, and at the same time to solicit subscriptions for shares, in order to form the company contemplated; the mechanics who were employed to do the work were all apprised of the plan, and were required to take a certain amount of stock in the company, as a condition upon which alone they would be employed. The libellant engaged to do the blacksmith's work, and in consideration of being so employed, he agreed to take stock to the amount

of \$200; and his subscription was accordingly entered for that amount, by the direction of the person whom he had authorized to enter it.

It does not appear that the amount required was subscribed; but those who had subscribed met, and appointed a committee to take charge of the boat, and to obtain the contract with the city authorities for keeping open the harbor; the appellant and appellee were both present at the meeting. The boat performed two or three trips under the direction of the committee; but they failed to obtain the contract with the city, and therefore, the whole enterprise was soon after abandoned, and the boat remained unemployed. It was then found, that her value was very far below what she had cost, including the very expensive repairs which had been put upon her after she was purchased by Turner; and Turner states in his answer, that he has since filed a bill in the circuit court for the city of Baltimore, charging that she belonged to the persons who subscribed for shares, and praying for a sale of the vessel, and a settlement of the partnership accounts; that she has been sold accordingly, a receiver appointed, and that the proceedings are still pending there to adjust the partnership accounts.

In this state of things this libel was filed; and the libellant claims to recover the whole amount of his bill from the appellant, without deducting anything on account of his subscription of \$200 for shares in the company. And several questions have been raised on the pleadings and evidence which it is proper to state, in order to determine whether the case before me is within the jurisdiction of a court of admiralty.

1. The libellant contends that the work and materials furnished by him, were furnished on the credit of Turner, who was the owner of the boat, and not on the credit of an embryo company, not then brought into existence, and which might never come into existence.

2. That he is not bound to deduct from his claim against the appellant, the two hundred dollars which he agreed to take in the stock of the proposed company, because the sum to be subscribed to purchase the boat, was never subscribed.

3. That if it had been subscribed, the libellant was not bound by his subscription, because it had been obtained by the misrepresentation of Turner as to the capacity and fitness of the boat for the purpose for which the company intended to use her; and also, because by the terms of his contract, he was to have had the whole of the blacksmith's work, and a part of this work was given to another person.

1. On the part of Turner it is contended, that the contract was made and the work done upon the credit of the contemplated company, to which, and not to him personally, the libellant and the other mechanics who worked upon the vessel were to look for payment.

2. That the company was brought into existence, and the libellant was a partner in it, and as such took a share in its proceedings.

3. That the accounts between him and the other partners, and with the libellant, as one of the partners, are unsettled.

4. That the partnership assets are now in the custody of a court of the state, and proceedings pending there to adjust the partnership accounts; and were so pending before and when this libel was filed.

These are the questions which have arisen in the case, and present the inquiry into the jurisdiction of the court of admiralty.

If the contract of the appellee had been the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute was to whom the credit was given, and who was liable for the amount, it is very clear that it would be a case for admiralty jurisdiction; and the court would, undoubtedly, be authorized to determine, whether Turner or the anticipated and contingent partners would be liable to the libellant for the money; and this question, upon the testimony, could be easily disposed of. But inseparably connected with this maritime contract, and forming a part of it, is the agreement to become a partner in a company to be formed to purchase the vessel. Now, a contract to form a partnership to purchase a vessel, or to purchase anything else, is certainly not maritime; a court of admiralty has no right to decide whether such a contract was legally or equitably binding, nor to adjust the accounts and liabilities of the different partners. These questions are altogether outside of the jurisdiction of the court; and yet the amount actually due to the libellant, by whomsoever it is to be paid, cannot be decided, until these questions are first examined and determined. And I consider it to be a clear rule of admiralty jurisdiction, that although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of *Grant v. Poillon* was decided upon this ground, at the last term of the supreme court. (20 How. 162.)

If the contract for repairs, and for the partnership, had been separate contracts, there would be no doubt of the jurisdiction; and so also, if the partnership had related to some collateral matter, But according to the testimony, the agreement to repair the boat and to become part-owner of her with the libellant and others, were but parts of one and the same contract, and in relation to one and the same thing, that is, the boat to be repaired; and this court

cannot adjust the rights and liabilities of the parties upon one portion of the contract, and leave the other to be litigated in another court. If it has not jurisdiction over the whole contract, it could not, without great injustice, dispose of a part and compel the party to pay money on one portion of it, and leave it to another court to decide whether he had not claims against the libellant upon the partnership branch of it, which ought to have been adjusted before the account for work on the vessel was paid. Upon these grounds, the court is of opinion, that the decree of the district court must be reversed, and the case remanded, with directions to dismiss the libel for want of jurisdiction in the district court.

I have said nothing of the proceedings in the state court of equity, to which the appellant refers in his answer. They have not been filed in the case, and this court cannot, therefore, regard them as open to consideration here. Certainly, if the same question, between the same parties, upon the same subject-matter, were pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, this court would refuse to entertain a suit upon any portion of the matters so in litigation in the state court.

The Electron: Electro-Dynamic Co. v. The Electron.

District Court of the United States, Southern District of New
York, 1891

48 Federal Reporter 689.

In Admiralty. The Electro-Dynamic Company of Philadelphia libeled the yacht Electron to recover for machinery furnished. James Bigler filed a cross-libel, and moved for stay until security is filed. . . .

Brown, J. In the first above libel the claim is for \$2,106.08, with interest, the balance of a bill alleged to be due "in and about the refitting and repairing" of the yacht Electron, belonging in Philadelphia, by furnishing her with a quantity of electrical machinery for the purpose of propelling her by electricity. The yacht was arrested and released on security given, and has answered, alleging misrepresentations and various breaches in the performance of the contract under which the repairs were furnished, and an offer to return the articles. The cross-libel alleges substantially the same misrepresentations and breaches, and claims damages by reason thereof in the sum of \$4,553.04. Under the fifty-third rule of the supreme court in admiralty, she now moves that the respondents' proceedings in the original libel be stayed until security is given for the damages claimed in the cross-libel. The defense to the original libel is the same as the ground of claim in the cross-libel. The case is therefore within the fifty-third rule of the supreme court in admiralty, as construed by this court in the case of *Vianello v. Credit Lyonnais*, 15 Fed. Rep. 637. It is urged, however, that the cross-libel is for a demand which could not be entertained in admiralty, because it is merely an action for damages for the breach of a contract for supplies. No doubt, if the court was without jurisdiction of the cause of action stated in the cross-libel, the motion should not be granted; but, though actions for damages and for misrepresentations and breaches of contracts for supplies may not be frequent, I cannot regard them as beyond the proper jurisdiction of the admiralty. In the case of *The Eli Whitney*, 1 Blatchf. 360, though it was held that an action in rem would not lie for false representations which had been the inducement to the execution of a charter-party, there is no intimation that an action in personam would not lie for such a cause. The contract in this case, being for supplies, is a maritime contract, within the ordinary jurisdiction of the admiralty courts. Upon such a contract, and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in *Church v. Shelton*, 2 Curt. 271, 274, "will proceed to inquire into

all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve." See, also, Cox v. Murray, Abb. Adm. 342; The J. F. Warner, 22 Fed. Rep. 342; The W. A. Morrell, 27 Fed. Rep. 570; The Baracoa, 44 Fed. Rep. 102. In the latter case the action was for damages for breach of the stipulations of a charter-party, and, as respects jurisdiction, is indistinguishable from the present, though the form of remedy in this case is in personam only. The cross-libel is therefore properly brought, and falls within the rule; and the motion for stay of proceedings on the original libel, until security is given, is granted.

Diefenthal et al. v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft.

District Court of the United States, Eastern District of Louisiana, 1891.

46 Federal Reporter 397.

Billings, J. This is a suit in admiralty, brought by process in personam. The question submitted is presented by a plea to the jurisdiction. The suit is brought to recover damages for a breach of a contract. The question, therefore, is whether the contract which has been violated, is maritime. The contract is fully described in the libel. The respondents were owners of a number of steamers running between New Orleans and various European ports. They made a contract, whereby it was agreed that the libelants would, for the period of one year, furnish and deliver to the respondents on board of their several vessels all the meat, eggs, and vegetables required as supplies for the passengers and crews of said boats at fixed prices. The libel further propounds that the number of respondents' boats departing within the year from New Orleans was 43; that the execution of the contract was entered upon, and two boats had been furnished with supplies, which, at the agreed prices at that season of the year, caused a loss to the libelants; and that the respondents, refusing to carry out thereafter the said contract, have caused a loss to the libelants of the full sum of \$10,000. The contract, therefore, was a contract whereby the libelants agreed to sell and deliver, and the respondents, who were owners of vessels engaged in foreign commerce, agreed to purchase and receive, at enumerated prices, the supplies which such vessels might require at the port of New Orleans for the period of one year. . . .

In an omitted part of the opinion the court referred to Insurance Co. v. Dunham, 11 Wall. 1; The Paola R., 32 Fed. 174; Pritchard v. The Horatio, Bee 167; The City of London, 1 W. Rob. 91; Minturn v. Maynard, 17 How. 477; Vandewater v. Mills, 19 How. 82; Ferry Co. v. Beers, 20 How. 401; The Steamer St. Lawrence, 1 Black 527; Leland v. The Medora, 2 Woodb. & M. 109; Cox v. Murray, 1 Abb. Adm. 342; Cunningham v. Hall, 1 Cliff. 34; and Plummer v. Webb, 4 Mason 388.

This is a contract relating to the furnishing of supplies. But it is, after all, not a contract where, until the supplies are actually furnished, the contractors relied upon any ship, but upon the other contracting party. "The proximate and not the remote cause is looked to as the source of jurisdiction in admiralty." Dunl. Adm. Pr. marg. p. 44. It was not a contract for supplies for a ship, except that the wants of the 43 ships were to furnish the measure of the extent of what was to be furnished, - i.e., the contract related to navigation only so far as concerned amounts. For all other purposes it was a general contract for the sale and delivery of

provisions, and, according to the distinction which has been made in the cases above referred to both in England and in this country, though having ulterior reference to navigation, is still one for the refusal to carry out which, by the defendants, the plaintiffs must have their remedy in the common-law courts, and not in the court of admiralty. It need not be held that there could not be an admiralty suit in some cases where there is no maritime lien. But where the contract is for supplies, to bring it within the admiralty jurisdiction it must come within the reason that brings materialmen within the dominion of admiralty courts, - i.e., it must appear that the necessities or conveniences of ships in ports remote from home ports require that a credit should be given and a debt created which, though arising on land, are distinctively maritime, because necessary to maritime commerce as conducted by ships. It must begin and end in the necessities of a particular vessel for her own voyage. Where owners group together a large number of vessels, and make annual contracts for their supplies, the admiralty jurisdiction does not include them, because the reason for it does not. The objection to the jurisdiction, which it seems to me must prevail, is that this contract, though relating remotely to navigation and maritime commerce, is separated so far from them that it did not spring from the necessities of navigation, and is not within the considerations which make it essentially and distinctively maritime, and, though in part executed, is not, with reference to damages for its further non-execution, within the jurisdiction of the courts of admiralty. The exception to the jurisdiction must be maintained.

Doolittle v. Knobloch et al.

District Court of the United States, District of South Carolina,
1889.

39 Federal Reporter 40.

Simmonton, J. The libel sets up a claim against the steamer in rem and her owner, the respondent, in personam, for services and advances. The services were going to New York as the agent of Knobloch, and purchasing for him the steamer Bellevue, and coming in her on her voyage from New York to Charleston, looking generally after the interests of the owner; not, however, having any control or concern in the navigation of the vessel. The advances consist of cash to the master from time to time, and moneys paid for supplies to the steamer, pilotage, and dock fees. The libel was amended by striking out all claim in rem on the steamer. Respondent excepts to the jurisdiction of the court. The jurisdiction in admiralty depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The Jefferson, 20 How. 393. It is not easy to get an exact definition of the term "maritime contract". It is far easier to say what is not a maritime contract. "The true criterion," says that eminent jurist, Mr. Justice Bradley, "is the nature and subject-matter of the contract as whether it has reference to maritime services or maritime transactions." Insurance Co. v. Dunham, 11 Wall. 1. Mr. Browne, in his work on Civil and Admiralty Law, (volume 2, page 82,) asks the question: "What contracts should be cognizable in admiralty?" and answers it: "All contracts which relate purely to maritime affairs." "Maritime contracts are such as relate to commerce and navigation," says Justice Clifford. The Orpheus, 2 Cliff. 29. The English courts limit courts of admiralty by the locality of the contract. Our courts look to the subject-matter. De Lovio v. Boit, 2 Gall. 398. But "to be a maritime contract, * * * it is not enough that the subject-matter of it, the consideration, the service, is to be done on the sea. It must be in its nature maritime. It must relate to maritime affairs. It must have a connection with the navigation of the ship, with her equipment of preservation, or with the maintenance or preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though not strictly mariners or seamen, may all sue for their wages in the admiralty because they contribute in their several ways to the preservation and support of the vessel and her crew." The Farmer, Gilp. 531. The charge for services in purchasing the steamer cannot be entertained in this court. It does not spring from a maritime contract. A ship-broker cannot sue in admiralty for services in procuring a charter-party, as they do not arise out of a maritime contract. The Thames, 10 Fed. Rep. 848. Nor do the services of an agent in soliciting freight come within this category. The Crystal Stream, 25 Fed. Rep. 575. Nor is a contract for building a ship, (Cunningham v. Hall,

1 Cliff. 43,) nor for furnishing materials for building a ship, (The Orpheus, 2 Cliff. 29,) a maritime contract. The underlying principle is this: All these are preliminary services leading to a maritime contract. They do not constitute in themselves a maritime contract. Of the same character is the purchase of a vessel. See Edwards v. Elliott, 21 Wall. 532. The service in the purchase of the steamer in this case was not a maritime contract.

The claim for advances made to the master and steamer do not come within our jurisdiction. "Admiralty has no jurisdiction over an account between the agent of a steam-boat and its owners for moneys paid for its use." *Minturn v. Maynard*, 17 How. 477; *White v. Dollars*, 19 Fed. Rep. 848; *Hen. Adm.* p. 135, § 47; *Bank v. The Charles E. Page*, (MS. Cir. Ct. South Carolina, Dec. 1886.) The same conclusion must be reached with regard to the claim for services in coming on the steamer from New York. He was not master, pilot, officer, engineer, fireman, or one of the crew. He only stood for the owner, - a privileged passenger. His service was not in its nature maritime, did not relate to maritime affairs, had no connection with the navigation of the steamer, nor with her equipment or preservation or with the maintenance or preservation of the crew. The libel is dismissed for want of jurisdiction. No decree can be made as to costs. *Railway Co. v. Swan*, 111 U.S. 387, 4 Sup. Ct. Rep. 510; *Blacklock v. Small*, 127 U.S. 105, 8 Sup. Ct. Rep. 1096; *Mayor v. Cooper*, 6 Wall. 250. Each party is responsible to the officers of the court for costs incurred at his instance.

Haveron et al. v. Goelet et al.

District Court of the United States, Southern District of New York, 1898.

88 Federal Reporter 301.

This was a libel in personam by John Haveron and Michael Brennan against Mary R. Goelet and George G. De Witt, as executors of the last will and testament of Ogden Goelet, deceased, to recover for services in procuring a crew for a yacht, and in boarding them at the master's request. The cause was heard on exceptions for want of jurisdiction. . . .

Brown, District Judge. In determining the exceptions to the jurisdiction the averments of the libel are to be taken as true; namely, that the libelants at the request of the master of the respondents' yacht obtained the seamen for the contemplated voyage, procured them to sign an agreement in the nature of shipping articles for employment on the vessel on and after February 21, and that at the master's request, the yacht not being ready to receive the crew, the libelants procured board and lodging for them for 30 days, at which time the voyage was abandoned and the seamen discharged, in consequence of negotiations for the sale of the yacht to the United States; and that the libelants have become liable for the board of the men during this time to the amount of about \$900, and were further entitled to the customary charge of \$3 for each seaman shipped.

I cannot distinguish the present case from that of *The Gustavia*, Blatchf. & H. 189, Fed. Cas. No. 5,876, in which Judge Betts in 1830 upon almost identical facts held that the services of the libelants were not only maritime but constituted a lien upon the vessel, the ship there being foreign though the seamen never went on board. In the present case, as the yacht is a domestic vessel there is no maritime lien; but the libelants' services were maritime within the decision in that case; and as *The Gustavia* seems never to have been overruled, it is my duty to follow that decision. The distinction between that case and various others in which the services are held to be not maritime is that in the case the procuring of seamen was held to be furnishing necessary supplies to the ship, i.e. the means indispensable for the contemplated voyage, and furnished at the express request of the master. It is the same here. By signing the agreement, which in the case of a yacht stands in the place of shipping articles, the seamen were virtually brought by that contract under the control and disposition of the master; and they were at all times in readiness to obey his orders. Their board while the yacht was not ready to receive them, was also at the master's request and was for the benefit of the yacht, inasmuch

as from the time they were engaged to be on board, viz. February 21st, the yacht was bound to support them. The seamen were virtually delivered to the yacht and to the master as in the case of any other necessary supplies or goods, which are held to be delivered to the ship, when placed under the control of the master, whether actually on board or not.

The exceptions are therefore overruled.

On subsequent hearing of the cause the right to commission was established, but the claim for board of the seamen was disallowed, no shipping articles having been signed by the master, and otherwise no authority existing to bind the owners.

Terminal Shipping Co. v. Hamberg et al.

District Court of the United States, District of Maryland, 1915.

222 Federal Reporter 1020.

Rose, District Judge. This is a libel in personam with a clause of foreign attachment. It sets up a contract between the respondents and the libelant, by which the latter until December 31, 1915, was to do all stevedoring work required by the respondents' vessels at the port of Baltimore, except when some charter otherwise provided. It alleges that the Bertha arrived at this port, but that its master declined to permit the libelant to do the stevedoring work, although it tendered its services and had rigged up its gears and was ready and willing to perform. It is asserted that by such refusal the libelant lost \$75, that being the amount of profit which it says it would have made, had it done the work under the contract and been paid the contract price.

To this libel the respondents have excepted, and on two grounds: First, that the cause of action is not within the jurisdiction of a court of admiralty. . . .

The breach of an executory contract does not, ordinarily, at least, give the injured party a maritime lien upon the ship, and therefore a libel filed in rem may not be filed to recover therefor. *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *Scott v. Ira Chaffee* (D.C.) 2 Fed. 401. It has also been decided that executory contracts to furnish all provisions that certain ships may require at a particular port, or all coal that they will need at that place, are not maritime contracts, and that admiralty has no jurisdiction, even in personam, to award damages for their breach. *Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft* (D.C.) 46 Fed. 397; *Steamship Overdale Co., Ltd., v. Turner* (D.C.) 206 Fed. 339. In the case last cited it was pointed out that a contract to buy coal or provisions is not in its nature maritime, and does not become so until the coal or the stores are furnished to the ship.

The libelant in this case says that a contract to do stevedoring work on a ship calls for a service which can never be otherwise than maritime. Whatever may have been the original difference of opinion on the subject, it is now clearly settled that stevedoring services are maritime. *Atlantic Transport Co. of West Virginia v. Imbrovek*, 234 U.S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L.R.A. (N.S.) 1157. Respondent replies that the contract is executory, and that for a breach of such a contract there is no remedy in the admiralty.

The reasoning, if not the express language, of Justice Story on circuit in *Andrews v. Essex Fire & Marine Ins. Co.*, 1 Fed. Cas. 889, goes far to justify this contention. In a number of cases in

which a right of action in rem has been denied, doubt has been expressed as to whether there was any jurisdiction even in personam. The Seven Sons (D.C.) 69 Fed. 271. On the other hand, the jurisdiction in personam has been expressly sustained in a case on all fours with this. The Allerton (D.C.) 93 Fed. 219. The Circuit Court of Appeals for the Seventh Circuit has upheld such jurisdiction where the breach complained of was that of an executory contract for towing. Boutin v. Rudd, 82 Fed. 685, 27 C. C. A. 526.

The question seems to have been foreclosed in this circuit by the decision of the Circuit Court of Appeals in Baltimore Steam Packet Co. v. Patterson, 106 Fed. 736, 45 C. C. A. 575, 66 L.R.A. 193. It was there distinctly held that for the failure of a shipper to furnish cargo which he had bargained to ship recovery may be had in the admiralty upon a libel in personam.

It follows that the first exception must also be overruled.

Israel et al. v. Moore & McCormack Co., Inc.

District Court of the United States, Southern District of New York, 1920.

295 Federal Reporter 919.

Learned Hand, District Judge. The first question raised in this case is of the jurisdiction of the admiralty over the libel, which unquestionably sets up a valid cause of action at law in quasi contract. The facts are these: The libelant shipped coffee on the respondent's ship from Rio to New York. En route the ship jettisoned a part of the cargo unknown to the libelant, who on arrival paid the whole freight due under the bills of lading supposing the coffee was still on board. The libel is for the freight paid upon the part jettisoned.

It appears to me impossible to decide the case without a regrettable refinement of reasoning, but we must be content to proceed from case to case, in the absence of any clear principles. The obligation resulting from the facts alleged is the mere creature of law, and it is only by a fiction that we call it a contract. If the payee ought not in good conscience keep the money, we say that he impliedly promises to pay it, which of course is quite untrue. Therefore, when a question arises of the jurisdiction of the admiralty over such an obligation, the relevant considerations should be those facts from which the law raises the obligation, not the mere form of the remedy or the fictitious promise.

In the case at bar the reason why the respondent ought not to keep the money is that he has not performed the contract of affreightment. He has been paid for something which he did not do, and has received a gift where none was intended. The ignorance of the libelant merely negatives what would otherwise be an effective bar to his recovery, the voluntary character of the payment. The question of the maritime nature of the obligation depends on whether it makes a difference that it was a maritime service which he failed to perform. I confess that I can see on principle no clear reason either way, but I think that the case of *United Transportation, etc., Co. v. N. Y., etc., Transp. Co.*, 185 Fed. 386, 107 C. C. A. 442, which is authoritative upon me, controls. In that case the Circuit Court of Appeals assumed that the cross-libel stated a claim to recover back money paid for lighterage services. These services had been in fact performed, but under contracts in which a common agent acted for both parties. The ground of the recovery was that the payment was more than the services were worth, and the allegation as to the common agent was necessary only to avoid the contract which fixed the rate, just as in the case at bar the libelant's ignorance of the fact is necessary to avoid the effect of a voluntary payment. Still the gravamen of the cross-libel was necessarily that the cross-libelant, being under such circumstances

bound to pay only the fair value of the services, had paid something for which he had received nothing, had made involuntarily a gift.

I do not see any just distinction between paying for maritime services actually rendered more than one need, and paying for such services when not rendered at all. If any distinction is to be drawn, I should suppose that the first payment was closer to maritime matters than the second. *The Oceana* (D.C.) 148 Fed. 131, stands upon a genuine distinction, pointed out by Judge Hough, who also tried *Union Transp., etc., Co. v. N. Y., etc., Trans. Co.*, supra. The ship had agreed to deduct from the freight all disbursements paid by the charterer who mistakenly overpaid her. The right of recovery rested upon the ship's unfulfilled promise, and could indeed have been so pleaded at law, the payment and mistake in payment being successively pleaded in a avoidance as plea and replication. The right to sue in indebitatus assumpsit should not obscure that very obvious difference.

The libelant urges *The Gracie Chambers*, 248 U.S. 387, 39 Sup. Ct. 149, 63 L. Ed. 318 and *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U.S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15. No point of jurisdiction was raised in those cases in any court, as both sides were extremely anxious to have the question authoritatively settled, because the embargo had raised many such cases involving in the aggregate a very large sum of money. The courts would not have been eager to take the point sua sponte, as they sometimes do. *Rhederei, etc., v. Clutha Shipping Co.* (D.C.) 226 Fed. 339. However, there is a clear distinction between the case at bar and those. They turned altogether upon the meaning of a clause in the charter parties, "retained and irrevocably ship lost or not lost." While it is true that the theory of the libel was that the shipper or charterer, as here, had paid for a service not rendered, it became necessary to construe a part of the charter party in order to ascertain whether or not the respondent was holding the money ex aequo et bono. That necessity might have drawn with it the whole case into the admiralty, had the point been urged.

Without attempting, therefore, to discuss the question in theory, if there, indeed, be any clear line of theory possible, which most people doubt, I think that I ought to follow the case cited. Perhaps in any event this is desirable, as it allows a determination of the question of jurisdiction an appeal at the outset, and, if I am right, will avoid a needless trial.

The libelant's exceptions I need not consider. Exceptions to the libel sustained. I assume that the libelant will not wish to amend, so the libel will be dismissed for lack of jurisdiction.