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MARITIME loans have been usually secured by either bottomry bonds or ship mortgages. The former constituted maritime liens of high and privileged character,[1] while the latter had no standing in admiralty at all[2] except as to remnants after all other claims against the ship had been satisfied.[3] The statute now under discussion, being part of general legislation for the revival of the American merchant marine, makes "preferred mortgages" thereunder maritime liens, enforceable by admiralty process *in rem*. The changes made by the statute in existing law are radical and its construction by the Supreme Court will be of great interest. The outcome will probably depend upon the view which that court may take concerning the inherent nature of maritime liens and the power of Congress to enlarge admiralty jurisdiction.

The John Jay[4] was decided in 1854, and excluded vessel mortgages from the jurisdiction of American admiralty. It was the case of a libel *in rem* for the foreclosure of a purchase-money mortgage on the ship, praying a decree for the payment of the debt, or condemnation and sale for its satisfaction. The district court for the southern district of New York had dismissed the libel for want of jurisdiction, and this had been affirmed by Mr. Justice Nelson on appeal to the circuit court.[5] The opinion of the Supreme Court was delivered by Mr. Justice Wayne. It denied admiralty jurisdiction on several grounds, namely: (1) it had never been exercised in this country or in England; (2) a ship mortgage lacked any of the characteristics of a maritime loan and was made without reference to navigation or perils of the sea; (3) it is only security for the mortgagor's promise; (4) it is disconnected from all agency and interest in the navigation of the ship and from all responsibility for contracts made on her account; (5) it has no analogy to maritime contracts

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[1] O'Brien v. Miller, 168 U. S. 287.

[2] Bogart v. The John Jay, 17 How. 399.

[3] The J. E. Rumbell, 148 U. S. 1.

[4] 17 How. 399.

[5] 3 Blatch. 67.

and there is nothing maritime in it; and finally, (6) courts of admiralty cannot give the parties to such an instrument the remedies and protection which a court of chancery affords.

Of these grounds, all except the first and last contrast the ship mortgage with the bottomry bond and present the underlying reasons for the denial of jurisdiction. The first ground, that such jurisdiction had never been exercised here or in England, will hardly bear an historical test; a foot-note in Sprague's Admiralty and Maritime Causes (1861), page 278, states that prior to this decision admiralty jurisdiction of such mortgages was exercised in Massachusetts and the eastern district of Pennsylvania, although none of the cases had been reported; *The Romp*[6] is persuasive that such jurisdiction was then exercised in the southern district of New York by Judge Betts; and the instrument foreclosed by Justice Story in *The Draco*[7] would be called a mortgage and not a bottomry bond if it were found elsewhere than in that opinion. On the other hand, the differentiation between mortgages and bottomry bonds is very significant and requires consideration in any estimate of the present statute.

The bottomry bond was essentially a contract of the ship and the ship mortgage was a contract of the owner. The former gave a maritime lien because it benefited the ship; the latter did not because it benefited the owner only. The underlying theory of all maritime liens rests upon the quasi-personality of the ship and upon benefits received and wrongs done by her as a legal entity, independent of her owner. The whole scheme of priorities among liens *ex contractu*, for example, depends on the degree of benefit conferred upon the ship by the various lienors. Hence, when the Supreme Court was called upon in *The John Jay* to treat a purchase-money mortgage as a maritime lien it was only natural to inquire what it possessed of the characteristics of a maritime loan, and primarily, how it had benefited the ship. The answer was that the "foundation (of the denial of jurisdiction) is that the mere mortgage of a ship, other than that of a 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."

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[6] Olcott, 196 (1845).

[7] 2 Sumner, 157 (1835).

Now maritime loans, to be maritime liens, with appropriate priorities, must have the basis and characteristics of the class. The basis of a maritime lien would seem to be a benefit to the ship, if *ex contractu,* just as the basis of such a lien *ex delicto* is a tort or wrong of the ship.

Dr. Lushington is quoted[8] as holding that the law never imposes a lien upon a ship except for the benefit or preservation of the ship.[9] "The basis of a lien for necessaries is a benefit rendered the vessel. Hence, in order for such lien to arise the necessaries must be either delivered on board the vessel or brought into immediate relations with her, as by being delivered on the wharf or into the custody of some one authorized to receive them. No lien attaches to a breach of a contract to furnish supplies."[10] There is a lien for salvage,[11] but none for an unsuccessful attempt,[12] and unless the ship is benefited there is no claim for any award.[13] The reason why there is no maritime lien for insurance premiums[14] is that the policy is for the personal benefit of the owner. "A contract of insurance in no way aids the ship. She sails no better and no faster because of the insurance. It puts no steam in her boilers, and no wind in her sails."[15] So in the recent case of *Piedmont Coal Co. v. Seaboard Fisheries Co.*[16] it was said that the maritime lien could arise "only if the repairs and supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were obtained upon her credit."

If it is true that the basis of a maritime lien *ex contractu* is a benefit to the ship, the distinction between bottomry bonds and ship mortgages would be radical. The former represented a benefit to the ship and the latter did not.

"Bottomry is a contract whereby in certain circumstances a ship and her freight, with, if necessary, her cargo, may be charged with

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[8] 70 L. R. A. 357, note.

[9] Dowthorpe, 2 W. Rob. 74.

[10] 26 Cyc. 786 and citations.

[11] Desty, Sh. & Ad., § 327.

[12] Ibid., § 315.

[13] Kennedy on Civil Salvage, 27.

[14] The Wabash, 279 Fed. 921.

[15] In re Insurance Co., 22 Fed. 109.

[16] 254 U. S. 1.

the repayment, on safe arrival, of a debt contracted for the ship's preservation or to enable her to continue upon her voyage."[17]

This definition is substantially the same as the earliest development of this form of loan. Ashburner says[18]: "A maritime loan—as it existed during the period dealt with here—had some peculiarities which distinguished it from an ordinary loan. In an ordinary loan, if made for a legal purpose, the borrower is unconditionally bound to restore the amount lent, with or without interest, as the case may be. The destination of the money lent is immaterial to the lender. If the borrower builds a house with it and the house is burnt down, or buys slaves and the slaves run away, the lender's absolute right to repayment is in no wise affected. In a maritime loan the destination of the loan conditioned the right of the lender to be repaid. A maritime loan—in the jurisprudence of Greece, Rome, and the middle ages—was a loan made to a ship-owner, or a merchant trading at sea, and made for the purpose of the maritime adventure. It was made, *e. g.,* to build or buy or repair a ship, or pay seamen's wages, or buy a cargo to be put on board ship, or meet expenses connected with the cargo. Now the material on which the loan was expended, the ship or the cargo, was necessarily subject to maritime risk, and, as a rule, the borrower was not in a condition to repay the loan until the maritime risk had been run, and the ship or cargo or that into which the cargo had been converted was safe at home. If a man borrowed money to build, buy, or repair a ship, he could not, as a rule, repay the loan until the ship had earned freight. If he borrowed money to purchase cargo, he could not, as a rule, repay the loan until he had sold the cargo. Whether from kindness to the borrower or from some other reason, it was settled that in a contract of maritime loan the lender took the maritime risk; and this is the leading distinction between a maritime loan and other loans."

"A loan may be accompanied by a pledge of property belonging, or to belong, to the borrower. Such a pledge does not *prima facie* affect the rights of the parties to the contract; it only affects the remedies of the lender. It is an additional security. If the personal remedy against the debtor proves fruitless, the creditor may (in some cases) retain the pledge in satisfaction of the debt, (in other

[17] The Law Relating to the Mortgage of Ships, Constant, 86 (1920).

[18] The Rhodian Sea Law, CCIX (1909).

cases) sell the pledge and pay himself out of the proceeds of sale. The right of resorting to the pledge belongs to the pledgee in preference to other creditors. The loss or destruction of the pledge does not *prima facie* diminish the creditor's rights; it only narrows the sphere of his remedies, and his personal right against the debtor remains as before. But in a maritime loan, the existence of the obligation depends upon the continued existence of the property pledged or hypothecated till the expiration of the period during which the maritime risk is running. If ship or cargo, as the case might be, perished during the voyage, the lender not only lost his right to recover the amount secured out of ship or cargo; he also lost all other rights against the borrower in respect of the loan. The loan was wholly extinguished."

Such is also the general conception of continental Europe. "Tous les docteurs énumèrent," writes Desjardins,[19] "à la suite de Pothier et d'Emérigon, les caractères du contrat à la grosse. Il est 1° reel en ce qu'on prête à la chose plus qu'à la personne." (It is primarily *real* (*i. e.*, as distinguished from personal; *jus in re*) in that one loans to the thing rather than to the person.)

That is to say, the loan was so absolutely to and for the ship, and became so much a purely maritime lien, that, if she was lost, all liability for repayment was lost with her. An interesting article on "Athenian Maritime Laws"[20] affords considerable information on the law and practice in regard to maritime loans in classical times and is in harmony with the views just expressed. The tenor of authority in England and the United States has been in harmony with these views. Such loans "give rise to a maritime lien * * * preferred to all other claims upon the property, except those arising from seamen's wages, the claims of salvors for subsequent service in saving the adventure, and the holder of a subsequent bottomry bond."[21] "A bottomry bond is an obligation, executed, generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at

[19] 5 Traité de Droit Commercial Maritime, 166.

[20] 3 Amer. Jurist, 248.

[21] Insurance Co. v. Gossler, 96 U. S. 645, 654.

the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival."[22]

In *The St. Jago de Cuba*[23] it was said: "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull. * * * It is not in the power of anyone but the shipmaster, not the owner himself, to give these implied liens on the vessel, and, in every case, the last lien given will supersede the preceding." It will be noted that this limitation on the power of the ship-owner is confined to implied liens[24] and that, according to the American doctrine, the ship-owner may create maritime liens on his vessel by express agreement, with this qualification, "But even the owner can only create a maritime lien on his vessel when there is a maritime necessity therefor. However extensive his right to create ordinary liens on his property, they would not be maritime if this requisite is lacking."[25] In other words, maritime liens created by the owner must depend upon a benefit received by the ship,[26] and if there was no benefit to the ship the lien fails.[27] In the case of loans or advances of money, the lender must see to its application to maritime purposes, for the ship, if he is to have a maritime lien.[28] The basic idea of necessity of, and benefit to, the ship appears in the opinion of the Supreme Court in *Piedmont Coal Co. v. Fisheries Co.*[29]: "The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners, it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others and of

[22] The Grapeshot, 9 Wall. 129, 135.

[23] 9 Wheat. 409 (1824).

[24] Flander's Maritime Law, § 241.

[25] 26 Cyc. 778 and cases cited.

[26] Cuddy v. Clement, 113 Fed. 454, 462.

[27] The Woodland, 104 U. S. 180; The Wyoming, 36 Fed. 493; James Dalzell's Son & Co. v. The Kaine, 31 Fed. 746.

[28] 26 Cyc. 765 and cases cited.

[29] 254 U. S. 1.

becoming responsible for her own acts. Because the ship's need was the source of the maritime lien, it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit."

The entire law and reason of maritime liens is condensed into this quotation. The statutory maritime lien of the preferred mortgage lacks every essential to which the opinion alludes, and in this difference lies one of the interesting features of the new law. Can Congress create maritime liens without reference to the nature of the service involved?

It cannot, however, be said that all the American cases prescribe an actual benefit to the ship as one of the essentials of a bottomry bond, although that would be the logical result of its classification as a maritime lien and of its priority over others representing actual benefits. In this connection, Judge Story's opinion in *The Draco*[80] is important.

That case was this: The ship-owners, in the home port, borrowed three thousand dollars from the Tremont Insurance Company, and secured repayment by the instrument in question. That commenced as a bond, with sureties, in the sum of six thousand dollars; recited the loan of three thousand "to run on Bottomry on the block, tackle and apparel of the brig Draco"; and, in consideration thereof, mortgaged and assigned the whole of the brig to the insurance company, on condition that if the debt be paid on safe arrival of the ship, or her salvage in case of loss, then the instrument should be void. It was not recorded and innocent third parties purchased the vessel. A libel *in rem* was then filed by the insurance company praying a decree of sale for satisfaction of the indebtedness. Among the defenses urged by the purchasers was "that the sum lent was not lent to fit out, or repair, or supply the brig, or to purchase a cargo for her, or for any purpose connected with any voyage, or the navigation of the brig, but for the general purposes of the firm, in their trade and negotiations as merchants." Their counsel supported his proposition, that the foundation of bottomry is the lender's contribution of value to the thing on which he claims a lien, with many authorities. The report evidences a thorough argument, but Judge Story held that when the loan was to the ship-owner he might employ

[80] 2 Sumner, 157.

the money as he pleased; he, as the owner, could create the lien on his ship without using its proceeds for her benefit.

In spite of the great weight which the name of Justice Story carries, the soundness of this opinion has been generally doubted,[31] but coupled with the two decisions of the Supreme Court next mentioned, it may be an important factor in the history of the present statute. For if the ship-owner could create a maritime lien for money used in his general business by a bottomry bond, obviously he may do so by a mortgage on his ship. There ceases to be any real distinction between the two instruments.

Conard v. Insurance Co.[32] was trespass against a United States marshal for taking and carrying away a cargo of tea; plea general issue and justification under a *fi. fa.* against the goods as property of one Thompson. The latter had borrowed $21,000 of the insurance company, securing repayment by a *respondentia* bond on the cargo then on board the ship "Addison," from Canton to Philadelphia; he also gave a similar *respondentia* on the cargo of the "Superior" to secure a balance due for preceding loans; he afterwards confessed judgment in favor of the United States and the levy of the marshal was on this account. If the bonds were good, the insurance company would have had maritime liens superior to the levy, as *respondentia* on cargo is like bottomry on hull. Their validity was denied by the defendant because not based upon any necessities of the voyage, and many classical authorities, from Demosthenes down, were cited in support of this position. The arguments on both sides were learned and exhaustive. Justice Story delivered the opinion of the court and disposed of the point by saying briefly: "It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage."

[31] 1 Conkling's U. S. Admiralty, 218.

[32] 1 Peters, 386.

No authorities were cited or discussed in this connection, and judgment for the plaintiff was affirmed.

Although the *Conard* case was at law, the *Draco* case was in admiralty, and, taken together, they indicate that the ship-owner could create a lien on his ship, for money for his general purposes, equivalent to bottomy or *respondentia* under the general maritime law. It will be difficult to distinguish the instruments in these cases from the ordinary ship mortgage, as far as any real distinction is concerned. The verbiage varies and the form is different, but the legal effect is about the same.

In *Conard v. Nicoll*[33] the opinion of Mr. Justice Story was affirmed; the bottomry bonds were here called mortgages, and in several subsequent citations the original case was regarded as an authority in questions growing out of mortgages of lands.[34]

When *The John Jay* was decided, a quarter of a century later, the entire personnel of the court had changed and its tendency was toward a closer view of admiralty jurisdiction and the enforcement of liens by process *in rem*. Its reasons against the exercise of admiralty jurisdiction over mortgages indicate that they rest upon the essential distinction between the personal obligations of the owner and the contractual obligations of the ship. When the court said 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 the perils of the sea," the essentials of the necessity of the ship and of the lender's risk of her perils were plainly in the judicial mind.[35] The sentence, "It is a security to make the performance of the mortgagor's undertaking more certain," implies the distinction between those liens which the ship-owner creates for his own benefit and those which derive their maritime nature from a benefit to the ship. *The John Jay* cannot be reconciled with *The Draco,* and it is quite possible that the ultimate fate of the Ship Mortgage Act of 1920 depends upon one of these cases.

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[33] 4 Peters, 291.

[34] Bronson v. Kinzie, 1 How. 318; Massingill v. Downs, 7 How. 760; Gibson v. Stevens, 8 How. 400; Lawrence v. Tucker, 23 How. 27; Schuelenburg v. Martin, 2 Fed. 747.

[35] The Aurora, 1 Wheat. 96; The Virgin, 8 Peters 538.

The statute gives to a duly recorded preferred mortgage priority over all claims against the vessel except costs and "preferred maritime liens." It defines the latter as liens prior in time to the recording and indorsement of the mortgage; and those arising out of tort, stevedores' and sailors' wages, general average and salvage.

The existing law, prior to the statute, appears in *The J. E. Rumbell.*[36] That case presented the single question whether a lien for supplies and repairs in the home port, given by a state statute, to be enforced by proceedings *in rem* in the nature of admiralty process, took precedence of a prior mortgage on the ship, recorded as required by the act of Congress. The decision depended on whether the contract and lien of the material man, on the one hand, or those of the mortgagee, on the other, were in their nature maritime. The court said: "According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re,* a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied.

"It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

[36] 148 U. S. 1.

Priorities among maritime liens depend upon the necessities and benefits of the ship. "The vital principle of a bottomry bond is, that it be taken in a case of unprovided necessity, where the owner has no resources or credit for obtaining necessary supplies. * * * The same principle of necessity which upholds a bottomry bond entitles a bond of later date, fairly given at a foreign port, under a pressure of necessity, to priority of payment over one of a former date; notwithstanding this is contrary to the usual rule in other cases of security. (3 Kent's Comm. 354.) The rule stated extends to all maritime liens given for services which are necessary to the preservation or use of the ship. (*Ibid.* 358, note x^1.)"

The cardinal rule in determining preferences among maritime liens is their degree of benefit to the ship. They are paid in the inverse order of the dates at which they accrued. The reason is that the service to the ship tended to preserve and improve the security of the earlier lienors. "He is to be preferred who contributed most immediately to the preservation of the thing."[37] The distinction is well stated in *The Christian*[38]: "It is one of the necessities of commerce that a ship needing repairs and supplies should be forthwith relieved. For that reason a lien is given to him who supplies her need. For a like reason it should be understood that such a lien is in no danger of being supplanted by a subsequent demand arising upon a contract voluntarily made, and having no relation to any necessity of the ship, and not tending to increase her value."[39]

In *The Emily Souder*[40] the contest was as to priority between those who had advanced funds to pay for necessary repairs in a foreign port and the holders of a mortgage to prior creditors at home. The court said: "The fact that the vessel was, at the time the advances were made, under mortgage to the claimants does not subordinate the lien of the libellants to the claim of the mortgagees. Funds furnished in a foreign port, under the circumstances and for the purposes mentioned in this case, have priority as a lien upon the vessel over existing mortgages. Advanced for the security and protection of the vessel, they were for the benefit of the mortgagees as

[37] The Tucker, 20 Fed. 129; The De Smet, 10 Fed. 489 and excellent note; The City of Tawas, 3 Fed. 170; The Guiding Star, 18 Fed. 263.

[38] 16 Fed. 796.

[39] See also The John G. Stevens, 170 U. S. 113.

[40] 17 Wall. 666.

well as of the owners. If liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as having any certain value or as affording any reliable security."

These citations indicate the preponderance of American authority in respect of priorities among maritime liens and show that the rule is based upon benefits to the ship. That is also the rule to be deduced from the general maritime law and most of the foreign codes. In Belgium liens always rank before ship mortgages; Denmark postpones the rights of all mortgagees, registered or unregistered, to maritime liens; Holland places mortgages upon ships as twelfth in the order of priority; in France "a mortgage ranks prior to ordinary creditors, but only after the maritime liens, so that for practical purposes a mortgage on a ship is very often of small value owing to the number and importance of maritime liens"; Greece postpones the mortgage to all the maritime liens which it recognizes, namely: wages, salvage, and collision; Italy has a procedure *in rem* for the foreclosure of mortgages, but thirteen classes of claims have priority over them; and Norway postpones the mortgage to maritime liens as well as owner's liens for expenses.[41]

It is therefore apparent that the Ship Mortgage Act of 1920 contemplates a great change in our admiralty law. It imposes no conditions upon the loan which the preferred mortgage secures. The funds may be used for any purpose other than the benefit of the ship. The shipbuilder, whose lien has always been denied by the Supreme Court because not a maritime contract,[42] may now have one by taking a mortgage for his pay. The credit of the ship with material men, and others to whom the exigencies of the voyage compel application, will naturally be impaired. On the other hand, there may be compensating advantages in attracting capital to resume investments in American ships. The reasons for its withdrawal have little connection, however, with the former status of ship mortgages.

The power of Congress to enact this legislation may be the subject of debate, and the first reaction to the question is likely to be the closing sentences of the opinion in *The John Jay:* "It is true that the policy of commerce and its exigencies in England have

[41] See Constant's Law Relating to Mortgage of Ships, Appendix A.

[42] People's Ferry Co. v. Beers, 20 How. 393; The Winnebago, 205 U. S. 354.

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 this 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."

The statute mentioned is the Admiralty Courts Act of 1840, which provided that when any ship was under arrest by admiralty process, or the proceeds of such a ship were in the registry of the court, such court should have jurisdiction "To take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claim or cause of action, respectively." This, however, only gave the mortgagee that right of intervention in a pending suit which the Supreme Court recognized in *Schuchardt v. The Angelique*[43] and frequently resorted to in our admiralty practice.[44] It did not give him a maritime lien, and in England and Canada his claim appears to be still subordinate to those of such lienors.[45] Parliament, indeed, is not subject to the limitations of a written constitution, and its power is, of course, much wider than that of Congress.[46]

Congress may amend our maritime law; the power to make such amendments is said to be as extensive as the maritime law itself[47]; and that Congress can vest jurisdiction of non-maritime torts in the admiralty is the proposition upon which *Richardson v. Harmon*[48] is based. That case grew out of damage to a railroad bridge by a vessel; the railroad sued the owners of the vessel for trespass in a state court; the ship-owners filed a petition in admiralty for limitation of liability and obtained the usual injunction; the district court then, on exceptions, held that it had no jurisdiction in admiralty of a non-maritime tort; this question of jurisdiction was then certified, on appeal, to the Supreme Court; it reversed the court below and

[43] 19 How. 239.

[44] The Greenwood, 2 Biss. 131; The Wyoming, 37 Fed. 543; The Advance, 63 Fed. 704.

[45] Mayer's Admiralty Law and Practice, 71.

[46] See Hughes on Admiralty [2d ed.], 20, note 7.

[47] Ex parte Garnett, 141 U. S. 1.

[48] 222 U. S. 96.

directed it to proceed with the limitation proceeding on the ground that the act of Congress of June 26, 1884, had extended admiralty jurisdiction so as to include damages to real estate by a vessel in proceedings for limitation of liability.

On the other hand, the Supreme Court has said, in *The St. Lawrence,*[49] that the extent of the admiralty jurisdiction was a purely judicial question, "nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits." And in *The Lottawanna*[50] it repeated that it was "exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." So in *The Belfast*[51] we find, "Congress may regulate commerce with foreign nations and among the several states, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the federal government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce nor for the more convenient execution of its commercial regulations."

In such a situation, the Act of 1845, extending admiralty jurisdiction to the Great Lakes, becomes of interest. As is well known, before that time the Supreme Court was committed to the doctrine that admiralty jurisdiction was limited to the ebb and flow of the tide.[52] Congress then enacted the Act of February 26, 1845,[53] extending the jurisdiction to cases of contract and tort, of vessels of more than twenty tons burden, upon the Great Lakes. *The Genesee Chief*[54] was a case of collision on Lake Ontario, between such vessels, in 1847. The suit was *in rem,* under the statute. The question of jurisdiction was raised and the constitutionality of the statute questioned for attempting to extend admiralty jurisdiction to cases which the Supreme Court had held could not be within it. The same point could be made against the Ship Mortgage Act of 1920, in that it declares a contract to be maritime which the Supreme Court has held to be non-maritime. The Act of 1845 was held to

[49] 1 Black, 522, 527.
[50] 21 Wall. 558, 576.
[51] 7 Wall. 624, 640.
[52] The Thomas Jefferson, 10 Wheat. 428.
[53] 5 Stat. 726.
[54] 12 How. 443.

be constitutional; its validity, however, was not placed on the power of Congress to extend admiralty jurisdiction, but on the fact that the waters had always been within the admiralty grant of the Constitution; the earlier decisions to the contrary were frankly conceded to have been erroneous. The result was that the extension of jurisdiction was by the judicial power rather than the legislative, and in the subsequent case of *The Eagle*[55] the Act of 1845 is treated as inoperative and ineffectual. It has since passed into oblivion except for an occasional invocation of its jury clause,[56] but, singularly, almost every libel filed upon the Great Lakes is still expressed in the phraseology which compliance with that statute originally required.

These views relate only to the general theory of the statute which gives preferred mortgages the rank and status of maritime liens. The chances of sustaining the validity of the act would seem to be about evenly balanced, unless the constitutional grant of jurisdiction is interpreted in a broad and literal sense. Section 2 of Article III says, "to all cases of admiralty and maritime jurisdiction." The natural meaning of this is that the admiralty jurisdiction embraces all maritime cases. The obvious meaning of these words is broad enough to include all litigation whose subject matter is the ship or any transactions concerning her use in commerce or navigation. But the apparent meaning of the words has proved misleading and occasioned more perplexity and conflicting decisions than any other in the Constitution. What are "cases of admiralty and maritime jurisdiction"? Is the question ultimately a judicial one or is the action of Congress final? Could Congress, for example, create admiralty jurisdiction over shipbuilding contracts or extend the law of salvage to real estate?

In an article on "Admiralty Jurisdiction,"[57] Mr. Justice Brown noted that in but one instance had Congress attempted to define or meddle with this general grant of jurisdiction (by the Act of 1845 above mentioned), and thought that experience not likely to tempt it to further experiments of the same nature. In 1917, however, the effort was made to extend the jurisdiction to include rights and

[55] 8 Wall. 15.

[56] The Western States, 151 Fed. 929.

[57] 9 Col. L. Rev. 1.

remedies under the workmen's compensation law of any state.[58] This was held unconstitutional as a delegation of the legislative power of Congress and impairing the harmony and uniformity of the maritime law.[59]

The statute also extends the jurisdiction of the district courts *in personam;* thus, one step in a foreclosure *in rem* under the act is actual notice by the libellant to the master, or ranking officer, or caretaker of the vessel, and also to any persons who have recorded notices of undischarged liens; failure to give such notice renders the libellant liable in damages to the persons entitled thereto in the amount of his interest terminated by the foreclosure. The district courts are given jurisdiction of such suits, irrespective of the amount involved or the citizenship of the parties. Similar jurisdiction is granted of suits for damages sustained by persons crediting a vessel covered by a preferred mortgage and suffering pecuniary loss by the failure of the collector of customs, or the mortgagor, to perform any of their duties under the act. This jurisdiction seems to be given to the district courts at law and to be intended to protect those lienors who are misled by absence of statutory notice of the mortgage. It is evidently concurrent with that of the courts of the several states, territories, districts, and possessions. The court rendering judgment is authorized to include a reasonable counsel fee. As the judicial power of the United States extends to all cases in law and equity arising under the laws of the United States, the power of Congress to so extend the jurisdiction is not likely to be questioned.

The admiralty jurisdiction *in personam* is also extended to embrace suits by the mortgagee against the mortgagor for the mortgage debt or any deficiency thereunder.

This extension is, of course, the logical consequence of declaring the mortgage a maritime contract. The debt is the real contract; the mortgage, after all, is only the incident. Now, as the business of loaning money upon vessel security is usually and necessarily done where large amounts are involved, the debt itself is evidenced by a large number of negotiable promissory notes or bonds. These pass into the hands of numerous individuals. Sometimes the right of action is confined to a trustee, when the mortgage is in the trust-

[58] Act of Oct. 6, 1917.

[59] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

deed form; sometimes it belongs to the holder of the paper. Apparently, this jurisdiction will embrace an action on a promissory note for any amount, between residents of the same state, without any limitations or conditions other than the fact that the instrument is secured by a preferred mortgage.

It should also be noted that the negotiability of these bonds or notes seems to be impaired or restricted by paragraph (d) of Subsection O of the act, which provides that no rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the United States Shipping Board. A similar restriction is carried forward into the following paragraph (e), which confines the power of sale of the district courts in admiralty, as to any American vessel, under proceedings *in rem*, to citizens of the United States. The title which passes under an admiralty sale *in rem* is good against all the world[60] because all the world are parties to it. To draw the line between such parties in respect of the very important right to bid in the *res* for self-protection seriously qualifies the inherent nature of the proceeding as it has hitherto been supposed to exist.

The constitutionality of the act has been sustained by the district court for the eastern district of Virginia in *The Oconee*.[61] The ship had been libelled for necessaries. The United States, as the holder of a preferred mortgage securing fifteen negotiable promissory notes for purchase money, intervened and successfully claimed the priority which the statute declares. The opinion is a strong one in support of the law and deserves careful consideration.[62]

In *The New York*[63] the district court for the eastern district of New York refused priority to a preferred mortgage over maritime liens for repairs commenced before, and in progress when, it was recorded, but apparently sustained the law in respect of other liens.

[60] The Garland, 16 Fed. 283; The Trenton, 4 Fed. 657.

[61] 280 Fed. 927.

[62] The same is true of a note on the subject in 11 Calif. L. Rev. 268. Both seem, however, to be influenced, to some extent, by the consideration that (to quote from the opinion) "the legislation in question goes no further than to establish in this country a statute of universal application in the maritime countries of Europe." An investigation of the authorities relied upon to support this statement would be useful; it seems contrary to the codes, statutes, and decisions cited in Constant's Law Relating to the Mortgage of Ships, London, 1920.

[63] 288 Fed. 83.

There is no question that our maritime law and the jurisdiction of the American admiralty have gradually expanded and that this expansion has been by the concurrent action of Congress and the Supreme Court within the grant of the Constitution. In the process each has shown great deference to the other. There has been no conflict. Several of the most conspicuous extensions by Congress have been preceded by suggestions or intimations of the Supreme Court in such regard, the Court denying jurisdiction under existing law, but alluding to the power of Congress to change it. Thus, while adhering to the tide-water doctrine in *The Thomas Jefferson,*[64] in 1825, and denying jurisdiction of a libel for wages on a voyage along the Ohio, Mississippi, and Missouri Rivers, it was queried whether Congress might not, under the commerce clause, extend admiralty practice to the western waters. The Act of 1845 followed. So, in the case of *The Lottawanna,*[65] denying a maritime lien to material-men in the home port, it was said: "But we must always remember that the court cannot make the law; it can only declare it. If within its proper scope any change is desired in its rules other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. * * * And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication."

This suggestion was answered by the Act of June 23, 1910, restoring the ancient uniformity of the law in regard to repairs, supplies, and necessaries. Superseding as it does all state statutes on the subject, it may be regarded as an extension of admiralty jurisdiction. A similar intimation concerning ship mortgages in *The John Jay* has already been noted.

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[64] 10 Wheat. 428.

[65] 21 Wall. 577.

The real weakness of the Ship Mortgage Act of 1920 lies in the creation of a maritime lien without regard to the essential nature of such property in the maritime law. Its strength, however, may develop from the power of Congress to create such liens, if the Supreme Court finds that the power exists. Between these two perplexing factors, the Act of 1845 and *The Genesee Chief* suggest a course which may not only restore the ship mortgage to admiralty jurisdiction but also assign its proper place in the scheme of maritime liens. This would be in the vicinity of bottomry bonds under the general maritime law. Generally speaking, this seems to have been the result of considerable legislation and litigation in other maritime countries. The tendency of maritime law is toward uniformity and the ultimate result of this enactment will probably be to establish the maritime nature of these mortgages with a rank adjusted to their degree of benefit to the ship itself.