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Roger G. Connor
Member, Alaska bar; United States Attorney, First Judicial Division of Alaska, at Juneau

MARITIME LIEN PRIORITIES: CROSS-CURRENTS OF THEORY

*Roger G. Connor**

THE subject of maritime lien priorities is often said to be permeated with confusion.[1] The responsibility for the confusion lies partly in the variety of fact situations which are presented for decision as well as in the competing policies and attitudes in this field. Another condition to be reckoned with is that the great bulk of admiralty law is molded by the federal district and circuit courts, operating independently of each other for the most part, with only an occasional ruling by the Supreme Court. The observer is somewhat in the position of one trying to learn what rules of the common law are uniform throughout the United States. Predictability is at a low level. Nonetheless, the existing rules and policies can be pinpointed, and when this is done some of the alleged uncertainty disappears, at least in the more typical cases. The purpose of this article is not to develop a synthesis, for no synthesis is possible, but to give an account of the general theories governing maritime lien priorities, together with a discussion of the concrete issues which arise in their application.

An obvious fact should be stated at the outset. The problem of priorities arises only when the fund produced by sale of the vessel is insufficient to satisfy all claimants. It is essentially a problem in distribution. The other basic fact is that the determination of priority is separate from the question of the existence of the lien. The validity of the lien is first determined, then its priority. In many cases the two questions are discussed together, leading to a confusion of thought if one is not on guard. But the distinction is basic and clearly recognized. The original classification of a claim against a vessel and the determination of its validity are, from a realistic standpoint, crucial to the priority which it will receive. To a certain extent the two problems are interacting. As Justice Curtis said, " . . . incumbrances created by maritime liens are marshalled according to the causes from which such liens spring."[2] It does not follow, however, that because a lien is

* B.A. 1951, University of Washington; LL.B. 1954, University of Michigan; member, Alaska bar; United States Attorney, First Judicial Division of Alaska, at Juneau.—Ed.

1 The City of Tawas, (D.C. Mich. 1880) 3 F. 170 at 172, and ROBINSON, ADMIRALTY §61 (1939).

2 The Young Mechanic, (C.C. Me. 1855) Fed. Cas. No. 18,180, at 876.

granted as "seamen's wages" it will always be deemed to have the priority over other liens which is commonly accorded to the wage claims of seamen. Validity and priority are for the most part separate hurdles in the path of the claimant.

It is generally agreed that the priority of maritime liens is determined by the character of the lien itself and by the time at which the lien accrues. The method of classifying the liens, placing the classes into ranks, and selecting the applicable time priority, make up the subject matter of this article. The scheme of exposition adopted here is to state what appear to be the general doctrines of time and class priorities, followed by a development of the leading issues to be encountered in the application of those doctrines. By first laying down a set of constructs from which to operate it becomes much easier to embark upon a more detailed analysis of the issues and their resolution.

It is common to explain the adjustment of maritime liens as a situation calling for the application of equitable principles. Much reliance is placed upon the language of Justice Brown:

> "Although courts of admiralty have no general equity jurisdiction and cannot afford equitable relief in a direct proceeding for that purpose, they may apply equitable principles to subjects within their jurisdiction, and in the distribution of proceeds in their possession or under their control may give effect to equitable claims."[3]

To many this denotes the equitable principles of a Lord Eldon: a developed, ascertained body of rules. It is a judicial declaration that admiralty courts will recognize equitable doctrines and defenses pertaining to ownership, laches, subrogation, and marshalling of assets just as the state courts do under the procedural codes. Some courts, on the other hand, have taken this language as a license to exercise a broad discretion more reminiscent of the ecclesiastical chancellors. It is used as a justification for determining lien priorities according to how the case strikes the conscience of the court, and as a denial of any fixity in the methods of distribution. This is sometimes referred to euphemistically as the use of a "wholesome equity."[4] The important thing to understand is that the courts may have differing conceptions of what their true function is in these cases.

3 United States v. Cornell Steamboat Co., 202 U.S. 184 at 194, 26 S.Ct. 648 (1906).
4 The Samuel Little, (2d Cir. 1915) 221 F. 308 at 317.

I. TIME AND ITS CRITERIA

The basic datum of time priority is the day when a vessel is libelled in rem by any lienor. Others can file subsequently, but it is well settled that time is reckoned backward from the date of the first libel. It is a hallowed doctrine that priority is determined by the inverse order of the time of accrual of the liens, that is, the more recently created lien is superior to a lien created at an earlier time. This is contrary to the familiar common law rule of "first in time, first in right."

The admiralty rule would be of easy application if it operated according to a conception of strict time. One would need only find the date of accrual of each lien, arrange the dates in consecutive order, and give preference to the more recent ones. Instead the modern practice is along different lines. A period of time is taken as the criterion. This period may be the voyage, the season, the calendar year, 40-days, 90-days, or, as some have urged, "a reasonable period of credit." Whatever the period, it is reckoned backward from the date of the libel. If it is the voyage, all liens arising on the most recent voyage are taken as if they had accrued at the same time, and they share *pari passu* in the proceeds of the vessel. If it is the calendar year, all liens arising in the calendar year in which the vessel is libelled are on an equal plane so far as time priority is concerned. The season period and the 40-day or 90-day periods, sometimes known as the "harbor rules," operate in a similar fashion. Once given a certain period as the basis of time priority, and given the fact that liens in the most recent period are of first priority together, the question remains concerning those liens which have arisen in an earlier period of time. Are they to be placed in a series of successive periods, each with seniority inversely over the others, or are they to be placed in a single group, all junior to the most recent period before the filing of the libel, but co-equal among themselves? It seems to depend upon which one of the periods is selected as the applicable one to the case at hand. These and like questions will be taken up below.

A. *Toward a New Theory of Time Priority.* The orgins of time priority are said to rest upon at least two theories, each of which involves a deductive conclusion about the nature of maritime liens. Under the "property" theory each lienor not only acquires a claim against the vessel at the time the lien attaches but becomes a part owner in the vessel as well. As an owner, he is subjected to any later liens which may accrue. The later claimants should have priority over all who have an "ownership" in the ves-

sel, for it is axiomatic that maritime liens are superior to mere rights of ownership. That in brief is the property theory. There would seem to be an essential gap in this process of reasoning, however. The earlier lienors are no more owners than the later ones. They all obtain a property interest on the creation of their respective liens, including the last one in point of time. It is not adequately explained how a lien, which is something more than a mere right of ownership, becomes less than a lien by the occurrence of another one later in time. This undeniable paradox has not troubled the courts to any noteworthy extent. Here, as in other areas of the law, a circularity of reasoning may produce desirable results, though it may be logically unsound. At any rate the idea of a maritime lien as a property right is historically well-based. In the nineteenth century the courts repeatedly observed that the liens were a *jus in re* and not a *jus ad re*.[5]

> "Indeed, if a maritime lien be merely a privilege to attach the vessel for a debt, which becomes an incumbrance only in virtue of an actual attachment, it is difficult to see, how it amounts to any special privilege in the New England states, where every creditor has the privilege of attaching all vessels for all debts, which become incumbrances by virtue of such attachments. Incumbrances created merely by attachments, must take rank, in the absence of positive provisions of law to the contrary, according to the dates of such attachments. But incumbrances created by maritime liens are marshalled according to the causes from which such liens spring. That is, they subsist, and bind the property, not in virtue of the legal process used to enforce them, but by operation of the law which creates them and fixes them on the property, at the moment when the debts are incurred."[6]

That this basic concept has not changed appreciably in the course of a century can be seen by the statement of a present day writer on admiralty:

> "In the United States admiralty practice, the maritime lien and the right in rem—jus in rem—are closely identified and exist together. The right in rem is only available to enforce a maritime lien, and only against the identical ship, cargo or freight money concerned. The details of this practice are quite different from those now prevailing in England or in the British Commonwealths. In the United States, a right in rem may be asserted against a ship without regard for

[5] The Yankee Blade (Vandewater v. Mills), 19 How. (60 U.S.) 82 (1856).
[6] The Young Mechanic, (C.C. Me. 1855) Fed. Cas. No. 18,180, at 876.

the presence or absence of the owner or agent; the ship will be arrested in rem by the Marshal of the federal court even if the shipowner is standing at the spot offering to give an appearance in the law suit."[7]

The contrast between admiralty and the common law approach is especially keen in the matter of enforcement of rights and duties.

"In a general sense, the policy of the common law is to litigate the liability first, and afterwards assist the successful party to seek the means of payment. The thought is that the defendant and his property will remain in the jurisdiction during the litigation and will remain solvent. That of course is usually true when litigation concerns lands and houses and domestic property. It is less true when the law suit concerns money and credits. It is almost never true when litigation concerns ships in the sea trades. The admiralty court, with its process *in rem* and its attachment process as a first step in litigation, secures the means of payment of the decree at the very commencement of the lawsuit. This is well adapted to shipping cases when the ship, her owner and the witnesses may sail away and never return."[8]

The other traditional basis of time priority is known as the "benefit" theory. The reasoning is that the later lienor has conferred a benefit upon the res and has helped to preserve it for all concerned, including lienors. It is as if each lienor were a contributor to the venture, and as if the successive lienors provided goods and services without which the vessel could not have gone on. As an explanation of why the law should impose an inverse time priority upon ship chandlers and repairmen it is largely based on truth. But applied to tort claims the theory contains obvious defects. The offending vessel in a collision has incurred a detriment rather than a benefit. The property theory, on the other hand, encompasses liens of every sort.

The effect of either of these theories, if rigidly applied, would be to encourage the utmost diligence in enforcement. Priority would be determined by strict time, and presumably an hour's difference would be enough to prefer one claim to another. At least a consistent application of the principle would require that result.[9] It would not matter that the earlier lienors had no oppor-

[7] Knauth, "Characteristics of United States Maritime Law," 13 MD. L. REV. 1 at 11 (1953).

[8] Id. at 27.

[9] The Bold Buccleugh, 7 Moore, P.C. 267 (1850-51), from which much of the "property" thinking in the United States is derived, seems to take a strict time approach.

tunity to enforce their claims by reason of the vessel being out of reach. In fact a literal adherence to the principle would mean that all class rankings would have to give way.

The courts have modified the premium on diligence, however, by having time periods as the test of priority. By saying that all liens arising during a voyage or season will be considered as arising at the same time, the courts have given recognition to the need for an opportunity to enforce the lien. One need be diligent only to the extent that a time period rule requires it. And the measure of diligence is the opportunity to enforce. A voyage rule means that those who have supplied the vessel at the start of the voyage will not lose their priority until the end of the voyage when they have an opportunity to find and arrest the vessel. A season rule means that those who acquire liens at the beginning of a season, or during it, can locate the vessel when it is tied up at the close of activity without being deferred to intervening liens. It is intimated in *The J. W. Tucker*[10] that the voyage rule (by parity of reasoning the other period rules should be included) was erected for the purpose of mitigating the harshness of strict time priority, which impinged most severely upon those furnishing supplies and repairs. At any rate the voyage concept is deeply ingrained in American admiralty.[11]

From a realistic standpoint the introduction of period rules, as a qualification upon the property and benefit principles, works such a fundamental change in operation that the qualifications would seem to swallow the rule. If a theory of time priority is desired, it would be preferable to say that liens are adjusted by two main considerations: (1) reasonable diligence; (2) reasonable opportunity to enforce. As a description of what the courts *do,* and as an expression of the policies at work, this is somewhat closer to reality than an abstraction such as "property" or "benefit."[12] Furthermore, it is a less cumbersome method of explaining time priority than to go through the mental gymnastics of strict time priority to arrive at a system in which strict time has little place.

Occasionally it has been suggested that time priority ought to operate as at common law: "first in time, first in right." For a while

[10] (D.C. N.Y. 1884) 20 F. 129.

[11] The Paragon, (D.C. Mass. 1836) Fed. Cas. No. 10,708, mentions a voyage rule of priority for supplymen. Though no citations are given, it still shows that a notion of voyage was familiar at an early date.

[12] That the "property" concept is susceptible to conflicting interpretations can be seen in such cases as The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129.

it was thought by some very competent admiralty jurists in the Second Circuit that inverse priority applied only in cases of liens which were beneficial in nature. It was believed that torts were outside the scope of the rule. Judge Blatchford declared that the property theory was without authority.[13] Judge Addison Brown agreed with the result, but did so by means of the property theory.[14] He reasoned that because a tort lien is a substantial right of property it should not be displaced by later incumbrances.[15] It can be said that these views did not make serious inroads upon traditional doctrine in other districts. This is due in large part to the subsequent reaffirmation of faith in the property theory by the Supreme Court in *The John G. Stevens.*[16]

B. *The Voyage Rule.* This venerable rule has been applied chiefly to ocean-going vessels which operated on fairly distinct and definite voyages.[17] In the days of sail and before steamship schedules existed it was the natural time period to select. With modern times conditions have changed appreciably, and the rationality of the rule has been criticized. Professor Robinson has argued for a "reasonable period of credit" as a substitute, pointing out that in the case of fast steamers the voyage may be shorter than the 40-days allowed for harbor vessels in New York.[18] In the *City of Athens,*[19] with only ten percent of the fund left for supply claimants, counsel were astute to urge upon the court a "year rule" as a reasonable period of credit for the vessel involved, which was an ocean-going steamer. Judge Chesnut said:

> "On this point it has sometimes been said that the judicial decisions are in confusion; but an examination of very many cases leads to the conclusion that this statement is correct only insofar as it is applicable to other than ocean voyages of ships.

[13] The Frank G. Fowler, (C.C. N.Y. 1883) 17 F. 653, in which the court said that only the dictum of Judge Hall in The America, (D.C. N.Y. 1853) Fed. Cas. No. 288, could be mustered in support of an inverse order for non-beneficial liens.

[14] The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129. He recognized the compulsion of The Yankee Blade (Vandewater v. Mills), 19 How. (60 U.S.) 82 (1856), and The Young Mechanic, (C.C. Me. 1855) Fed. Cas. No. 18,180, at 876.

[15] Other than The Frank G. Fowler, (C.C. N.Y. 1883) 17 F. 653, he relied upon The Jerusalem, (C.C. Mass. 1815) Fed. Cas. No. 7,294. But a careful reading of that case reveals that Justice Story did not say that non-beneficial liens go by a common law priority. He did not mention tort liens. Rather he noted (at 566) that the supplyman's lien is "not like a dry lien by way of mortgage or other collateral title." He was contrasting maritime liens in general with those at common law.

[16] 170 U.S. 113, 18 S.Ct. 544 (1898).

[17] The Melita, (D.C. Md. 1880) Fed. Cas. No. 6,218; Porter v. The Sea Witch, (C.C. La. 1877) Fed. Cas. No. 11,289.

[18] ROBINSON, ADMIRALTY 427-428 (1939).

[19] (D.C. Md. 1949) 83 F. Supp. 67, 1949 A.M.C. 572.

> The rule originally developed in admiralty law and still the basic rule is that maritime liens of the same class are entitled to priority of payment in the inverse order of the time of accrual and that therefore liens arising in connection with the last voyage of the ship have priority of payment over liens accruing on a prior voyage."[20]

In rejecting the reasonable period of credit the court stated that the case law is entirely in favor of a voyage rule for ocean-going vessels, that the voyage is still a desirable time determinant because it encourages credit at ports of call more than would a set period like a year, and that the court did not have sufficient information on shipping practices throughout the United States to lay down a reasonable period of credit. The court did note that a voyage rule presupposes an appreciable time lapse between trips. The implication would seem to be that a reasonable opportunity to enforce must be present. Presumably lienors would not be cut off if the ship were in port only a few hours before it departed again.

It is clear that the voyage rule is one of successive periods, each voyage being senior in priority to the one before.[21] To make the rule meaningful it would be necessary to consider supplies furnished in preparation for a voyage as furnished on that voyage.[22] A few courts have held that liens arising in ports of call are preferred to those obtained at the start of the voyage.[23] This is a cross between a strict time approach (because the opportunity to enforce is not considered) and the voyage rule (because liens at any given port are taken as arising at substantially the same time instead of by precise date). These cases could best be described as embodying a "fractional voyage rule" which seems an anomaly. The better approach would be a continuing voyage rule whereby priority would be retained until the vessel touches the home port again.[24]

[20] 83 F. Supp. at 79.

[21] Ibid.

[22] The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129, and The Brimstone, (2d Cir. 1934) 69 F. (2d) 106, 1934 A.M.C. 283.

[23] The Fanny, (D.C. Mass. 1876) Fed. Cas. No. 4,638, where the court says (at 994) time priority is granted ". . . when a voyage or part of a voyage has intervened . . ."; and The Omer, (D.C. Va. 1877) Fed. Cas. No. 10,510, in which it was held that repairmen at an intermediate port cut off suppliers at the home port, upon the ground that the repairmen contributed "most immediately" to the completion of the voyage.

[24] In The Nisseqogue, (D.C. N.C. 1922) 280 F. 174, Judge Connor held in the case of a tramp vessel which stopped at various ports, and which carried different cargoes between those ports, that these trips all constituted one voyage until the ship returned to the home port.

C. *The Season Rule.* As we have seen, time periods exist to carry out the policies of reasonable diligence and opportunity to enforce. The courts have not been hesitant in molding new rules to replace the voyage concept where necessary. On the Great Lakes the natural period is the season of navigation. There is mention of a season rule on the lakes at an early date.[25] It was affirmatively established by Judge (later Supreme Court Justice) Henry B. Brown in *The City of Tawas.*[26] After noting that there were other concepts such as strict time and voyage time, he said:

> "I regard it, however, as a reasonable modification of the general practice that claims of equal rank should be paid *pro rata;* that each year should be considered as a voyage, and that claims accruing the last year should be paid in preference to claims of the same rank accruing the year before, each season of navigation here being separated from the preceding season by four months of inaction. This will encourage diligence in the prosecution of claims, and prevent the proceeds of sale from being absorbed by dilatory creditors. But I know of no authority or principle which would justify the court in ordering a claim of inferior rank to be paid prior to claims of superior rank, on the ground that the latter claim accrued the year before the former, unless the defence of stale claim is pleaded to the libel."[27]

There has been no dissent from this view.[28] The rule has been invoked in situations off the Great Lakes as well. In the Southern District of New York it was applied to a canal boat running between New York and Connecticut, perhaps for the reason that canals freeze over in winter as do the lakes.[29] Despite the subsequent development of a special period for harbor vessels the season apparently is still the period for canal boats.[30] There is some authority for using it elsewhere when the physical circumstances for applying the rule are present. If the vessel's operation entails distinct seasons of activity, it is no doubt the most convenient time measurement to use.[31] That does not mean that it will be used for fishing vessels merely because they operate by seasons, for there are

25 Stillman v. The Buckeye State, (D.C. Mich. 1856) Fed. Cas. No. 13,445.

26 (D.C. Mich. 1880) 3 F. 170 at 172, and ROBINSON, ADMIRALTY §61 (1939).

27 3 F. at 173.

28 The Nebraska, (7th Cir. 1895) 69 F. 1009; The Oswego No. 2, (D.C. N.Y. 1938) 23 F. Supp. 311, 1938 A.M.C. 980.

29 The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129.

30 The Brimstone, (2d. Cir. 1934) 69 F. (2d) 106, 1934 A.M.C. 283.

31 Dictum in The Alfred J. Murray, (D.C. Md. 1894) 60 F. 926; and The Steam Dredge A., (4th Cir. 1913) 204 F. 262, which is not very clearly reported.

other appropriate schemes. But where there is a long winter lay-up an argument could certainly be made to employ it.[32]

It is clear that the rule envisages a number of consecutive seasons, with corresponding priority, just as does the voyage rule. Even on the Great Lakes the rule will not be given automatic application. Where the vessel was in actual navigation the year round it was held that the calendar year rule should be used instead.[33]

D. *The Calendar Year Rule.* For fishing vessels and those in the coastwise trade the calendar year rule is the one most commonly selected. Apparently it was developed in the Massachusetts District where it has been utilized repeatedly.[34] It has gained widespread acceptance on the Atlantic coast, and some recognition on the Pacific.[35] Where it is applied it seems to cover vessels whose activity falls in between the trans-ocean and harbor types of operation.[36] Some of the cases refer to a "year" rule, but in all of those the actual disposal of the liens is on a calendar year basis, a new period commencing on January 1st of each year.[37] In only one case is a year alone taken as a time period, and that was a "year before the disaster" rule, which seems a little spurious.[38]

One problem which has come up in the administration of this rule is the treatment to be given to claims which overlap the year. This occurs where a running account is kept by a supplyman, or where work done under a repair contract covers the end of one

32 As yet there are many districts in which the question has not been raised.

33 The John J. Frietus, (D.C. N.Y. 1918) 252 F. 876.

34 See, inter alia, The Philomena, (D.C. Mass. 1912) 200 F. 873; The Bethulia, (D.C. Mass. 1912) 200 F. 876; The Olive M. Williams, (D.C. Mass. 1932) 1932 A.M.C. 1353; The Josephine & Mary, (D.C. Mass. 1940) 1940 A.M.C. 1628.

35 *Rhode Island:* The Evan N., (D.C. R. I. 1952) 109 F. Supp. 505, 1953 A.M.C. 576; *Connecticut:* In re New England Transportation Co., (D.C. Conn. 1914) 220 F. 203; *Pennsylvania:* The John Cadwalader, (D.C. Pa. 1937) 1937 A.M.C. 395, affd. (3d Cir. 1938) 99 F. (2d) 678, 1939 A.M.C. 52; *Maryland:* The Fort Gaines, (D.C. Md. 1928) 24 F. (2d) 438, 1928 A.M.C. 459; The Little Charley, (D.C. Md. 1929) 31 F. (2d) 120, 1929 A.M.C. 398; The City of Athens, (D.C. Md. 1949) 83 F. Supp. 67, 1949 A.M.C. 572; *Florida:* The Oddyseus III, (D.C. Fla. 1948) 77 F. Supp. 297, 1948 A.M.C. 608; *Washington:* University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585; *California:* The Annette Rolph, (D.C. Cal. 1929) 30 F. (2d) 191, 1929 A.M.C. 212.

36 It has been applied to a harbor tug in Buffalo, however. The John J. Frietus, (D.C. N.Y. 1918) 252 F. 876.

37 The Little Charley, (D.C. Md. 1929) 31 F. (2d) 120, 1929 A.M.C. 398; The Annette Rolph, (D.C. Cal. 1929) 30 F. (2d) 191, 1929 A.M.C. 212; University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585.

38 The Thomas Morgan, (D.C. S.C. 1903) 123 F. 781. By using this test, it appears that all liens were placed in parity so far as time was concerned. In Metlakatla Indian Community v. The Welcome, Civil Action No. 3329-KA (D.C. Alaska, 1st Div., 1953), the court, by an unreported memorandum opinion, adopted a period of one year preceding the filing of the libel as the rule applicable to fishing vessels in Southeastern Alaska. No extensive treatment is given to the problem, and the language of the opinion is obscure.

year and the beginning of another. There is a tendency to say that when in doubt the lien shall be deemed to have accrued in the more recent year.[39] Likewise, when payments have been made against a running account it is presumed that they were used to pay off the earliest items of indebtedness, thus throwing more of the claim into the later year.[40] Wherever it has been adopted, the rule is taken to be one of successive calendar years, like the voyage and season rules.[41]

E. *The Forty-day Rule.* In 1890 Judge Addison Brown announced the 40-day rule as the proper measure of time in the case of New York harbor vessels. The reason given for this was that it allowed for 30 days credit plus 10 days notice, an ample period to preserve the time priority of any diligent lienor.[42] The rule was later approved by the circuit court of appeals in *The Samuel Little.*[43] This latter case also resolved a dispute between the Eastern and Southern Districts on the question of whether the rule applied to liens of all types or only to supplies and necessaries.[44] The court stated[45] that the rule governed liens of all classes, though operating only within each class. Subsequently the rule was adopted by the New Jersey District.[46] Some believed that there should be successive periods, as with the voyage rule,[47] but it was determined authoritatively that there is only one period of 40 days preceding the libel, and everything coming before that time shares

39 The Fort Gaines, (D.C. Md. 1928) 24 F. (2d) 438, 1928 A.M.C. 459; The Little Charley, (D.C. Md. 1929) 31 F. (2d) 120, 1929 A.M.C. 398.

40 The Olive M. Williams, (D.C. Mass. 1932) 1932 A.M.C. 1353; University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585.

41 See, inter alia, The Philomena, (D.C. Mass. 1912) 200 F. 873; The Bethulia, (D.C. Mass. 1912) 200 F. 876; The Olive M. Williams, (D.C. Mass. 1932) 1932 A.M.C. 1353; The Josephine & Mary, (D.C. Mass. 1940) 1940 A.M.C. 1628. *Rhode Island:* The Evan N., (D.C. R.I. 1952) 109 F. Supp. 505, 1953 A.M.C. 576; *Connecticut:* In re New England Transportation Co., (D.C. Conn. 1914) 220 F. 203; *Pennsylvania:* The John Cadwalader, (D.C. Pa. 1937) 1937 A.M.C. 395, affd. (3d Cir. 1938) 99 F. (2d) 678, 1939 A.M.C. 52; *Maryland:* The Fort Gaines, (D.C. Md. 1928) 24 F. (2d) 438, 1928 A.M.C. 459; The Little Charley, (D.C. Md. 1929) 31 F. (2d) 120, 1929 A.M.C. 398; The City of Athens, (D.C. Md. 1949) 83 F. Supp. 67, 1949 A.M.C. 572; *Florida:* The Oddyseus III, (D.C. Fla. 1948) 77 F. Supp. 297, 1948 A.M.C. 608; *Washington:* University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585; *California:* The Annette Rolph, (D.C. Cal. 1929) 30 F. (2d) 191, 1929 A.M.C. 212.

42 The Proceeds of The Gratitude, (D.C. N.Y. 1890) 42 F. 299.

43 (2d Cir. 1915) 221 F. 308 at 317.

44 See The Glen Island, (D.C. N.Y. 1912) 194 F. 744, and The Towanda, (D.C. N.Y. 1914) 215 F. 232.

45 The Samuel Little, (2d Cir. 1915) 221 F. 308 at 321.

46 The Interstate No. 2, (D.C. N.J. 1922) 290 F. 1015. Previously the New Jersey District had taken a strict time approach to liens on harbor vessels. The America, (D.C. N.J. 1909) 168 F. 424.

47 The Leonard F. Richards, (D.C. N.Y. 1916) 231 F. 1002.

pro rata in the remainder.[48] There appear to be no cases adopting the rule for harbors other than New York.[49]

F. *The Ninety-day Rule.* This rule was developed by Judge Neterer in *The Edith*[50] as the Puget Sound equivalent of the New York harbor rule. It is intended to cover those situations "where vessels are operating from local harbors in the district, and from which they make daily or weekly trips," unless another reason to the contrary is present for not applying the rule.[51] The court held in a later case that a vessel running between Seattle and Vancouver, B. C., is not covered by the rule.[52]

There are still some unanswered questions about the 90-day rule. Is there only one time period, as in the 40-day rule, or are there successive periods? If priorities are established according to the realistic approach of Judge Addison Brown in *The J. W. Tucker*[53] and *The Proceeds of The Gratitude,*[54] one period would seem to be enough, because once a lienor has failed to exercise his power of enforcement there is no reason for preferring him to others who have done likewise. At the same time the calendar year rule, which is based upon an arbitrary length of time, operates by successive periods. The urge for uniformity would yield a similar result with the 90-day rule. There are indications that the calendar year rule may prevail in Puget Sound cases where the 90-day or voyage rule is not in order.[55] It still seems undetermined what vessels and what types of operation are to be included in the 90-day rule. There are always some vessels that make a number of short trips followed by a long trip outside the Sound proper. How they should be classified must await a concrete case and a practical solution.

G. *Waiver of Priority.* It is said generally that laches, in the form of delay in pressing one's lien, is a defense to the claim itself,

48 The Interstate No. 1, (2d Cir. 1923) 290 F. 926, 1923 A.M.C. 1118, cert. den. 262 U.S. 753, 43 S.Ct. 701 (1923). There are earlier and later cases which adhere to this view. The Samuel Morris, (D.C. N.Y. 1894) 63 F. 736; The Oregon, (2d Cir. 1925) 6 F. (2d) 968, 1925 A.M.C. 1271; The Baker Brothers, (D.C. N.Y. 1928) 28 F. (2d) 920, 1928 A.M.C. 1600.

49 It was rejected for Buffalo harbor in The John J. Frietus, (D.C. N.Y. 1918) 252 F. 876.

50 (D.C. Wash. 1914) 217 F. 300. The court used the technique of announcing the rule prospectively.

51 Id. at 302. The rule was applied in The Sea Foam, (D.C. Wash. 1917) 243 F. 929.

52 The Morning Star, (D.C. Wash. 1924) 1 F. (2d) 410.

53 (D.C. N.Y. 1884) 20 F. 129.

54 (D.C. N.Y. 1890) 42 F. 299.

55 University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585.

and it should be pleaded to the libel. Under that reasoning, once a decree of liability upon maritime liens is rendered, laches has nothing to do with the distribution of the fund.[56] The priorities question properly should have no connection with matters of stale claim. As Judge Hough put it, "With liens judicially established, there was and is nothing for the doctrine of laches to operate upon."[57] But without any express negation of this principle a doctrine of "waiver of priority" has crept into some of the cases.[58] The waiver is usually said to operate in favor of another lien of either the same or lower class. No doubt the courts are conscious of the idea that distribution and marshalling is of an "equitable" nature. It is because priority would be unfair under the circumstances of the case that a waiver is found.

In *The Morning Star*[59] Judge Neterer said that crewmen who allowed their claims to mount up for more than six months should be postponed to later supplymen because of laches. Equity and good conscience required that those who knew of the vessel's shaky financial condition, and who delayed enforcement, should be deemed to have deferred their priority. This case was followed in *The James W. Follette,*[60] where certain wage claimants were placed below others, though still superior to tort. Other earlier cases were also relied upon as authorizing a waiver of priority. Some of these actually adopt a "time over class" approach,[61] while another[62] held that laches by a supplyman put his claim below all others and would have barred it totally had not the owner admitted liability on the claim. The only other case cited in support of the doctrine[63] is quite brief and not at all clear, though it can be explained simply as an application of the voyage rule.[64]

The effect of recognizing a doctrine of *implied* waiver is to put a fourth possible hurdle in the path of the lienor. In any case he

56 This was the view of Judge Henry B. Brown in The City of Tawas, (D.C. Mich. 1880) 3 F. 170 at 172. Laches in the field of maritime liens is a rather fluid concept. See generally ROBINSON, ADMIRALTY §55 (1939).

57 The Oregon, (2d Cir. 1925) 6 F. (2d) 968 at 970, 1925 A.M.C. 1271.

58 This is distinct from waiver of the lien itself, for which there is clear authority. The President Arthur, 279 U.S. 564, 49 S.Ct. 420 (1929).

59 (D.C. Wash. 1924) 1 F. (2d) 410.

60 (D.C. N.Y. 1934) 1934 A.M.C. 1525.

61 The Dubuque, (D.C. Mich. 1870) Fed. Cas. No. 4,110; The Amos D. Carver, (D.C. N.Y. 1888) 35 F. 665. The Dubuque said that a pilot waived the lien by a delay of more than a season. The Amos D. Carver did say that laches caused the lien to be superseded by later ones, but it also contains some "time over class" language.

62 The Wexford, (D.C. N.Y. 1881) 7 F. 674.

63 The John T. Williams, (D.C. Conn. 1901) 107 F. 750.

64 The district court in which the James W. Follette was decided has held more recently that laches is only a defense and cannot be raised in the distribution stage of the

must pass the tests of laches, time priority, and class rank. When one more element of a highly flexible nature is added, the result is more uncertain than ever. One of the less attractive features of the waiver doctrine is that it injects an additional time element into a system which already has laid down definite criteria of time: the various voyage, season, calendar year, and harbor rules. The time rules themselves, while not connected with laches, in practical effect operate as a principle of quasi-laches. By definition there is no priorities problem unless the fund is insufficient. The ultimate question is: who among these claimants has the fewer equities in his favor? The answer of the courts has been to set up objective standards in the interests of certainty: laches, time, and class. The danger of the waiver doctrine is that it interposes subjective methods of preference while paying formal respect to the objective standards which have evolved into an elaborate but knowable system.[65]

It would not be fitting to leave this topic without noting that some of the cases are either so contrary a view of the law or so loosely worded that they might best be discarded as lacking any practical value. Occasionally it has been suggested that the priority of filing the libels should affect the outcome,[66] but this has been repudiated by the other authorities.[67] The only importance attached to the time of the libel is that time periods are reckoned backwards from it. Other cases illustrate the confusion or contradiction which results from trying to state priority rules in an unduly contracted form.[68]

case. The Oswego No. 2, (D.C. N.Y. 1938) 23 F. Supp. 311, 1938 A.M.C. 980, in which repairs and supplies over a four-year period were not barred, the owner having failed to object to the liens as such. But see National Shawmut Bank v. The Winthrop, (D.C. Mass. 1955) 134 F. Supp. 370, in which the court held that laches only postponed the liens to other claims. In this latter case the court determined laches as of the time of filing a preferred ship mortgage which intervened between several of the claims.

65 An entirely different question is whether the lienor can *expressly* waive his priority. To say that he can is an entirely salutary principle. A preferred ship mortgagee may desire to have repairs made on the vessel, and if he represents to the repairman that he will not assert his priority it would be harsh to deny a waiver. So held in The John Cadwalader, (D.C. Pa. 1937) 1937 A.M.C. 395.

66 The Globe, (C.C. N.Y. 1852) Fed. Cas. No. 5,483.

67 The City of Tawas, (D.C. Mich. 1880) 3 F. 170; The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129; The Arcturus, (D.C. Ohio 1883) 18 F. 743; The Fanny, (D.C. Mass. 1876) Fed. Cas. No. 4,638; The Lady Boone, (D.C. Ark. 1884) 21 F. 731; The Julia, (D.C. S.C. 1893) 57 F. 233.

68 The Belize (Rubin Iron Works v. Johnson), (5th Cir. 1939) 100 F. (2d) 871, 1939 A.M.C. 27; The J. R. Hardee, (D.C. Tex. 1952) 107 F. Supp. 379, 1952 A.M.C. 1124; The Thomas Morgan, (D.C. S.C. 1903) 123 F. 781.

II. CLASS AND ITS CRITERIA

In handling priorities measured by the character of the lien itself, the courts have worked out a spectrum of classes which are said to rank one another. In the past there was much controversy over how many categories there should be, how they should rank, and what liens fell into the respective classes. The recent cases exhibit a comforting stabilization of the number of classes and their relationship *inter se*. The chief problems today are those of classification of the liens to determine into what rank they should fall.

A popular and much-quoted statement of the main classes and their comparative positions is that made by Judge Coleman in *The William Leishear,*[69] though it would not be completely acceptable to some admiralty jurists either then or now:

> "Generally speaking, the law of maritime liens may be said to be made up of exceptions to the above doctrine, which gives priority to the lien latest in point of time, so that to-day it is possible to deduce, from the decisions, the following order of priority, existing irrespective of time, which represents the weight of authority: (1) Seamen's wages; (2) salvage; (3) tort and collision liens; (4) repairs, supplies, towage, wharfage, pilotage, and other necessaries; (5) bottomry bonds in inverse order of application; (6) non-maritime claims. This, however, is no more than a very general statement, since any summary is subject to further exceptions of more or less narrow application."[70]

It should be noted that court costs and the costs of preserving the ship pending suit may be preferred even to the maritime claims. There is also the preferred ship mortgage to be considered. It is a creature of statute and occupies a position granted by its maker. It has introduced a common law notion of time priority to a limited but important extent.

The theory of class priority is simple. It consists of the idea that some liens have an inherent merit or comparative righteousness which entitles them to a preference.

In deciding that some claims by their nature and the circumstances out of which they arise are entitled to a preference, the courts use fundamental notions of policy regarding maritime commerce. The high rank of seamen's wage liens is usually justified

[69] (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770.
[70] Id. at 863.

by saying that commerce would not take place without men to man the ships, and that the men will not sign on without a trustworthy security for wages. Or resort may be had to the relatively unprotected situation of seamen, and their inability to learn the solvency of the vessel owner.[71] But if the rationalizing factor is commerce and the furtherance of commerce, the other liens are justifiable on that ground too. The rank of salvage is said to rest on the need to encourage the saving of maritime ventures, collision liens are desirable because they promote safety in navigation, and the contracts for necessaries facilitate credit to the vessel.

It can be seen that these justifications in themselves rest upon certain major premises or unstated assumptions which may raise doubt by persons of critical bent. The assumptions are beliefs about human conduct. The notion that seamen would hesitate to sign on were it not for the high security of their wage lien may have been a fairly valid generalization at one time. Certainly under the conditions of medieval shipping, or even in the days of the clipper ships, the element of "venture" was a highly realistic one. Each voyage was something of a separate entity, usually for a separate and distinct purpose, as contrasted with modern systems of transportation. With the strong unionization of seafaring men, and the present system of paying wages and allotments, it is at least questionable today whether the wage lien priority is a prime inducement to men signing on the ships. It is certainly desirable, but is it of the utmost necessity?

One might question the practical utility of favoring collision liens over those for repairs and supplies. Is it true in actuality that this encourages safety in navigation? In the first place, the supplymen have no control over the way the vessel is run, and to say that as "owners" they take the risk of collision is only to use a fiction in place of explanation. As Justice Holmes might say, a fiction is not a fact.[72] In the second place, the persons immediately responsible for safe navigation are the officers and crew of a vessel. Their motivation in avoiding collisions most likely has nothing to do with maritime liens. The care and prudence which they observe is more likely to stem from the fear that negligence will result in discharge by the company, that their reputations will be hurt, that finding re-employment will be difficult, and that the Coast Guard inspectors will revoke their licenses. There is also

71 See Norris, "The Seaman as Ward of the Admiralty," 52 MICH. L. REV. 479 (1954).
72 The Western Maid, 257 U.S. 419 at 433, 42 S.Ct. 159 (1922).

the positive interest in observing the rules of the road, the professional pride in skillful shiphandling, and the humane desire to avoid tragic and wasteful accidents.

This is not to say that the present system of priorities is unreasonable or untenable, though it does seem a little presumptuous to base a priorities rule on the idea that some abstract benefit to commerce will flow from it. The only point to be made is that we are not working with verifiable propositions. It is quite possible that class priorities are based to a certain extent upon even less tangible reasons. In fact the idea of "inherent merit" as a reason for class ranking would seem to contain a referent to the emotional feelings of the court.

Surely the traditional solicitude for seamen comes into play in determining what their rank ought to be, apart from any notions of furthering commerce. There is an admiration for the humanitarian conduct of salvors, just as there is an appealing quality about the tort claimant, asking redress for a wrong done to him without his consent. Is it not possible that supplymen may be put on a lower plane because their interest is more definitely mercantile in character, with fewer moral and emotional overtones? This is not said in criticism but only by way of pointing out that there may be a variety of policies to be invoked in any priorities case. That is indicated by the wide divergence of holdings in this field. It would seem that class rank is not entirely based on necessity.

A. *Wages.* Seamen have long enjoyed a high rank of priority for their wages. In *The Paragon*[73] Judge Ware put it upon the civil law principle that "he shall be preferred who has contributed most immediately to the preservation of the thing."[74] And in the early case of *Sheppard v. Taylor*[75] appears the language which has become hallowed by repetition, that wages adhere to the last plank of the ship. The general benevolence toward seamen is clear.

1. *Penalty wages.* The concept of what are wages would seem fairly straightforward. But there are problems in classification even here. Obviously the pay contracted for and due is wages. Not so obvious is the matter of "penalty wages," so-called, which are due under 46 U.S.C., section 596.[76] The question is whether

[73] (D.C. Me. 1836) Fed. Cas. No. 10,708.
[74] Id. at p. 1088.
[75] 5 Pet. (30 U.S.) 675 (1831).
[76] Failure to pay wages within the time stated in the statute and without sufficient cause subjects the master or owner to an extra payment of double wages for each day's delay.

sums due under the statute should be given wage priority or relegated to some other position. In *Covert v. Wexford*[77] it was held that penalty wages, given under a British statute similar to our own, were part of the wage lien and should be given the corresponding priority. The words of the act that the sum "shall be recovered as wages" were taken as an implication that the ship should be bound. To give other than first priority would be to defeat the purpose of the law. Furthermore, the shipping articles are signed with reference to existing law, which is imported into the contract. This case was followed in *Gerber v. Spencer,*[78] which went further and said that the statutory sum is not really a penalty. Rather it is in the nature of compensation for the delay in payment, and as such it is an incident to the claim for wages. The court pointed out that delay in payment involved economic detriment to the men, and they needed the extra money in order to make good the disadvantage to which they had been put. The fact that the owner was unable to pay promptly because he was in financial difficulties was deemed no excuse. The attitude would seem to be that the owner should exhaust all means of raising money to see that this prime obligation is fulfilled.

Other cases have not handled this claim quite so tenderly. In *The Nika*[79] Judge Neterer was in favor of giving it a high position, though not that of regular wages. Instead he put it just below salvage, though superior to all other liens. The frequency of penalty wages arising has been greatly inhibited by more recent rulings of the Supreme Court[80] which say that the sum is not to be assessed where the failure to pay is due to the vessel being arrested for claims beyond its value.[81] By its own terms the statute does not apply where "sufficient cause" is shown. There has been a tendency to read the statute restrictively, or rather it has resulted through proper application in disallowance of a number of claims.[82] There are indications that penalty wages will be deferred to other liens for lack of due diligence. This was done in

[77] (D.C. N.Y. 1880) 3 F. 577, affd. in The Wexford, (D.C. N.Y. 1881) 7 F. 674.

[78] (9th Cir. 1922) 278 F. 886.

[79] (D.C. Wash. 1923) 287 F. 717, 1923 A.M.C. 409.

[80] Collie v. Fergusson, 281 U.S. 52, 50 S.Ct. 189 (1930), which construed the term "sufficient cause"; and McCrea v. United States, 294 U.S. 23, 55 S.Ct. 291 (1935), which says no recovery shall be had unless the delay in payment is arbitrary, willful, or unreasonable.

[81] The claim was disallowed for this reason in The City of Athens, (D.C. Md. 1949) 83 F. Supp. 67, 1949 A.M.C. 572; The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222; The Eastern Shore, (D.C. Md. 1940) 31 F. Supp. 964, 1940 A.M.C. 388.

[82] Ibid.

one case where the seaman had waited almost two months after discharge without asserting his claim.[83] The lien was valid but through a waiver of priority it was placed below the supplymen. It is still open to argument that where the sum has accrued sometime before the vessel is libelled or where the delay is arbitrary, it should be recovered with the same priority as wages. Unless the claim is defeated on the merits, the reasoning of *Covert v. Wexford*[84] would seem to remain unimpaired.

2. *Seamen's remedies.* The lien for maintenance and cure has been given wage priority on the theory that it is an integral part of the contract for wages and a material ingredient in the compensation of seamen.[85] The question of what rank should be given to the seaman's claim for damages due to the unseaworthiness of the vessel has seldom been considered. One court gave it a tort priority[86] on the ground that unlike maintenance and cure it is a claim of fairly recent origin, it does not arise solely from the seaman's contract, and it could be invoked by anyone lawfully aboard the vessel who is injured by defects of hull and equipment. It might be asked why, by reasoning analogous to that in *Covert v. Wexford,*[87] the claim for unseaworthiness should not be considered part of the wages. If a seaman's contract is made with reference to existing law, and the existing law grants a remedy for unseaworthiness, it could be said that the contract of employment imports compensation for the unseaworthiness of the vessel as well as for maintenance and cure and statutory penalties. That he should be indemnified for such injuries is an integral part of the seaman's relationship to the vessel. The right was formulated consciously in *The Osceola,*[88] in which it was said, ". . . in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage."[89]

[83] The Morning Star, (D.C. Wash. 1924) 1 F. (2d) 410. This was the same court that in The Nika, (D.C. Wash. 1923) 287 F. 717, 1923 A.M.C. 409, where there was no lack of diligence, put the lien just below salvage.

[84] (D.C. N.Y. 1880) 3 F. 577, affd. in The Wexford, (D.C. N.Y. 1881) 7 F. 674.

[85] The James W. Follette, (D.C. N.Y. 1934) 1934 A.M.C. 1525; The Josephine & Mary, (D.C. Mass. 1940) 1940 A.M.C. 1628; and The Washington, (D.C. N.Y. 1924) 296 F. 158, in which return passage money and indemnity for loss of seaman's personal property were also held to be in the category of wages. The courts have been influenced by the benevolent language of Justice Story in Harden v. Gordon, (C.C. Me. 1823) Fed. Cas. No. 6,047.

[86] The James W. Follette, (D.C. N.Y. 1934) 1934 A.M.C. 1525.

[87] (D.C. N.Y. 1880) 3 F. 577.

[88] 189 U.S. 158, 23 S.Ct. 483 (1903).

[89] Id. at 171.

Thus it was thought to be a "warranty" of a contractual character. It has been suggested that a warranty theory was used in order to avoid common law tort limitations of negligence and contributory fault.[90] Nonetheless, the Supreme Court, in extending the doctrine in 1945 to cover a longshoreman injured on the vessel, rejected the contractual notion and placed liability on a relational basis. The Court said, "It is a form of absolute duty owing to all within the range of its humanitarian policy."[91] The recent extension of the principle to cover a carpenter employed by a third party and injured while working aboard the vessel[92] would seem to point even more to a tort basis. The Court at one point calls it a maritime tort.[93] This certainly provides a logical argument for denominating unseaworthiness a species of liability without fault, in the nature of tort.[94] On the other hand, it might still be said that so far as priorities are concerned the claim should be granted as wages. It could be said to arise out of the seaman's contract, even though the basis is not contractual in regard to others.

Logical consistency may not always be the desideratum in adjusting lien priorities, however. To rank unseaworthiness as wages may be to defeat salvage in some cases, and it may even result in diminution of the claims for straight wages in a case where the

[90] Justice Rutledge in Seas Shipping Co. v. Sieracki, 328 U.S. 85 at 93, 66 S.Ct. 872 (1946).

[91] Id. at 95.

[92] Pope & Talbot v. Hawn, 346 U.S. 406, 74 S.Ct. 202 (1953).

[93] Id. at 409. It should be noted that strong dissents in both this case and the Sieracki case, 328 U.S. 85, 66 S. Ct. 872 (1946), protested the extension because they believed that the remedy was one arising upon the breach of warranty to the seaman, a warranty existing by virtue of the peculiar hazards to which seamen are exposed. In a much discussed case, Keen v. Overseas Tank Corp., (2d Cir. 1952) 194 F. (2d) 515, Judge Hand's sole concern is with the scope of the *warranty* of seaworthiness, and the terminology of insurance law is utilized throughout. See also Judge Hand's refusal to apply the warranty to a workman sent aboard ship to clean tanks in Guerrini v. United States, (2d Cir. 1948) 167 F. (2d) 352.

[94] No doubt an attempt will be made to say that the Hawn Case, 346 U.S. 406, 74 S.Ct. 202 (1953), is in line with the traditional doctrine because the carpenter went aboard the vessel to repair a grain loading device, and that this can be brought under the rubric of "traditional seaman's work." The seaman's work doctrine is used to give seamen's remedies to non-crew members on the ground that the employer should not be allowed to avoid liability by getting landsmen or subcontractors to do seamen's work while the vessel is in port. See International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19 (1926), where a longshoreman was declared to be a seaman under the Jones Act. This doctrine was revitalized and heavily relied upon in the Sieracki case, 328 U.S. 85 at 93, but as the dissent in the Hawn case pointed out, the majority opinion in this latter case virtually ignores the seamen's work doctrine. To say that the Hawn case is in line with the previous decisions is merely to play with words and not to face the substance of the matter. See also the dissent in Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601 (1954), which extends unseaworthiness to a longshoreman's injuries owing to a defective snatch block which was brought aboard by the contracting stevedore.

fund is not large enough to satisfy even those. It would amount to holding the other seamen's wages liable for contribution to a liability which is not theirs but that of the owner. The element of personal injury connotes tortious rather than contractual liability to the judicial mind. There is also a natural tendency for the court to allow something to other claims instead of having the entire res swallowed by one class.[95]

3. *Other wage claims.* In the Massachusetts District, where fishermen work for "lays" or shares of the catch it is the practice to grant their claims as wages and to give them priority as such.[96] The bonus pay given for wartime merchant marine service has also been granted wage priority.[97] An interesting case on its facts is a bankruptcy proceeding in which the referee allowed a preference to the sums due under a union job security clause. The collective bargaining contract called for eleven months pay in the event of involuntary layoffs. The company went into receivership, and the referee gave effect to the extra pay as wages.[98]

Where a watchman's lien is granted there is a tendency to recognize it as equivalent to that of a seaman.[99] The cases in which it has been granted have not been ones in which many classes were in competition, so the law remains a little uncertain on the point. In some instances it has been given a rank with necessaries.[100] But as one court pointed out,[101] the lien is so difficult to obtain that in order to give rise to it at all the services would have to be such as contribute to the navigation of the vessel, or for seamanlike work. In fact the watchmen of a live vessel are likely to be certificated and licensed men sent down from the hiring hall. Logic would appear to favor a wage rank where the service is seamanlike in nature.[102] There is always the possibility of the watchman getting

[95] There is no priority problem for Jones Act claims, of course, because no lien is given. Plamals v. The Pinar del Rio, 277 U.S. 151, 48 S.Ct. 457 (1928).

[96] The Juneal, (D.C. Mass. 1932) 1932 A.M.C. 1284; The Olive M. Williams, (D.C. Mass. 1932) 1932 A.M.C. 1353; The Helen M., (D.C. Mass. 1932) 1932 A.M.C. 587.

[97] The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222.

[98] Matter of Southern Pacific Golden Gate Ferries, Ltd., (D.C. Cal. 1942) 1942 A.M.C. 1581.

[99] The Hattie Thomas, (D.C. Conn. 1894) 59 F. 297; The Joseph Nixon, (D.C. Pa. 1890) 43 F. 926; The Seguranca, (D.C. N.Y. 1893) 58 F. 908; The Erinagh, (D.C. N.Y. 1881) 7 F. 231.

[100] The Estrada Palma, (D.C. La. 1923) 8 F. (2d) 103, 1923 A.M.C. 1040; The Olive M. Williams, (D.C. Mass. 1932) 1932 A.M.C. 1353; The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222.

[101] The Seguranca, (D.C. N.Y. 1893) 58 F. 908.

[102] In The Hattie Thomas, (D.C. Conn. 1894) 59 F. 297, the court said by way of dictum that if the watchman's lien was for a seamanlike service it should have a wage rank,

a high priority where he renders service to a vessel after arrest, not as a wage claim but as "costs." The Supreme Court has said that wharfage claims arising while the vessel was in *custodia legis* should be granted a preference over the various maritime liens as a necessary incident to the administration of the fund.[103] By analogy this should extend to watchmen whose services are impliedly or expressly authorized by the Court. In one case[104] the seamen themselves got high priority as watchmen after the vessel had been arrested. This was granted as "costs" because the marshal did not protest their remaining aboard.[105]

Not all tasks done on a vessel by the regular crew will be given a high priority, however. Work done by the ship's engineers while the vessel was in port between trips, under the direction of shore engineers, has been put in the class of repairs and supplies.[106] But the court was careful to distinguish this from the case where seamen did work in port which was part of their contractual duties.[107] It is in the area of seamen's wages that the onslaught of the waiver of priority doctrine has been felt most severely. For a variety of reasons the court may feel it inequitable to give the seamen first rank. Failure to assert the claim promptly may amount to postponement of it to that of supplymen.[108] In some cases the courts may have been a little hasty in dropping the claim to a lower position. Especially in the small vessels a man is likely to stay with the vessel in the hope that she will earn her freight and be able to make good out of the proceeds. If jobs are hard to find, the seaman may be reluctant to press for pay the moment it is due. He

and by the same reasoning if the service was that of a landsman it should be classed with repairs and supplies.

103 The Poznan, 274 U.S. 117, 47 S.Ct. 482, 1927 A.M.C. 723 (1927). This preference was granted neither as a maritime lien (for none could arise after arrest) nor in the technical sense as an equitable lien (for equitable remedies supposedly are not available in admiralty), but rather as an application of equitable principles in the distribution of the res.

104 The General Geo. W. Goethals, (D.C. N.Y. 1928) 27 F. (2d) 183.

105 However, in The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222, the court cited The General Geo. W. Goethals, (D.C. N.Y. 1928) 27 F. (2d) 183, but placed similar services of the seamen in a class below the preferred mortgage lien.

106 The Juneal, (D.C. Mass. 1932) 1932 A.M.C. 1284.

107 The Helen M., (D.C. Mass. 1932) 1932 A.M.C. 587, also held work done beyond regular crewmen's duties to be in the necessaries class.

108 In The Morning Star, (D.C. Wash. 1924) 1 F. (2d) 410, a delay of six months was sufficient for waiver. The court spoke of "laches" but did not bar the claim absolutely. The effect was the same, of course. As to penalty wages the court put the seaman junior to the supplymen because he had waited almost two months before making his claim. Again the court said the lien was valid, but could not take top priority because of the lack of due diligence.

might prefer working, with room and board provided, to "sitting on the beach." In one such case the conduct of certain crew members was held to be inequitable as to other seamen in that they continued working and allowed their claims to mount up.[109]

The stevedore's lien, when it arises,[110] is not difficult to assign. Where it is the lien of a stevedore who contracts to provide specific ships with cargo handling services, it should fall into the category of repairs and supplies.[111] But where it is the lien of the individual longshoreman who does the work, which might be the case in smaller ports, it should properly be classed as wages.[112] This would seem to follow from the principle of the *Haverty* case[113] that longshoremen are "seamen" in certain respects.[114]

The pilotage lien also fits into fairly neat divisions. It is viewed sometimes as in a class with supplies and other necessaries, probably on the theory that it is a contract which benefits the vessel in the same manner as the contract of towage, and that it is not wages because the pilot is somewhat like an independent contractor.[115] That might be true of harbor and bar pilots who remain aboard only a short time. But even then there is compensation for a personal service performed by a skilled mariner, and it is not extravagant to say that his claim is in the nature of wages.[116] Where the pilot is carried in a full-time capacity as a permanent member of the crew, as in much of the coastwise and river trade, his services are most certainly wages.[117] But if his real duties are

109 The James W. Follette, (D.C. N.Y. 1934) 1934 A.M.C. 1525. It should be noted that the deferred crewmen were also members of the owner's family. Though junior to other seamen they were still placed ahead of tort claimants, although that point was academic in view of the exhaustion of the fund.

110 No lien granted in The E. A. Barnard, (D.C. Pa. 1880) 2 F. 712; The Esteban de Antunano, (C.C. La. 1887) 31 F. 920; The Henry W. Breyer, (D.C. Md. 1927) 17 F. (2d) 423, 1927 A.M.C. 290, where it was disallowed because of contract with the owner. But see The Canada, (D.C. Ore. 1881) 7 F. 119, where the lien was granted, relying on the language of The Emily Souder, 17 Wall. (84 U.S.) 666 (1873).

111 The Canada, (D.C. Ore. 1881) 7 F. 119.

112 This is suggested in the dictum in The Henry W. Breyer, (D.C. Md. 1927) 17 F. (2d) 423, 1927 A.M.C. 290.

113 272 U.S. 50, 47 S.Ct. 19 (1926).

114 The principle of the Haverty case was thought to be superseded by the passage of The Longshoreman's and Harbor Workers' Act of 1927, 33 U.S.C. (1952) §901 et seq., but has undergone a striking parthogenesis in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946).

115 Allowed as necessaries in The Estrada Palma, (D.C. La. 1923) 8 F. (2d) 103, 1923 A.M.C. 1040. The Emily Souder, 17 Wall. (84 U.S.) 666 (1873), put pilotage with necessaries, but the real issue there was common law liens against maritime liens.

116 In The Alexander Barkley, (D.C. N.Y. 1894) 83 F. 846, the reasoning seems to proceed along that course because were it otherwise the pilotage should have been placed junior to the collision claim.

117 The Dubuque, (D.C. Mich. 1870) Fed Cas. No. 4,110. See also the dictum in The Willamette Valley, (D.C. Cal. 1896) 76 F. 838, and Collyer v. S. S. Favorite, (D.C. N.Y. 1940) 1940 A.M.C. 1051.

those of a master, or if he acts as a combination master and pilot, the courts will pierce through the title and declare that he has no lien.[118] It is well settled that the master has no lien for his wages.[119] The courts have hinted, however, that if the services as pilot can be segregated properly from those as master they will be entitled to a lien, and presumably wage priority.[120] Nor is it only through claiming pilotage that the master has attempted to obtain lien priority against the vessel. If the law of the flag allows a lien for master's wages, it is usually granted by American forums.[121] But it is deferred to supplymen with whom he contracted personally,[122] and to liens for collisions in which he is at fault.[123] Like others who advance their own funds to discharge maritime liens, he may be subrogated to the rights of those whom he pays with his own money.[124] One case[125] indulges in legal semantics to arrive at the conclusion that a ferryboat captain is not a "master," but only a foreman, and thus entitled to a lien with wage priority.

4. *The rank of wages.* Having now examined what types of claims may be allowed as wages and given that rank, the inquiry turns to the question of how wages stand with respect to other classes. It was early established in our history that wages should occupy a most favored position. This was accomplished by analogizing freely from medieval sea codes and from the practice in civil law countries.[126] This high position has become confirmed

118 The Willamette Valley and Collyer v. S. S. Favorite, note 117 supra.

119 The Orleans v. Phoebus, 11 Pet. (36 U.S.) 175 (1837).

120 Collyer v. S. S. Favorite, (D.C. N.Y. 1940) 1940 A.M.C. 1051, and The Willamette Valley, (D.C. Cal. 1896) 76 F. 838. In the latter case the segregation of the two services was held inadequate because the master could only show that he was paid a certain extra amount for acting as pilot. It is hard to see how a proper segregation can be made as a practical matter. Even while piloting the man is theoretically still in charge as master. Perhaps the skipper could change uniform and pipe himself aboard whenever the vessel is coming into close waters.

121 The Estrada Palma, (D.C. La. 1923) 8 F. (2d) 103, 1923 A.M.C. 1040 (Cuban law); The Fort Gaines, (D.C. Md. 1928) 24 F. (2d) 438, 1928 A.M.C. 459 (Norwegian law); The Pride of the Ocean, (D.C. N.Y. 1881) 7 F. 247 (British law).

122 The Fort Gaines, (D.C. Md. 1928) 24 F. (2d) 438, 1928 A.M.C. 459; The Olga, (D.C. N.Y. 1887) 32 F. 329.

123 The Pride of the Ocean, (D.C. N.Y. 1881) 7 F. 247.

124 The Olga, (D.C. N.Y. 1887) 32 F. 329.

125 Matter of Southern Pacific Golden Gate Ferries, Ltd., (D.C. Cal. 1942) 1942 A.M.C. 1581. The Holmes statement that words are flexible and the jurisprudential utterances of Cardozo and Jerome Frank are mustered in support of the result here. The conclusion is reached that if a bartender has a lien as a "seaman" the ferryboat captain ought to have one also.

126 Sheppard v. Taylor, 5 Pet. (30 U.S.) 675 (1831), and The Paragon, (D.C. Mass. 1836) Fed. Cas. No. 10,708.

through habit and repetition to the point where it is an irrefragable principle of distribution.[127]

One of the more contentious issues is the position which wages should occupy in respect to salvage. In the case of *The Elizabeth & Jane*[128] the ship had wrecked upon the shore and the crew had abandoned it totally. It was later salvaged. Judge Ware ruled that the seamen could not claim their wages, but he allowed the salvor's lien. The theory of the case is that the right to wages is connected with the safety of the ship, and as long as the crew stand by the wreck, even on shore, they have their lien. When they depart physically from the scene, it amounts to a legal abandonment of the venture.[129] This was not a determination of priority but of existence of the lien. The court said by way of dictum that if the seamen had a wage lien it would be superior to salvage. The holding of the case is in danger of being generalized, however, as a precedent for giving top priority to salvage. Some courts have read the English cases as requiring that result.[130] The notion is that salvage has more to do with preservation of the res than does the labor of seamen. It is usually phrased in terms of a preference over wages earned up till the point when the salvor arrives on the scene.[131] Other courts have accepted the doctrine of *The Elizabeth & Jane*[132] that only a complete abandonment and loss of the lien will affect the high priority of wages.[133] To hold wages prior in all cases, where there is a lien at all,[134] is certainly more consonant with the idea that class rank is the predominant method of alignment. To hold otherwise is to say that class rank is qualified by the contingencies of the voyage, that the seamen must gamble on the strength of the ship's equipment and the skill of the master,

127 The G. F. Brown, (D.C. Conn. 1885) 24 F. 399; Saylor v. Taylor, (4th Cir. 1896) 77 F. 476; Provost v. The Selkirk, (D.C. Ohio 1878) Fed. Cas. No. 11,455; The America, (D.C. N.Y. 1853) Fed. Cas. No. 288; The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770; The James W. Follette, (D.C. N.Y. 1934) 1934 A.M.C. 1525.

128 (D.C. Me. 1823) Fed. Cas. No. 8,321.

129 The court looked to the English, United States, and European sources of the time but found them all somewhat equivocal on this point.

130 The Athenian, (D.C. Mich. 1877) 3 F. 248; The Nika, (D.C. Wash. 1923) 287 F. 717, 1923 A.M.C. 409.

131 Ibid.

132 (D.C. Me. 1823) Fed. Cas. No. 8,321.

133 Provost v. The Selkirk, (D.C. Ohio 1878) Fed. Cas. No. 11,455, is frequently cited for salvage over wages, but actually it is there limited to cases of abandonment. The E. M. Davidson, (D.C. Wis. 1880) 1 F. 259, maintains the same distinction, holding wages over salvage.

134 The Lillie Laurie, (C.C. Tex. 1880) 50 F. 219; The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770 (dictum).

and that notions of strict time priority will be injected within the period rule which would otherwise be controlling. In any event, the talk of preferring those who most immediately preserve the res is of little moment, for without a crew the vessel would never leave port, and there would be no occasion for a salvage service. As a practical matter, the seamen have preserved the vessel for the salvor as much as he has done so for them.

Similar to the problem just discussed is that of wages and collision claims. In *Norwich Co. v. Wright*[135] the Supreme Court quoted the following language from an English text: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause."[136] The statement was gratuitous and unnecessary, but it gave rise to decisions which preferred tort to wages earned before the tort.[137] In *The F. H. Stanwood*[138] the court fastened upon this dictum and gave extended reasons for its application. First, the seamen share in the fault of the vessel by imputation.

> "The negligent navigation causing collision and consequent injury was the act of the crew, or of some one or more of them. The negligent act or omission is, in the law, charged upon the vessel so negligently navigated. She is treated as the offending thing. The fault of the crew is visited upon the agent by which the fault became effective, causing injury. It is an instance of imputed guilt, the sin of the crew being attributed to the innocent instrument. So, also, we think that, as to the injured vessel, the crew should share in the fault imputed to the offending vessel. As to the injured vessel, the offending thing and her crew are one. The crew participate in the navigation of the ship. She is the passive instrument of the active co-operation in effecting the injury. Ship and crew constitute the common enemy that has worked destruction. There may be but one directing mind. The others are, however, like the ship, his instruments in the perpetration of the wrong, and, as to the injured vessel, participants in the fault. They are joint tort-feasors. Which one, *inter se*, was directly and immediately responsible for the negligent act or negligent omission is of no moment to the vessel injured through their co-operation."[139]

135 13 Wall. (80 U.S.) 104 (1871).
136 Id. at 122.
137 The Maria & Elizabeth, (D.C. N.J. 1882) 12 F. 627.
138 (7th Cir. 1892) 49 F. 577.
139 Id. at 578.

The court said it would be contrary to natural justice to allow wage priority and thereby encourage negligence. Secondly, the court applied equitable marshalling principles, remitting the seamen to a personal action against a solvent owner, a remedy which was not available to the tort claimants.

The decision seems patently unjust. To erect a doctrine of imputed fault in such cases is to employ thought processes more fitting in medieval than in modern life. To call the crew joint tortfeasors as a matter of law is practically to make them conspirators. In truth most crew members have no choice whatever over the manner in which the vessel is navigated. They merely follow orders from the bridge. The probable effect of the imputed fault doctrine would be not to encourage safety in navigation as much as to stir up argument and disorder among the crew whenever the ship is in danger of collision. The resort of the men to a remedy in personam also leaves much to be desired. The owner might become insolvent after the proceeds had been distributed to the tort claimant. The seamen may have to bear the burden of further costs and proceedings. Nonetheless the *Stanwood* has been used as a basis for decision.[140]

The better method would be to adjudicate actual fault in each case and defer to the tort claim only those individuals who are in fact blameworthy. That is the method which has evolved in the courts of the New York District and elsewhere.[141] They have rejected the argument that the seamen have a solvent owner from whom to collect,[142] and each case has determined individual fault on its merits.[143] There are still other cases which use broad language to the effect that wages are always preferred to tort, but it is not clear whether the question of individual responsibility was raised in those instances.[144] The rational approach would be clearly to favor wages over tort except in those situations where specific crew members are found to be at fault.

140 The Nettie Woodward, (D.C. Mich. 1892) 50 F. 224.

141 The Pride of the Ocean, (D.C. N.Y. 1881) 7 F. 247.

142 The C. J. Saxe, (D.C. N.Y. 1906) 145 F. 749.

143 The Daisy Day, (D.C. Mich. 1889) 40 F. 538. In The Alexander Barkley, (D.C. N.Y. 1894) 83 F. 846, a default decree had been entered against the vessel on a claim of negligent towage. But in the distribution stage the pilot was not bound by the earlier determination, and succeeded in getting priority because the court found him not at fault. The personal fault idea was employed in The Owego, (D.C. Wash. 1923) 292 F. 505, 1923 A.M.C. 1057, a case of cargo damage, and this was followed in the James W. Follette, (D.C. N.Y. 1934) 1934 A.M.C. 1525, involving the claim for unseaworthiness, which is not to be imputed to the crew.

144 Provost v. The Selkirk, (D.C. Ohio 1878) Fed. Cas. No. 11,455; The America, (D.C. N.Y. 1853) Fed. Cas. No. 288; The Glen Iris, (D.C. N.Y. 1896) 78 F. 511.

There is not much question about the priority of wages over general contract claims for supplies, repairs, and other necessaries.[145] A large number of cases also hold that crew members who are innocent of statutory violations lose neither their lien nor priority where the vessel is forfeited for breach of federal laws.[146] The theory is that maritime liens are granted because they provide "wings and legs" to the vessel. The liens are seen as a benefit to the government which seeks forfeiture.[147] Against the claim for forfeiture, common law liens are almost universally held to fail, however.[148]

With seamen's liens there is sometimes a problem encountered when the vessel is libelled by another claimant. The seamen may continue to work about the ship's tasks, and file their own libel at a later date. Some courts say that no wage lien can be granted after the first libel,[149] but others allow it and give priority up to the time when the libel on behalf of the crew is filed.[150] The proper resolution would seem to lie in the nature of the first libel. If the vessel is arrested, no lien should be granted for work done thereafter, on the authority of *The Poznan*.[151] But if the vessel is still free it would seem reasonable to allow continued accrual and priority of the wage lien.

B. *Salvage and General Average.* Aside from the conflict with seamen's claims which has been discussed above, there is virtual unanimity today that salvage is at least superior to all other classes of liens.[152] In the past, there have been expressions to the

145 Saylor v. Taylor, (4th Cir. 1896) 77 F. 476; The Samuel Little, (2d Cir. 1915) 221 F. 308; The City of Athens, (D.C. Md. 1949) 83 F. Supp. 67, 1949 A.M.C. 572.

146 The St. Jago de Cuba, 9 Wheat. (22 U.S.) 409 (1824), is the basic case on the effect of forfeiture on maritime liens. This was a slave trading case. See also: The Thomaston, (D.C. Md. 1928) 26 F. (2d) 279, 1928 A.M.C. 845 (liquor smuggling); The J. R. Hardee, (D.C. Tex. 1952) 107 F. Supp. 379, 1952 A.M.C. 1124 (tax lien); The Winona, (D.C. S.C. 1927) 1928 A.M.C. 108 (illegal sale of the vessel); The Mary A., (D.C. N.Y. 1931) 52 F. (2d) 982, 1931 A.M.C. 1220 (liquor laws); The Florenzo, (D.C. N.Y. 1828) Fed. Cas. No. 4,886.

147 The St. Jago de Cuba, 9 Wheat. (22 U.S.) 409 (1824); The River Queen, (D.C. Va. 1925) 8 F. (2d) 426, 1926 A.M.C. 79.

148 The St. Jago de Cuba, 9 Wheat. (22 U.S.) 409 (1824); The Thomaston, (D.C. Md. 1928) 26 F. (2d) 279, 1928 A.M.C. 845; The Olympia, (D.C. Conn. 1932) 58 F. (2d) 638, 1932 A.M.C. 1161.

149 Bromfield Co. v. The Yacht Brown, Smith & Jones, (D.C. Mass. 1954) 117 F. Supp. 630, 1954 A.M.C. 350.

150 The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222; The Nisseqogue, (D.C. N.C. 1922) 280 F. 174.

151 274 U.S. 117, 47 S.Ct. 482, 1927 A.M.C. 723 (1927).

152 The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770; The Lillie Laurie, (C.C. Tex. 1880) 50 F. 219; Provost v. The Selkirk, (D.C. Ohio 1878) Fed. Cas. No. 11,455.

contrary[153] but these views seem to have had no permanent effect. No distinction has been made between pure salvage and contract salvage. The courts give priority to the one as readily as the other.[154] Usually when salvage occurs the vessel is unable to proceed very soon in the completion of its voyage, and in many cases the salvage constitutes the effective end of the voyage. Thus the salvor will frequently be the last one to render service, and he may also be the first one to assert his claim. It is even possible that the high rank of salvage arose as a rationalization from strict time priority. In point of time the salvor usually has "contributed most immediately" to the preservation of the res. If enough cases arise on facts of that sort, and the court is used to thinking in terms of strict time, it is not too large an inductive jump to say that salvage is always preferred. There is always the possibility that if a salvor were not prompt in enforcement he might not be so highly privileged as in the case where he has the property and benefit theories working in his favor.[155]

The lien for general average is sometimes said to be in the nature of salvage. In an early case[156] Justice Story pointed to the elements of sacrifice and saving of the venture. The lien arises under the general maritime law, independently of contract, and it is one for the benefit of those against whom it is claimed. In all these respects it is analogous. This view was expressly approved by the Supreme Court,[157] but the priorities question was left undecided. It has been viewed as occupying the same rank as salvage[158] and as falling just below it.[159] In one case it was ranked over bottomry on the theory that it preserved the security for the bondholders.[160] But that did not adjudicate its position regarding any other liens.

Some courts might classify the lien as falling more into the category of contracts of affreightment. In *The Andree*[161] the court said:

153 The America, (D.C. N.Y. 1853) Fed. Cas. No. 288.

154 The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770; The Athenian, (D.C. Mich. 1877) 3 F. 248, relying upon English cases.

155 See The Oddyseus III, (D.C. Fla. 1948) 77 F. Supp. 297, 1948 A.M.C. 608, where general average, called therein a form of salvage, was deferred because of time lapse.

156 United States v. Wilder, (C.C. Mass. 1838) Fed. Cas. No. 16,694.

157 Dupont deNemours & Co. v. Vance, 19 How. (60 U.S.) 162 (1856).

158 The Oddyseus III, (D.C. Fla. 1948) 77 F. Supp. 297, 1948 A.M.C. 608.

159 Provost v. The Selkirk, (D.C. Ohio 1878) Fed. Cas. No. 11,455, but this is only dictum.

160 The Dora, (D.C. La. 1887) 34 F. 343.

161 (D.C. N.Y. 1930) 41 F. (2d) 812.

> "A maritime adventure is a multipartite relationship which is comparable, in a sense, to a partnership between the interests involved. The law of general average, when the contingency arises on which it can properly be invoked, is the partnership law of the adventure, and concerns itself, not with the claims for damage to the adventure by outsiders, but wholly with the equitable adjustment, under its rules, of the rights and liabilities inter sese of the partners to the adventure."[162]

As a manifestation of the partnership law of the venture the lien could be given a somewhat lower rank than that suggested by Story's approach. Because of the paucity of cases on this point the priorities question is likely to remain in doubt for some time yet. On the whole the argument for a salvage position is quite compelling in view of the traditional policies which are imbedded in the law of maritime liens. While there is not the need to encourage the sacrifice, as there is in the case of salvage, there is an involuntary character to the loss, and it is beneficial to the vessel, unlike tort.

C. *Torts and Quasi-Torts.* The situation of tort liens is unsettled both as to the type of claim that falls into the class and as to what priority should be given in respect to other classes. We have already seen that the personal injuries of seamen may or may not be classified as tort for some purposes. We have also seen that some courts have granted priority to tort over previously earned wages. One of the most important remaining issues is the comparative rank of tort with liens arising out of contracts for necessaries such as repairs and supplies.

1. *Collision.* The common tort lien encountered in priorities cases is that for collision. In many ways it is the typical maritime tort, and it is this lien which is ordinarily referred to when the courts speak of the class rank of "tort." In the past some courts have expounded a generalized doctrine that liens arising ex delicto are superior to those arising ex contractu.[163] Perhaps by "ex contractu" the courts really mean contracts for necessaries. At any rate it is apparent that this is an unworkably broad statement, for wages and some salvage liens may be founded on contract, but they

[162] Id. at 816.

[163] The Pride of the Ocean, (D.C. N.Y. 1880) 3 F. 162; The M. Vandercook, (D.C. N.J. 1885) 24 F. 472; The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770 (dictum).

have a clear preference over tort.[164] Even on the proposition that collision liens should rank repairs and supplies there is hearty disagreement. For some time there was an opposite school of thought which believed all contract liens to be superior to tort.[165] The reasoning was that supplies, repairs, bottomry, and contracts of affreightment were an aid to maritime commerce in general and a furtherance of the venture in particular. It was felt that damage liens were really in the nature of "perils of the sea"—though that seems a misuse of the term—and these perils are usually secured by a policy of marine insurance. If not so secured they should be. To subordinate contract liens would be to make the contract lienors reinsurers pro tanto of the underwriters of the ship.[166] To put supplymen at the mercy of later torts would, it was thought, discourage credit, which constitutes the "wings and legs" of the vessel.[167] This was inextricably involved with the theory that benefit to the vessel was the sole test of lien priority, and that the property theory was without foundation.[168]

As a doctrine and as a basis for decision these views were largely vitiated by the concrete result reached by the Supreme Court in *The John G. Stevens*,[169] which held that a lien for tort, whether arising from collision or negligent towage, is to be preferred to supply claims arising before the tort. The Court definitely reinstated the property theory of priority, though it left the benefit theory undisturbed. The opinion assiduously avoided reference to time periods as such, and the Court expressly limited its decision to the precise facts of the case. It can be interpreted as an application of strict time priority between these two competing classes of liens. The case definitely did not hold that torts rank contracts in general.[170] The binding and authoritative rule of the *Stevens*[171] is that whenever a tort occurs it swallows up all pre-existing liens

164 Other courts have been strongly critical of such overstatement. In The Penobscot, (D.C. Mass. 1940) 1940 A.M.C. 1217, the belief is expressed that the dictum in The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770, is based upon a misconception of the John G. Stevens, 170 U.S. 113, 18 S.Ct. 544 (1898).

165 The Young America, (D.C. N.Y. 1887) 30 F. 789; The Amos D. Carver, (D.C. N.Y. 1888) 35 F. 665; The Proceeds of The Gratitude, (D.C. N.Y. 1890) 42 F. 299. All three of these opinions are by Judge Addison Brown.

166 The Amos D. Carver, (D.C. N.Y. 1888) 35 F. 665.

167 The Young America, (D.C. N.Y. 1887) 30 F. 789.

168 The rationale of The Frank G. Fowler, (C.C. N.Y. 1883) 17 F. 653, and The J. W. Tucker, (D.C. N.Y. 1884) 20 F. 129.

169 170 U.S. 113, 18 S.Ct. 544 (1898).

170 The William Leishear, (D.C. Md. 1927) 21 F.(2d) 862, 1927 A.M.C. 1770, and other cases have taken that to be the policy implicit in the John G. Stevens, however.

171 170 U.S. 113, 18 S.Ct. 544 (1898).

based upon repairs, supplies, and other necessaries.[172] There is a tendency to interpret it as requiring a strict time inverse priority among successive torts,[173] but in view of the established period rules that would seem to be a too literal application of the property theory. The opinion in the *Stevens*[174] is careful to avoid the problem of torts among themselves, and if "time within each class" is the predominant mode of priority the tort liens ought to be adjusted inter se by some period rule.

The question of all torts against all contracts also was left untouched by the Supreme Court. As a result, those courts which approve of the benefit theory exclusively, and who feel that the contract lienor should not take the risk of collision, have been able to say that contract liens arising subsequent to collision are to be preferred.[175] What this amounts to is only a grudging acceptance of the *Stevens*.[176] It means that those tribunals regard the Supreme Court's determination as a mere intrusion upon the benefit theory, which is conceived to be the basic rule. It means that they are unable to accept the clear language in which the property theory was revitalized, if indeed there was ever a question of its liveliness as an instrument of admiralty jurisprudence. To continue along such a course also does violence to the system of time priorities. If the time periods are to be meaningful as a technique for securing just results they ought to be applied in a uniform manner. Once it is admitted that the periods will be applied, the problem of tort versus contract is foreclosed. The *Stevens*[177] says, without regard to time periods, that if a tort occurs it shall be preferred to previous contracts. Thus, if the torts occurring within any voyage or other time period are to be co-equal, it follows that they must be given priority together irrespective of whether any contract claims have arisen between the various torts. It would be inharmonious to say that the resolution of the tort against contract problem should depend upon the mere chance that there are several torts or only one.

172 And so applied in The Baker Brothers, (D.C. N.Y. 1928) 28 F. (2d) 920, 1928 A.M.C. 1600, and The Fanny F. Hickey, (D.C. Mass. 1931) 1931 A.M.C. 794.

173 The America, (D.C. N.J. 1909) 168 F. 424.

174 170 U.S. 113, 18 S.Ct. 544 (1898).

175 The Baker Brothers, (D.C. N.Y. 1928) 28 F. (2d) 920, 1928 A.M.C. 1600; The Penobscot, (D.C. Mass. 1940) 1940 A.M.C. 1217; The Glen Island, (D.C. N.Y. 1912) 194 F. 744 (at least if the tort claimant had an opportunity to enforce); The America, (D.C. N.J. 1909) 168 F. 242.

176 170 U.S. 113, 18 S.Ct. 544 (1898).

177 Ibid.

Not only does the theory of time priorities militate in favor of giving a preference to tort, but there are substantial policy reasons as well. The supplier, repairman, or bottomry holder has an option to take the risk or not, just as he chooses. But the claimant in damage has no option at all.[178] There is the further argument that reparation for harm done by breach of the rules of the road is at least as great an aid to commerce as helping the ship chandler. The fact that insurance could be procured should not change the law of maritime torts any more than it does the law of automobile negligence.

2. *Negligent towage.* The other main point which was necessary to the decision of the *Stevens*[179] was that the claim arising out of negligent towage sounds in tort. It had been held previously by some courts, in adherence to the benefit theory, that damages suffered by a tow due to the tug's negligence were not a tort[180] or else were sui generis, being neither a contract claim for necessaries nor a true tort.[181] It had been pointed out by others that "this is true, undoubtedly, but it is also essential to commerce that the ship when equipped should find employment. Giving it legs and wings to speed it on its way is profitless, if it goes empty."[182] Despite the ruling in the *Stevens*[183] the negligent towage claim has been handled variously, in some cases ranking equally with contracts,[184] in others being placed even below that.[185]

3. *Contracts of affreightment.* A recurrent problem, and one which is made doubly important in the light of the Ship Mortgage Act of 1920,[186] is the classification of claims arising out of contracts of affreightment. In the *Stevens*[187] it was contended that the negligent towage claim was one for a mere breach of contract. In holding that the action sounded in tort the court analogized it to cases involving common carriers who neglect to carry and deliver persons or property in safety. In the common carrier cases, said the court,

178 This was pointed out by Judge Benedict in The Pride of the Ocean, (D.C. N.Y. 1880) 3 F. 162, but it was not accepted in certain later decisions in the New York district.

179 170 U.S. 113, 18 S.Ct. 544 (1898).

180 The Samuel J. Christian, (D.C. N.Y. 1883) 16 F. 796.

181 The Young America, (D.C. N.Y. 1887) 30 F. 789.

182 The Daisy Day, (D.C. Mich. 1889) 40 F. 538 at 541. See also the M. Vandercook, (D.C. N.J. 1885) 24 F. 472, which likewise holds negligent towage to be a tort.

183 170 U.S. 113, 18 S.Ct. 544 (1898).

184 The Interstate No. 1, (2d Cir. 1923) 290 F. 926, 1923 A.M.C. 1118.

185 The John J. Frietus, (D.C. N.Y. 1918) 252 F. 876.

186 41 Stat. L. 1000, 46 U.S.C. (1952) §911.

187 170 U.S. 113, 18 S.Ct. 544 (1898).

the action was for breach of a duty imposed by law, independently of any contract or consideration. If the contract of towage were gratuitous the duty of due care would still be imposed. This broad principle of tort liability arising from the duties of a carrier has been argued in a number of cases in an attempt either to get a preference over contract claims or to avoid being subjected to a preferred ship mortgage. The courts tend to analyze the particular transaction or event involved, however, in order to determine its proper category. The cases are few, but they are interesting because they indicate the multifarious distinctions which can be drawn.

In *The St. Paul*[188] the vessel was seized by the marshal after it was fully loaded and about to sail. Subsequently a fire broke out, damaging part of the goods. The shippers were forced to unload the remaining cargo and thus incur further expenses. It later turned out that the vessel had been unseaworthy all along, for it was never licensed for the kind of voyage it had undertaken to perform. As against the contentions of the shippers, the court held their claims to be in contract and not in tort, on the ground that the actions were for breach of an implied warranty of seaworthiness, a contractual type of liability. But even as contract claimants these lienors were placed junior to repair and supplymen. The court said that the shippers did not benefit the vessel, and beneficial contracts should be put in a higher class than ordinary contracts. From the standpoint of policy the court remarked that supplies would be hard to obtain if shippers were allowed to eat up the proceeds in this manner. The shipper's liens for unearned freight were put on the same plane as those of the supplymen, however, because the prepayment helped put the vessel in funds for the voyage.

In *The Henry W. Breyer*[189] the failure to perform the contract of private carriage was held to be in the nature of a tort, analogizing from the common carrier cases. The tort consisted of accepting goods or freight money with knowledge of possible inability to perform. This was not a problem of getting priority over a supplyman but over a preferred ship mortgagee. Perhaps the court was worried about discouraging shippers, just as the court in *The St. Paul*[190] was worried about supplymen.

188 (D.C. N.Y. 1921) 277 F. 99.
189 (D.C. Md. 1927) 17 F. (2d) 423, 1927 A.M.C. 290.
190 (D.C. N.Y. 1921) 277 F. 99.

Quite close on its facts is *The Penobscot.*[191] The vessel failed to transport the cargo on a contract of private carriage, and there was a preferred ship mortgage in the picture. The freight had been prepaid. The court said that if this were a failure to transport by a common carrier it might be a tort under the dictum of the *Stevens.*[192] But this was a private carrier and the only source of liability was the contract. The *Breyer* case[193] was distinguished on the ground that there the basis of tort was the deceit by the carrier in taking the goods with knowledge of his inability to perform. Here there was a mere failure to carry. On the issue of the prepaid freight the court interpreted *Krauss & Co. v. Dimon S. S. Co.*[194] as saying impliedly that overpayment of freight is a contract lien, although it was admitted that the point was not completely clear. Having arrayed these claims in the contract category, the court held them to be junior to repairs and supplies, following the non-beneficial theory of *The St. Paul.*[195]

The difficulty encountered with these affreightment contracts is likely to remain for some time yet. We have just seen that this lien is susceptible to many distinctions and points of view. If anything it illustrates the importance of fundamental theories in the field of lien priorities. It shows that a basic approach such as the benefit theory has remarkable viability despite its being disfavored by the Supreme Court. Such a basic approach has the flexibility to be applied to a number of novel situations as they arise. Beginning as a reason for granting a supplyman's lien, it has evolved into a negative doctrine requiring the subordination of other liens. As a practical matter one cannot but wonder whether there can be such a thing as a non-beneficial contract lien. If a contract is not a benefit to the vessel there ought really to be no lien at all.

D. *Contracts for Necessaries.* Most of the problems concerning the comparative class rank of the lien for repairs, supplies, and other necessaries have been discussed above. We have seen that some courts divide contracts into two groups, depending on whether they are "beneficial" or not, giving the "non-beneficial" ones a lower rank. But most courts put the various contract liens upon a parity, when they do not have a higher rank. We saw also

191 (D.C. Mass. 1940) 1940 A.M.C. 1217.
192 170 U.S. 113, 18 S.Ct. 544 (1898).
193 (D.C. Md. 1927) 17 F. (2d) 423, 1927 A.M.C. 290.
194 290 U.S. 117, 54 S.Ct. 105 (1933).
195 (D.C. N.Y. 1921) 277 F. 99.

that when the liens of watchmen, stevedores, and pilots do not fall into the class of wages they are usually assigned to the necessaries category. The problem remaining is largely one of classification.

There is general assent that repairs and supplies are contract liens for necessaries. Towage (the lien for service *by* a tug) is clearly of the same class.[196] Most of the dispute over wharfage concerns its existence as a lien[197] rather than its class rank. Where it is granted it occupies the same position as other necessaries.[198] Like the watchman's lien it may obtain a top ranking if it occurs by authorization of the court while the vessel is in *custodia legis*.[199]

The position of bottomry has never been determined adequately, but it is largely unimportant in view of its rapid obsolescence as a maritime security device. It was mainly used in England to afford a lien to supplymen, who at one time had no lien as such.[200] What American cases there are indicate only that it will be subjugated to later liens for collision[201] or for supplies.[202] One judge thought it should be in a class with necessaries if the bond was executed by the master, but in a lower class if executed by the owner.[203]

There is good authority for allowing a lien for such items as consul fees, customhouse dues, hospitalization of crew, and survey of the vessel's condition, giving them the same rank as necessaries.[204] The lien for insurance premiums, where it is given at all,[205] seems to occupy a place below necessaries.[206]

196 Porter v. The Sea Witch, (C.C. La. 1877) Fed. Cas. No. 11,289; The Athenian, (D.C. Mich. 1877) 3 F. 248.

197 Dealing with the difficulty of acquiring a lien for wharfage: The Advance, (D.C. N.Y. 1894) 60 F. 766; The Shrewsbury, (D.C. Ohio 1895) 69 F. 1017; The Murphy Tugs, (D.C. Mich. 1886) 28 F. 429; The C. Vanderbilt, (D.C. N.Y. 1898) 86 F. 785; The General Lincoln, (D.C. Md. 1928) 24 F. (2d) 441.

198 The Estrada Palma, (D.C. La. 1923) 8 F. (2d) 103, 1923 A.M.C. 1040; The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770; The Advance, (D.C. N.Y. 1894) 60 F. 766; The Shrewsbury, (D.C. Ohio 1895) 69 F. 1017; The Murphy Tugs, (D.C. Mich. 1886) 28 F. 429; The C. Vanderbilt, (D.C. N.Y. 1898) 86 F. 785; The General Lincoln, (D.C. Md. 1928) 24 F. (2d) 441.

199 The Poznan, 274 U.S. 117, 47 S.Ct. 482, 1927 A.M.C. 723 (1927); The Herbert L. Rawding, (D.C. S.C. 1944) 55 F. Supp. 156, 1944 A.M.C. 222; The J. R. Hardee, (D.C. Tex. 1952) 107 F. Supp. 379, 1952 A.M.C. 1124.

200 PRICE, THE LAW OF MARITIME LIENS, c. 3 (1940).

201 The Pride of the Ocean, (D.C. N.Y. 1880) 3 F. 162.

202 The Aina, (D.C. N.Y. 1889) 40 F. 269; The Dora, (D.C. La. 1888) 34 F. 348, giving advances for wages over bottomry, and The Dora, (D.C. La. 1887) 34 F. 343, giving general average over bottomry.

203 The America, (D.C. N.Y. 1853) Fed. Cas. No. 288.

204 The Emily Souder, 17 Wall. (84 U.S.) 666 (1873); The Aina, (D.C. N.Y. 1889) 40 F. 269.

205 Not given in The City of Camden, (D.C. Ala. 1906) 147 F. 847.

206 The Daisy Day, (D.C. Mich. 1889) 40 F. 538, puts it below supplies. The Dolphin,

E. *The Preferred Ship Mortgage.* As a creature of statute,[207] the preferred ship mortgage is granted a lien and a certain priority by the same express legislation. The attempt will be made here to deal only with the priorities aspect of the act.[208] The relevant statutory provisions are:

> ". . . the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.
>
> ". . . the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court."[209]

What the act does in effect is to put the mortgage junior to contracts for necessaries which are earlier in point of strict time to the filing date of the mortgage, but senior to the contracts for necessaries which come after. It leaves many classes of liens undisturbed and unimpaired.

The problem which arises is that the mortgage itself operates as it would at common law, but the statute does not expressly change the priorities of maritime liens among themselves. Thus if there are supply liens before and after the mortgage, the one coming after the mortgage is junior to it under the statute, yet by the maritime law it is senior to the supply lien coming before the mortgage, and that in turn is superior to the mortgage. This situation is interpreted by some as a problem in "circular priorities," the solutions to which are several.[210] The same problem would be present if the earlier claim were barred by laches in relation to the

(D.C. Mich. 1876) Fed. Cas. No. 3,973, grants it and says in dictum that it would be below supplies. But see The Guiding Star, (C.C. Ohio 1883) 18 F. 263, which grants it but seems to give it a supplyman's priority.

207 Ship Mortgage Act, 1920, 41 Stat. L. 1000, 46 U.S.C. (1952) §911.

208 On the act generally, see ROBINSON, ADMIRALTY §§63-66 (1939).

209 41 Stat. L. 1004 (1920), 46 U.S.C. (1952) §953. By a 1954 amendment to §951, mortgages and hypothecations of foreign vessels are recognized as conferring a maritime lien under certain conditions, but such a lien is made expressly subordinate to "maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States." 68 Stat. L. 323, 46 U.S.C. (Supp. II, 1955) §951.

210 Kellogg, "Priorities Puzzle under Ship Mortgage Act," 2 WASH. L. REV. 117 (1927), proposes that each should get something from the fund. A recent note, "Priorities of

later supplyman, but were not a stale claim as to the mortgagee. And in those courts which adhere rigidly to the benefit theory the later supply lien might be superior to an earlier tort claim, but for the statute.

So far the response of the courts to this problem has been fairly uniform. In *The Zizania*[211] there were towage liens accruing before the mortgage and a number of contract liens after. These later lienors contended that under the calendar year rule they should be placed over the earlier towage claims, and that the statute did not change the priorities of supply liens *inter se*. The court interpreted the mortgage act as requiring the opposite result: it carried the common law system of priorities all the way through. Although Congress may not have considered this effect, the court felt that the language of the statute obliterates the maritime law priorities within the contract class whenever there is a preferred ship mortgage in the case. The same result was reached in another case presenting a similar factual pattern, in which the court said that supplymen are put on notice by the statute that they may be subordinated in this manner, and for that reason there is no injustice in this result.[212]

In another case of this kind the later lienors contended that they ought at least to share pro rata in the amount allocated to the earlier supply claims, as this would certainly not affect the amount received by the preferred mortgagee.[213] Once again this argument was rejected on the grounds that it violated the statutory intent. There is no indication that the above cases will be accepted uncritically. One court has expressed its dissatisfaction with *The*

Maritime Liens," 69 HARV. L. REV. 525 (1956), takes up the problem in the light of National Shawmut Bank v. The Winthrop, (D.C. Mass. 1955) 134 F. Supp. 370. The notewriter feels that the more equitable result would be to allow the postmortgage supply lienor to satisfy himself to the extent that the total fund exceeds the mortgagee's claim, such amount to be satisfied out of the proceeds allotted to the antemortgage supply lienor. This view would seem to ignore the purpose of the period rules, by which the postmortgage supply lienor is clearly in a superior position. The priority problem exists only between the two supply lienors, for under the statute the proceeds payable to the mortgagee are fixed with exactitude. The amount recoverable by the postmortgage supplyman, when by the maritime law he has priority, should simply depend upon how much of the fund is, by the statute, allotted to the antemortgage supply lienor.

211 (D.C. Mass. 1934) 1934 A.M.C. 770.

212 The John Cadwalader, (D.C. Pa. 1937) 1937 A.M.C. 395. See also National Shawmut Bank v. The Winthrop, (D.C. Mass. 1955) 134 F. Supp. 370, in which the court refused to apply the calendar year rule in favor of postmortgage lienors.

213 University Nat. Bank v. The Home, (D.C. Wash. 1946) 65 F. Supp. 94, 1946 A.M.C. 585.

Zizania,[214] calling it a "surprising result."[215] It certainly seems legitimate to argue that the statute fixed only the relationship between the mortgage and contracts for necessaries, not the relationship of contract liens among themselves. The workable alternative to the above cases would be to allow the later supplymen to satisfy themselves so far as they can out of the proceeds allotted to the supply liens arising before the mortgage.

F. *Miscellaneous Rankings.* There is authority for giving a high rank to "costs," placing them above seamen's wages. Just what this means is not completely clear. In some cases the costs are said simply to be first in rank,[216] while in others it is the costs of the first libellant which are preferred.[217] The most coherent group of cases are those saying that the costs should be allowed with the claims.[218] Even here a differentiation can be made in either allowing the cost ahead of the lien to which it attaches[219] or merely "with" each claim. The expenses incurred preserving the vessel while it is under arrest will be allowed a first preference as costs, even though no lien can arise in those circumstances.[220]

It is settled that one who advances money to be used to pay off maritime liens acquires a lien for such advances.[221] The lien is subrogated to the claims paid and is entitled to the same priority on a proportionate basis.[222]

A non-maritime claim, that is, any claim which does not import a maritime lien, occupies the lowest order of rank.[223]

214 (D.C. Mass. 1934) 1934 A.M.C. 770.

215 The Penobscot, (D.C. Mass. 1940) 1940 A.M.C. 1217 decided in the same district.

216 The Esteban de Antunano, (C.C. La. 1887) 31 F. 920.

217 Goble v. The Delos De Wolf, (D.C. Ohio 1880) 3 F. 236.

218 The Daisy Day, (D.C. Mich. 1889) 40 F. 538; The Nisseqogue, (D.C. N.C. 1922) 280 F. 174.

219 The John Gully, (D.C. N.Y. 1927) 20 F. (2d) 211, 1927 A.M.C. 1175.

220 The Poznan, 274 U.S. 117, 47 S.Ct. 482, 1927 A.M.C. 723 (1927).

221 The Emily Souder, 17 Wall. (84 U.S.) 666 (1873).

222 The Bethulia, (D.C. Mass. 1912) 200 F. 876; The Thomas Sherlock, (D.C. Ohio 1884) 22 F. 253; The Aina, (D.C. N.Y. 1889) 40 F. 269; The Dora, (D.C. La. 1888) 34 F. 348; The Nisseqogue, (D.C. N.C. 1922) 280 F. 174; The Commack, (D.C. Fla. 1925) 8 F. (2d) 151; The City of Camden, (D.C. Ala. 1906) 147 F. 847; The Minnie & Emma, (D.C. Md. 1927) 21 F. (2d) 991.

223 The Family Souder, 17 Wall. (84 U.S.) 666 (1873); The J. E. Rumbell, 148 U.S. 1, 13 S.Ct. 498 (1893); The Athenian, (D.C. Mich. 1877) 3 F. 248; The Guiding Star, (C.C. Ohio 1883) 18 F. 263; The Little Charley, (D.C. Md. 1929) 31 F. (2d) 120, 1929 A.M.C. 398.

III. CLASS VERSUS TIME

A much overlooked problem is the relationship between priorities measured by time formulae and priorities determined by class rank. Obviously one scheme must give way to the other. They are co-existent but not co-equal. Surprisingly few cases have dealt with the question specifically. Either the system has been assumed to operate in a definite fashion, or the question was unnecessary to the decision of the case. The alternatives are clear. If class rank is to be predominant, the liens should be arrayed into classes, and time priority would then operate within each class, the later liens taking precedence over the earlier ones. As between the various classes time would not be a factor. An earlier wage claim would still have priority over a later supplyman's claim. On the other hand, if time is to be the governing consideration, the liens should be arrayed primarily into time periods, and class rank would then operate only within each period. The later supplyman's claim would cut off the earlier wage claim. The resolution of this problem would seem to rest upon the strength of the policies which lie behind the time and class concepts of priority. It is safe to say that most courts are committed to class over time, but a few have taken an opposite position, and the practical effect in certain other cases has been to favor time priority while paying lip service to the majority view. The formula "time, within each class" is repeated almost automatically. In many cases there is no express recognition of the problem, but the distribution is according to class rank first, the assumption being that the priorities operate in this manner. An additional argument for class rank over time can be derived by implication from the Ship Mortgage Act of 1920,[224] which labels certain liens as preferred over the ship mortgage, while leaving others on a lower plane. It can only be taken as an indication that the draftsmen believed that a class structure was the settled primary method of aligning the liens in distribution.

As a practical guide the courts have relied heavily upon *The City of Tawas*[225] which is unequivocal in its language. It influenced the course of decision in the Second Circuit[226] as well as in

224 46 Stat. L. 1000, 46 U.S.C. (1952) §911.

225 (D.C. Mich. 1880) 3 F. 170 at 173.

226 The Towanda, (D.C. N.Y. 1914) 215 F. 232; The Samuel Little, (2d Cir. 1915) 221 F. 308 at 317, which qualified the language in The Proceeds of The Gratitude, (D.C. N.Y. 1890) 42 F. 299.

other districts.[227] It is not too much to say that this is the generally accepted rule, applied in the ordinary case without hesitation. In many cases the issue is not present, of course, because all or most of the liens are within the same time period.

The principle of class over time has not been an avowed or clear one throughout the history of American admiralty, however. In *The Paragon*[228] Judge Ware spoke approvingly of the civil law rule that wage claims retain their priority only for the most recent voyage.[229] In *The Proceeds of The Gratitude,*[230] the case most frequently cited in support of the voyage and 40-day rules, the court said: "The general maritime law adjusts all liens by the voyage. . . . By the general rule . . . the priority of liens continues only till the next voyage. The liens connected with every new voyage start with a priority over all former ones after the ship sails, if there has previously been opportunity to enforce them."[231] Taken literally that language would certainly require a time over class result. It was not subsequently interpreted that way, however.

The confusing thing is that courts persistently quote the language of *The Proceeds of the Gratitude,*[232] but apply it within each class, seemingly unconscious of the ambiguity involved. One recent case holds concretely that time is over class, doing so without hesitation.[233] Other than this there is a paucity of authority for holding time superior to class. Why this should be so is not clear from a philosophical standpoint. Time is really the more general category. Effectually speaking, it is a rule of reason concerning fairness in the enforcement of liens. Seemingly it ought to cut across all types of claims, as does the rule of laches, or as do the ordinary statutes of limitations. To the contrary, the courts evidently feel that the "inherent merit" which is the basis of class rank is of far greater importance than the individual conduct of the lienor himself in making an effort to enforce. It is possible that the preference

227 For example, The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862, 1927 A.M.C. 1770; The General Lincoln, (D.C. Md. 1928) 24 F. (2d) 441. ROBINSON, ADMIRALTY §61 (1939) assumes the rule to be as stated in The William Leishear and The City of Tawas, (D.C. Mich. 1880) 3 F. 170, and repeats the class over time formula.

228 (D.C. Mass. 1836) Fed. Cas. No. 10,708.

229 Although this was only dictum it is certainly evidence that at an early date there was doubt on the matter. See also the equivocal language in The Fanny, (D.C. Mass. 1876) Fed. Cas. No. 4,638, and The Melita, (D.C. Md. 1880) Fed. Cas. No. 6,218.

230 (D.C. N.Y. 1890) 42 F. 299.

231 Id. at 300.

232 The Samuel Little, (2d Cir. 1915) 221 F. 308, "clarified" it, resolving a dispute over its meaning.

233 The Oddyseus III, (D.C. Fla. 1948) 77 F. Supp. 297, 1948 A.M.C. 608.

for class arose in cases involving wage claims from an earlier voyage.[234] Courts have been and still are reluctant to see the seamen unsatisfied. Perhaps it was only a short analogical step from granting priority to all seamen's wage liens to granting priority to all claims in each class over the other.

We have already seen that some courts in effect use a mixed system of time and class when they declare a "waiver of priority" to have taken place by a mere delay in enforcement. It illustrates a dissatisfaction with an automatic rule of class over time. Of the same order are those cases, discussed above, which hold that class priority will give way when there is a certain sequence of events, such as wages earned followed by a tort or a salvage service. Some courts are prone to say that the tort or salvage has precedence over the wages earned previously. This means really that certain notions of strict time priority are allowed to operate despite a general adherence to a class system of ranking. It is submitted that a mixed system of class and time is highly unpredictable, if not anomalous, even though beneficient results may flow in the particular case. Predictability is difficult in two dimensions, but almost impossible in three.

IV. CONCLUSION

Those who have written on the subject of priorities recognize the need for a determinate system. Some writers have advocated a full-blown property theory, by which all liens would take precedence on a basis of strict time.[235] Priority would operate inversely according to the dates when the liens accrue. Even here these writers would make exceptions in the case of seamen's wages on the ground that they are not really "secret" liens, for everyone knows that seamen are unpaid until the end of the voyage. And certain of the time period rules would be recognized because they are said to be merely an "arbitrary" method for determining the date of accrual.[236] Although these views have the merit of simplicity, they also seem to overlook certain vital considerations. For one

234 Judge Hall in The America, (D.C. N.Y. 1853) Fed. Cas. No. 288, thought seamen should be preferred for only one voyage, but that all other liens went by strict time.

235 Beach, "Relative Priority of Maritime Liens," 33 YALE L.J. 841 (1924), and Hebert, "The Origin and Nature of Maritime Liens," 4 TULANE L. REV. 381 (1930). Both of these writers argue that The Bold Buccleugh, 7 Moore, P.C. 267 (1850-51), the first case to see all liens as a proprietary interest, was implicitly recognized and adopted as the fundamental doctrine in The John G. Stevens, 170 U.S. 113, 18 S.Ct. 544 (1898). But such an argument would seem to overlook other important American cases.

236 Ibid.: Beach would allow the season and harbor rules, while Hebert apparently would recognize the various period rules.

thing, the property concept has no objective validity other than its usefulness as an intellectual shorthand expression for explaining results. It is not an inexorable legal command, and that is demonstrated by the vast number of decisions which are based upon other notions. Likewise these writers seem to misconceive the true nature of the time period rules. Those rules do not exist merely to simplify the court's task in determining what liens are virtually contemporaneous, and thus to be taken as arising together because the time difference between them is only de minimis. Rather, they are rules of reason, resting upon basic notions of fairness. The only thing arbitrary about them is that a certain time length is taken as the criterion.

Another writer has suggested more flexibility in the application of time period rules, and indicates dissatisfaction with theories of ownership.[237] The courts themselves exhibit a tendency to follow earlier cases on points in controversy, often doing so with little discussion of the principles and policies invoked. That must stem largely from convenience, because it is not very often that a priorities case will involve many binding precedents. We have seen that the courts continue to give effect to several principles of priority and not to a single one. If a theory of priorities is to have practical utility it ought to be as descriptive and explanatory as possible. It ought to account for more than one line of cases, and should do more than propound a single point of view. The following proposals are submitted only as one possible approach.

The class ranks are so well established that they can be said to be definite rules of law. In the matter of comparative ranking, we have seen that many unresolved issues still exist today. In resolving those issues a court probably is justified in adopting the priority which it deems best, for in the main it must decide that issue on policy grounds. It is arguable what the best policy is, but choice lies with the court. Once a comparative ranking is adopted, however, it should not be subject to broad exceptions or strict time notions because that defeats the whole purpose of having classes of liens. One exception might be made in the matter of seamen's wages when there is personal fault in the picture. In the matter of time priority it should be recognized that the basic policy is that of affording lienors a reasonable opportunity to enforce. There is no reason why strict time should have to operate at all. To justify cutting off lienors before they have had a chance to enforce requires

237 Willard, "Priorities Among Maritime Liens," 16 CORN. L.Q. 522 (1931).

a resort to almost mystical doctrines of "ownership." The periods should also be used as a measure of diligence. This would mean that class rank would give way to time, but it seems no more than a fair application of the rules, entirely consistent with the purposes for which they are erected. Under existing practice it is unlikely that many courts would use time as the predominant method of grouping the liens. Such a radical departure would, however, be a rationally defensible position to take.