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PRIORITIES AMONG MARITIME LIENS

EDWARD L. WILLARD*

At a very early date in the development of the Admiralty law certain special rights were recognized against the ship itself. These rights were the forbears of our modern maritime liens.¹ At least by the 17th century it was recognized that certain of these liens contained more merit than others,² particularly in cases where the fund derived from the sale of the ship was insufficient to fulfill all the demands of the lien claimants. The purpose of this article is to examine the history and present status of the law which provides for the preference of certain maritime lien claims over others.³

I. THE AMERICAN LAW OF PRIORITIES

Of primary importance in this discussion is the status of the law in the American courts. Historically, priorities begin with the famous case of *Dall v. The Betsey*,⁴ tried in 1785, which is largely interesting because of the eminence of counsel rather than its weight as precedent. Of the Vice-Admiralty courts of Colonial days, we have little or no record. Such records as there are would seem to show a *pro rata* rather than a preferred division of the proceeds of the sale

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¹It is not the purpose of this article to dwell at any length on the theory of maritime liens as such. On the point see Griffin, *The Federal Maritime Lien Act* (1923) 37 HARV. L. REV. 15.

²MARINE ORDINANCE, LOUIS XIV, 1681; Title 4, XIX. The ship and the freight shall be specially liable for seamen's wages. Title 5, X, provides that creditors for money formerly due for such things (bottomry bonds) shall not come in competition with those who have actually lent for the last voyage.

³This topic has not been a prolific source of academic thought, although a prolific source of cases before the admiralty bar. The best article is Beach, *Relative Priority of Maritime Liens* (1924) 33 YALE L. J. 841. See also Herbert, *The Origin and Nature of Maritime Liens* (1930) 4 TULANE L. REV. 381; (1909) 23 HARV. L. REV. 60; *Ibid.* 144.

⁴Reported in HOUGH, *CASES IN VICE-ADMIRALTY AND ADMIRALTY* (1925) 243. The court allowed seamen's wages though earned on earlier voyages to be preferred over demand for necessaries furnished for a later voyage. The case was tried before Hon. Lewis Graham, in the Court of Admiralty of the State of New York, in 1785. Alexander Hamilton was of counsel for Dall, and Brockholst (later Associate Justice) Livingstone appeared for certain other claimants. The case is probably the earliest in America in which priorities are allowed.

of a ship when the total sum was insufficient to satisfy all the lien claimants.⁵

Coming, then, to a consideration of the present status of the law of priorities relative to maritime liens, it will be found that the cases are easily divisible into two general groups, i.e., classifications (1) in point of time of accrual of the lien, (2) according to the general class of which the lien is a part.

a. *Priorities of Liens According to Time of their Accrual*

From earliest times it has been recognized that some liens of a later date should be paid prior to those of an earlier date.⁶ This is in direct contravention of one of the ordinary principles of the common law. Presumably the present result was an outgrowth of the application of the civil law to this situation.⁷ A careful reading of all the cases shows that much of the difficulty and uncertainty of the law on this topic is due to an attempt to apply a rigid civil law to situations arising under the common law. From an early date the civil law provided that all bottomry bonds written on the last voyage should rank those of previous voyages.⁸ Today it is accepted as a general proposition that claims of the same rank have priority in inverse order of their accrual,⁹ subject to certain limitations later to be mentioned. Two reasons have been advanced for the establishment of such a classification. First, assuming that a maritime lien is a *jus in re* rather

⁵"I do therefore Order and Decree that the Court Charges amounting to Forty Nine pounds thirteen shillings and three pence be first Deducted and paid out of the Neat Amount of the sales of the said Sloop, and the Remainder be paid to the severall Parties in proportion to their severall Debts, and that each of the parties pay their own Lawyers." Executor of Michael Beesley v. Sloop Flying Fish (N. Y. 1750), reported in HOUGH, *op. cit. supra* note 4, at 69.

⁶The rule is not a rule of laches, there being a further period when such liens are considered. The Little Charley, 31 F. (2d) 120 (D. Md. 1929), 1929 Am. Mar. Cas. 398.

⁷Many of the American cases discuss the civil law as though it was an unquestionable authority. Proceeds of the Gratitude, 42 Fed. 299 (S. D. N. Y. 1890); Lewis v. Elizabeth and Jane, Fed. Cas. No. 8, 321 (D. Me. 1823); The Paragon, Fed. Cas. No. 10,708 (D. Me. 1836); The Young Mechanic, Fed. Cas. No. 18,180 (C. C. Me. 1855); Vandewater v. Mills, 19 How. 82 (U. S. 1856).

⁸See *supra* note 2. The Nissegoque, 280 Fed. 174 (E. D. N. C. 1922), interpreting the term "voyage" as that period from the writing of the ship's articles to the conclusion thereof, and not from port to port.

⁹The America, 168 Fed. 424 (D. N. J. 1909).

than a *jus ad rem*,²⁰ the lien holder as a result, is presumed to become a part owner in the adventure, and his lien becomes subject to all later maritime lienors by his implied consent. The theory, although expounded in the cases,²¹ is a difficult pill for the common lawyer to swallow, particularly with regard to liens for maritime torts discussed later. The second reason is that on a basis of pure merit, he who last administers to the necessities of the ship and puts her on her way acquires a better right than prior lienors, because in so doing he is keeping the ship in motion as a vehicle of commerce.²² He is the *causa sine qua non* of the ship's ability to continue her voyage. As a practical matter, today this second reason is not wholly true. In the era prior to international cable and communication by radio, distant ports heard little of the owners of foreign ships and it was quite true that a material man or wharfinger was forced to look to the credit of the vessel, rather than to the distant owner, as time was precious. Even today the courts pay lip service to the old theory made obsolete in part by modern invention. Further, such a theory is inapplicable to certain general classifications of liens. To be specific, seamen who contract for wages cannot be said to look to the credit of the vessel unless by special protection of the admiralty. There can be no question, also, that liens arising out of collision or other torts cannot be said to be acquired on the credit of the vessel.

Until the end of the last century the voyage rule of time priority was practically unquestioned. Since then various modifications have arisen caused by changing conditions and a desire to provide a reasonable credit in specific conditions. Probably the best known rule is that applying to vessels plying the waters of New York harbor. This is known as the 40 Day Rule.²³ It was found impractical, in the cases

²⁰It is suggested that the whole *jus in re* theory of maritime liens may be laid at the door of Pothier. 1 BENEDICT, ADMIRALTY (5th ed. 1925): 17. The Young Mechanic, *supra* note 7; The J. E. Rumbel, 148 U. S. 1, 13 Sup. Ct. 498 (1892); The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544 (1897).

²¹Vandewater v. Mills, *supra* note 7; The Arcturus, 18 Fed. 743 (N. D. Ohio 1883).

²²The Alcalde, 132 Fed. 576 (W. D. Wash. 1904); The St. Jago de Cuba, 22 U. S. 409 (1824); The Samuel J. Christian, 16 Fed. 796 (E. D. N. Y. 1883); The St. Paul, 277 Fed. 99 (S. D. N. Y. 1921); The Frank G. Fowler, 17 Fed. 653 (C. C. S. D. N. Y. 1883).

²³Many cases have applied and interpreted the rule so that it is undoubtedly law in the Southern and Eastern Districts of New York and in the District of New Jersey. Proceeds of the Gratitude, *supra* note 7; The Samuel Morris, 63 Fed. 736 (E. D. N. Y. 1894); The Glen Island, 194 Fed. 744 (S. D. N. Y.

of small harbor craft, where any given trip is of short duration, to apply the voyage rule, else tugs would be eternally tied up with libels for each voyage to avoid losing preference. The courts then decided that amongst liens of the same general class, no priority in time would be given effect during the customary harbor period of credit, which was thirty days, plus a ten day period of grace. The result is the Forty Day rule.¹⁴

Questions have arisen as to the interpretation of the application of the Forty Day rule. Three possible views may be presented: (1) All liens rank *pro rata* prior to the forty day period before the first libel;¹⁵ (2) that there are successive forty day periods which do not overlap each other and in which all liens will be paid *pro rata*;¹⁶ (3) from the filing of each libel there is a forty day period which runs without prejudice to libels filed at a prior time. The second view, while perhaps not the leading one, is probably the most logical. The Forty Day rule is not a rule of laches by which action is barred.

A similar rule for like reasons is in force for navigation on the Great Lakes. There the period of credit is for a season of navigation and liens of the same class rank equally in that period.¹⁷ Like-

1912); *The Samuel Little*, 221 Fed. 308 (C. C. A. 2nd, 1915); *The Interstate No. 1*, 290 Fed. 926, (C. C. A. 2nd, 1923), 1923 Am. Mar. Cas. 1118; *The Interstate No. 2*, 290 Fed. 1115 (D. N. J. 1923), 1923 Am. Mar. Cas. 1128; *Baker Bros.*, 28 F. (2d) 920 (E. D. N. Y. 1928), 1928 Am. Mar. Cas. 1600. In *The Leonard F. Richards*, 231 Fed. 1002 (E. D. N. Y. 1916), mention is made of a "rule of court" with reference to the 40 Day Rule in the Eastern District of New York. The Deputy Clerk and the officials of that court, however, deny all knowledge of there having been such a rule. Perhaps a rule of the common law is meant.

¹⁴"I think the time allowed for retaining priority in these harbor cases may be justly reduced to 40 days. That will give the short credit incident to the usual rendering of monthly bills, and 10 days more for settlement, or libeling the boat in case of non-payment." *Proceeds of the Gratitude*, *supra* note 7, at 301.

¹⁵*The Interstate No. 1*, *supra* note 13, at 930. See also *Proceeds of the Gratitude*, *supra* note 7; *The Samuel Morris*, *supra* note 13; *The Oregon*, 6 F. (2d) 968 (C. C. A. 2nd, 1925), 1925 Am. Mar. Cas. 1271. !

¹⁶*In re New England Transportation Co.*, 220 Fed. 203, 208 (D. Conn. 1914); *The Leonard F. Richards*, *supra* note 13.

¹⁷*Stillman v. Buckeye State*, Fed. Cas. No. 13,445 (D. Mich. 1856); *The Arcturus*, *supra* note 11; *The Nebraska*, 69 Fed. 1009 (C. C. A. 7th, 1895). The rule is generally cited as applying solely to the Great Lakes. *But see* *The Alfred J. Murray*, 60 Fed. 926 (D. Md. 1894); *The Cimbria*, 156 Fed. 378 (D. Mass. 1907); *The Bethulia*, 200 Fed. 876 (D. Mass. 1912). The rule is not invariable and may be modified where conditions justify. *The John J. Frietus*, 252 Fed. 876 (W. D. N. Y. 1918).

wise, United States Courts of the Western District of Washington have applied a rule for navigation in Puget Sound which limits priorities accruing within a period of 90 days.¹⁸ It is questionable how much further the application of this principle can be carried and to what jurisdictions it extends.¹⁹ It is interesting to note that even where the longer voyages of ocean steamers are concerned, the courts have ceased to apply a technical interpretation of the term "voyage" and talk in terms of years. The year is considered representative of the voyage.²⁰ This, it is suggested, shows a tendency, even in the case of larger vessels, to apply a time equal to a reasonable period of credit. Fast passenger liners today make the trans-atlantic run in less than a week and all steamers of any size in less than three weeks, so that the larger steamship companies in a certain measure, are beset with the same problem which faced harbor craft at an earlier date.²¹

b. *Priorities According to Character of Lien*

1. *Priorities According to General Class:* The more difficult questions of priority arise as regards class rank rather than as to time. Speaking of the former, Judge Brown said:

"The subject of marshalling liens in admiralty is one which, unfortunately, is left in great obscurity by the authorities. Many of the rules deduced from the English cases seem inapplicable here. So, also, the principles applied where the contest is between two or three libellants would result in great confusion in cases where 50 or 60 libels are filed against the same vessel. The American authorities, too, are by no means harmonious, and it is scarcely too much to say that each court is a law unto itself."^{22a}

¹⁸The *Edith*, 217 Fed. 300 (W. D. Wash. 1914); The *Sea Foam*, 243 Fed. 929 (W. D. Wash. 1917). But the rule applies only to Seattle Harbor (Elliott Bay), and does not extend to trips as far as to Vancouver. The *Morning Star*, 1 F. (2d) 410 (W. D. Wash. 1924), 1924 Am. Mar. Cas. 1571.

¹⁹There is some authority for the proposition. In the District Court of South Carolina all liens within a year of the same class will be paid *pro rata*. The *Thomas Morgan*, 123 Fed. 781 (D. S. C. 1903). The point is discussed in *The Nebraska*, *supra* note 17, and in *The Edith*, *supra* note 18.

²⁰The *Fort Gaines*, 24 F. (2d) 438 (D. Md. 1928), 1928 Am. Mar. Cas. 459; The *Annette Rolph*, 30 F. (2d) 191 (N. D. Cal. 1929), 1929 Am. Mar. Cas. 212; The *Little Charley*, *supra* note 6. There may be some question as to the meaning of "year"; cf. *The Jack-O-Lantern*, 282 Fed. 899 (D. Mass. 1922) in which the words "calendar year" are used.

²¹The point was considered at an early date. *Proceeds of the Gratitude*, *supra* note 7, at 301.

^{22a}The *City of Tawas*, 3 Fed. 170, 172 (E. D. Mich. 1880)

That was in 1880. Much water has passed under the bridge since that time, and in some measure the difficulties pictured by Judge Brown have been overcome. Much, however, remains to be done.

In general, liens have been said to be divided into two classes—maritime claims and non-maritime claims.²³ The distinction is well taken because by definition, maritime liens arise only out of necessity, and he who supplies that necessity must be given highest protection in the interest of commerce. Such priority is generally accepted under both the common and the civil law systems.

A second general classification is also commonly adverted to. Maritime liens arising *ex delicto* are said to rank those arising *ex contractu*.²³ The rule is probably based on the idea that priorities are only interesting where insufficient funds prevent full payment, in which event there is a visceral reaction in favor of the poor fellow who was hit in the face over the man who sold goods for which he was not paid. The rule, at best, is weak in theory, and it has had practical disadvantages. It can be regarded only as a basic rule subject to change when conditions justify. Probably the most prominent instance of variance from the rule is that arising from seamen's wages. A clearer case of contract claim is difficult to find, yet any court would allow the seamen their wages prior to a collision claim which arose without any fault on their part.²⁴

2. *Priorities Among the Specific Liens:* Many have been the attempts to lay down a given order by which specific liens shall be paid only to fail in one particular or another. It is respectfully suggested that any attempted classification is impossible under the theory and system of the common law. The probable origin of the idea was in the civil law. There are merits in a hard and fast order of priority, the chief being that of predictability, but the rank of any class of liens varies so greatly with the case before the court, that any classification in this country is out of the question. With that in mind, specific liens will be considered.

(a) *Seamen's Wages:* At first blush, there could seem to be little or no difficulty with the question of seamen's wages. The courts of

²³"In determining the order of priority among the several claimants, the first classification, therefore, is into liens, maritime and non-maritime, the latter being postponed until after satisfaction of the former." *The Guiding Star*, 18 Fed. 263, 265 (S. D. Ohio 1883). See also *the Liberty No. 4*, 7 Fed. 226 (S. D. Ohio 1881); *The William Leishear*, 21 F. (2d) 862 (D. Md. 1927), 1927 Am. Mar. Cas. 1770. ²⁴*The M. Vandercook*, 24 Fed. 472 (D. N. J. 1885).

²⁴*The America*, Fed. Cas. No. 288 (N. D. N. Y. 1853).

the Admiralty have from time immemorial favored and protected the men who have dared to venture forth on the "sea of darkness". Their rights have frequently been said to be nailed to the last plank of the ship,²⁵ but how far is such a rule to be carried? In *Saylor v. Taylor*,^{26a} the court said:

"Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight to the accomplishment of the main object in which the vessel is engaged, are clothed by law with the legal rights of mariners, 'no matter what may be their sex, character, station, or profession.'"

Under this decision a bartender²⁶ or a musician would have a prior claim to the most important material man's lien or the most meritorious collision lien. It is suggested that the invariable rule should be modified as has been done in some districts. An example of modification is seen in the case of a tort lien where, if the collision was due to the negligence of the seamen, their wage claim loses its priority. There is also considerable law to the effect that a salvage lien takes precedence over a claim for wages earned prior to the date of the salving of the ship. Here we have a conflict between a desire for a well ordered priority and an attempt to follow logically the theory of priorities. Seamen's wages are said to come first in order of rank, yet the salvors have been instrumental in saving the ship for the benefit of the wage claimants. Perhaps time priority is being confused with rank so that an equitable result may be reached.

It is to be noted that where seamen are entitled to penalty wages²⁷ the question of priority as to that sum is not settled.²⁸

²⁵*Sheppard v. Taylor*, 5 Pet. 675 (U. S. 1831); *The Samuel Little*, *supra* note 13; *The John G. Stevens*, *supra* note 10, at 119; *Butler v. Ellis*, 45 F. (2d) 951 (C. C. A. 4th, 1930).

²⁶277 Fed. 476, 479 (C. C. A. 4th, 1896).

^{26a}*The J. S. Warden*, 175 Fed. 314 (S. D. N. Y. 1910).

²⁷38 STAT. 1164 (1915), 45 U. S. C. § 596 (1928) provides for the payment of wages within specified times and "every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seamen a sum equal to two days' pay for each and every day during which payment is delayed..."

²⁸Recent cases seem to rank penalty wages in the lowest class of maritime liens. *The Nika*, 287 Fed. 717 (W. D. Wash. 1923), 1923 Am. Mar. Cas. 409; *The Washington*, 296 Fed. 158 (E. D. N. Y. 1924), 1924 Am. Mar. Cas. 394. *But see* *Covert v. British Brig Wexford*, 3 Fed. 577 (S. D. N. Y. 1880) (Interpreting the corresponding English statute, 17 & 18 VICT. c. 104, § 187 (1854)); *Gerber v. Spencer*, 278 Fed. 886 (C. C. A. 9th, 1922).

In the older American cases there was no lien for the master for his wages because of the close contact between the master and the owners. The master was considered to have looked to the credit of the owner, rather than that of the vessel,²⁹ but there may be some limitations on the rule.³⁰

(b) *Salvage*: Salvage is one of the larger and more important liens. Many cases deal with the requisite acts which constitute the salvage service. Such discussion, however, is without the scope of this article.³¹

Perhaps the one important incident of the lien for salvage is that it is one of the few liens which may take priority over seamen's wages. This lien is generally held superior to wages earned prior to the salvage service.³²

Probably because of the interest of the community in the conservation of property, salvage has been preferred to all other liens.³³ It would seem that the salvage lien should attach to the ship and all her tackle, although, there may be some question where the acts of salvage are separate.³⁴

(c) *Repairs and Supplies*: Perhaps the largest percentage of cases involving maritime liens concern liens for materials and supplies. It is a popular misconception of the Admiralty Bar today that priorities affecting material and supply liens were "settled" by the Federal Maritime Lien Act,³⁵ or the Ship Mortgage Act,³⁶ or both. As a mat-

²⁹The *Wexford*, 7 Fed. 674 (S. D. N. Y. 1881); The *Wyoming*, 35 Fed. 548 (E. D. Mo. 1888); The *Nebraska*, *supra* note 17; The *Bethulia*, *supra* note 17.

³⁰The *Cimbria*, *supra* note 17. See also The *Fort Gaines*, *supra* note 20, where, however, the lien was created by Norwegian law; The *Olga*, 32 Fed. 329 (S. D. N. Y. 1887) (Italian law). In some districts a lien is created by statute. See The *Edith*, *supra* note 18.

³¹The *Athenian*, 3 Fed. 248 (E. D. Mich. 1877); *Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co.*, 253 Fed. 635 (C. C. A. 7th, 1918).

³²The *Athenian*, *supra* note 31; The *Nettie Woodward*, 50 Fed. 224 (E. D. Mich. 1892); The *Conveyor*, 147 Fed. 586, 593 (D. Ind. 1906). Some cases seem to hold that seamen's wages come after salvage even though they accrue after the salvage lien; *cf. Dalstrom v. E. M. Davidson*, 1 Fed. 259 (D. Wis. 1880) (wages earned during salvage). *Contra*: The *Little Laurie*, 50 Fed. 219 (E. D. Tex. 1880).

³³The *Athenian*, *supra* note 31; The *Conveyor*, *supra* note 32; The *Andree*, 41 F. (2d) 812 (S. D. N. Y. 1930).

³⁴The *Nissegoque*, 280 Fed. 174 (E. D. N. C. 1922) (salving anchor after raising the ship).

³⁵36 STAT. 604 (1910), as amended 41 STAT. 1005 (1920), 46 U. S. C. § 971 (1928).

³⁶41 STAT. 1000 (1920), 46 U. S. C. § 911 (1928).

ter of fact, the Federal Maritime Lien Act expressly denies any such application,³⁷ and the Ship Mortgage Act denies priorities only in their relation to preferred mortgages under that Act. It is true that prior to 1910 the courts made a distinction between supplies furnished in the home port and a foreign port. A lien was not allowed in the home port because it was considered that there the material man looked to the credit of the owner, and not the ship. A lien then not being a necessity, no maritime lien was permitted. This argument, though theoretically and historically correct, was not found practical, and was abolished by the Act of 1910.³⁸ Questions are frequently raised as to what is to be included in a lien for material and supplies; and many things have been found fit subjects. Indeed, the lien is frequently supposed to include other liens such as towage. In some cases, where the assets are sufficient to pay all, these liens are so grouped. Care should be taken, however, not to consider them as precedents when the funds are insufficient to pay all.

(d) *Preferred Mortgage*: A fairly large number of cases have arisen since the Ship Mortgage Act of 1920³⁹ interpreting the application of that Act. Prior to 1920, a mortgage, being a non-maritime claim, was ranked by all maritime liens.⁴⁰ But under the provisions of the Act, mortgages, complying with certain definite provisions, are given a status prior to all but certain preferred maritime liens.⁴¹ Most cases have arisen because of failure to comply with the provisions of the Act.⁴² In such case the preferred mortgage loses the status con-

³⁷Subsection S of the Federal Maritime Lien Act, *supra* note 35, 46 U. S. C., § 974 provides: "Nothing in this section . . . shall be construed to affect the rules of law now existing in regard to . . . (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States."

³⁸36 STAT 604 (1910), 46 U. S. C. § 971 n. (1928).

³⁹See *supra* note 36.

⁴⁰The City of Tawas, *supra* note 21a.; The De Smet, 10 Fed. 483 (E. D. La. 1881); The Guiding Star, 18 Fed. 263 (S. D. Ohio 1883); The Little Charley, *supra* note 6.

⁴¹The Acropolis, 8 F. (2d) 110 (E. D. N. Y. 1924), 1924 Am. Mar. Cas. 1510.

⁴²Morse D. D. & R. R. v. North Star, 271 U. S. 552, 46 Sup. Ct. 589 (1926), 1926 Am. Mar. Cas. 977; The Northern Wave, 298 Fed. 188 (E. D. Pa. 1924); The Minnesota, 20 F. (2d) 926 (E. D. La. 1927), 1927 Am. Mar. Cas. 1355; The Ocean View, 21 F. (2d) 875 (D. Md. 1928), 1928 Am. Mar. Cas. 240. In the following cases the preference created by statute was upheld:— The Melissa Trask, 285 Fed. 781 (D. Mass. 1923), 1923 Am. Mar. Cas. 193; (1925 38 HARV. L. REV. 1060; The General Lincoln, 24 F. (2d) 441 (D. Md. 1928), 1928 Am. Mar. Cas. 432.

ferred upon it and returns to its former rank. It has also been held recently, that where there is a contract to furnish supplies and a subsequent preferred mortgage accrues, that supplies furnished under the contract after the preferred mortgage went into effect, creates a lien superior to the mortgage.⁴³

(e) *Wharfage*: The lien for wharfage seems to rank equally in all cases with that for materials and supplies, though no case has arisen to try its priority over the latter. The wharfage lien, however, under the definition of a maritime lien, is allowable only when such wharfage is obtained in the ordinary course of navigation, for only then is it a necessity.⁴⁴ When vessels are not actively engaged, as in the off season on the Great Lakes,⁴⁵ it ranks in the lowest group with non-maritime claims.⁴⁶ If, however, a vessel has been actively engaged and the lien for wharfage accrues while in the hands of the marshal, there is still priority, although it is doubtful whether the basis for the lien is not that of an ordinary cost of court.⁴⁷

(f) *Watchman*: Similar to the reasoning behind the lien for wharfage, there may be sufficient necessity to permit a lien with some priority in the case of a watchman, although to what extent is not yet known.⁴⁸

(g) *Towage*: There is a lien for towage against the ship towed, but this should be distinguished from a lien for negligent towage against the tug. Loose use of language sometimes makes it difficult to tell which lien is meant. A lien for towage generally is considered of equal dignity with liens for repairs and supplies.⁴⁹ In the case of negligent towage there is little unanimity of opinion as to rank.⁵⁰

⁴³The *Transford*, 1929 Am. Mar. Cas. 727 (E. D. N. Y. 1929), which would seem to indicate that a maritime lien attaches at the date of the making of the contract and priorities rank from that time.

⁴⁴The *Advance*, 60 Fed. 766 (S. D. N. Y. 1894); The *Shrewsbury*, 69 Fed. 1017 (N. D. Ohio) 1895). See also 40 Cyc. 911.

⁴⁵*Murphy Tugs*, 28 Fed. 429 (E. D. Mich. 1886).

⁴⁶The *C. Vanderbilt*, 86 Fed. 785 (E. D. N. Y. 1898); The *Estrada Palma*, 8 F. (2d) 103 (E. D. La. 1923), 1923 Am. Mar. Cas. 1040; The *General Lincoln*, *supra* note 42.

⁴⁷The *Poznan*, 274 U. S. 117, 47 Sup. Ct. 482 (1927), 1927 Am. Mar. Cas. 723.

⁴⁸The *Erinagh*, 7 Fed. 231 (S. D. N. Y. 1881), which was from its facts most interesting. *But cf.* The *Estrada Palma*, *supra* note 46; The *General Lincoln*, *supra* note 42.

⁴⁹The *G. F. Brown*, 24 Fed. 399 (D. Conn. 1885); *Saylor v. Taylor*, *supra* note 25a; The *William Leishear*, *supra* note 22. *But see* The *Director*, 34 Fed. 57 (D. Ore. 1888).

⁵⁰Claims for negligent towage have been held to rank claims for repairs and supplies. The *M. Vandercook*, 24 Fed. 472 (D. N. J. 1885). In some cases they

(h) *Collision*: There is considerable divergence in view as to the rank of liens arising out of collision. Probably, on the theory that liens *ex delicto* rank liens *ex contractu*, collision liens,⁵³ if rank is to be given, should take precedence over liens for repairs and supplies.⁵³ Where successive collisions occur, the one later in time is allowed priority.⁵³

(i) *Pilotage*: The lien for pilotage services, which is in the nature of a wage, should rank general contract claims. Its position as regards collision claims is probably not as advantageous.⁵⁴

(j) *Liens more infrequently occurring*: There must be considered also several lesser liens, some of which are more or less obvious. There is a lien for the costs of court which takes priority over all

were held to rank wages. The *Daisy Day*, 40 Fed. 538 (W. D. Mich. 1889). More recently, however, towage has given place to repairs and supplies. The *Wyoming*, *supra* note 29; The *Glenn Island*, *supra* note 13; The *John J. Frietus*, *supra* note 17; The *Interstate No. 1*, *supra* note 13; The *Anna J. Brooks*, 1927 Am. Mar. Cas. 1307 (S. D. N. Y. 1927).

⁵³The *Glenn Island*, *supra* note 13.

⁵⁴The *William Leishear*, *supra* note 22; The *Baker Bros.*, *supra* note 13. *Contra*: The *Amos D. Carver*, 35 Fed. 665 (S. D. N. Y. 1888); The *Anna J. Brooks*, *supra* note 50. An interesting case is *The Augusta*, 15 F. (2d) 727 (E. D. La. 1920) in which very sweeping language is used. The court says, "In a suit for damages resulting from a collision the ship is considered as the offending thing, the actual wrongdoer, and the lien for damages arising from the collision is superior to all other pre-existing liens, those for supplies, repairs, bottomry bonds, etc., with the possible exception of sailor's wages, although there are cases subordinating this lien also." On the priority of the lien for wages over collision claims, see *The C. J. Saxe*, 145 Fed. 749 (S. D. N. Y. 1906). *Contra*: *The F. H. Stanwood*, 49 Fed. 577 (C. C. A. 7th, 1892).

⁵⁵The *America*, *supra* note 9, commenting upon the case of the *Frank G. Fowler*, *supra* note 12, and approving the lower court opinion in that case, *The Frank G. Fowler*, 8 Fed. 331 (S. D. N. Y. 1881). The court is in error, however, in the last paragraph at p. 426; *see* *The J. W. Tucker*, 20 Fed. 129 (S. D. N. Y. 1884). The whole doctrine is a growth from the implications of *The John G. Stevens*, *supra* note 10, a decision by Gray, J., who attempted to base his opinion on the English cases. The decision is probably the most unfortunate in the law of priorities of maritime liens. See also HUGHES, *HANDBOOK OF ADMIRALTY LAW* (2d ed. 1920) § 187.

⁵⁶The *Estrada Palma*, *supra* note 46; *The Wexford*, *supra* note 29; *cf.* *The William Leishear*, *supra* note 22; *Porter v. The Sca Witch*, 3 Woods 75, Fed. Cas. No. 11,289 (C. C. La. 1877); *see* 48 C. J. 1199. Negligent towage ranks below pilotage. *The Alexander Barkley*, 83 Fed. 846 (E. D. N. Y. 1894). *Contra*: *The Emily Souder*, 17 Wall. 666 (U. S. 1873). There is no lien where the pilot is acting in the capacity of a watchman. *The Morning Star*, *supra* note 18.

other liens.⁵⁵ There is a very similar lien for taxes of various sorts which enjoys a high priority.⁵⁶ Much has been said about the ancient lien under a bottomry bond. Because of changing conditions, perhaps, it is seldom the subject of decision today.⁵⁷ There is authority for granting a lien in general average which is subordinate to salvage claims, but relative to other liens its priority is thus far unknown.⁵⁸ An insurer probably has no lien for unpaid premiums.⁵⁹ Stevedores have a lien which is superior to those for materials and supplies and towage, but probably is ranked by seamen's wages and

⁵⁵*Goble v. The Delos De Wolf*, 3 Fed. 236 (N. D. Ohio 1880); *The D. B. Steelman*, 48 Fed. 580 (E. D. Va. 1880); *The Lillie Laurie*, 50 Fed. 219 (E. D. Tex. 1880); *The G. F. Brown*, 24 Fed. 399 (D. Conn. 1885) (lien for costs taxed); *The Olga*, *supra* note 30; *The John Gully*, 20 F. (2d) 211 (E. D. N. Y. 1927), 1927 Am. Mar. Cas. 1175 (any fees due to the clerk or other officers of the court). There seems to be a slight question as to whether all the claims of the United States Marshal will be given priority. *The Poznan*, *supra* note 47, allows a marshal's bill for wharfage, not as a lien, but as a necessity to the fair administration of justice. See *The Cimbria*, *supra* note 17. But see *The William Leishear*, *supra* note 22, where a claim for the service of a watchman was disallowed as not a necessity. In *The Commack*, 8 F. (2d) 151 (S. D. Fla. 1925), 1925 Am. Mar. Cas. 1640, the Court says that a maritime lien may not be had for supplies furnished at the request of a master or owner of a ship while the ship is in the custody of the marshal; cf. *The Esteban de Antuano*, 31 Fed. 920 (E. D. La. 1887); *The Bethulia*, *supra* note 17; *The Nissegoque*, *supra* note 8; *The Anna J. Brooks*, *supra* note 50.

⁵⁶*Goble v. The Delos DeWolf*, *supra* note 55 (tonnage tax due United States prior to wages but subsequent to costs); *The Melissa Trask*, 285 Fed. 781 (D. Mass. 1923), 1923 Am. Mar. Cas. 193 (head tax due the government held to be subordinate to a preferred mortgage); *The River Queen*, 8 F. (2d) 426 (E. D. Va. 1926), 1926 Am. Mar. Cas. 79 (income tax lien held subordinate to a supply lien); *The A. Brooke Taylor*, 14 F. (2d) 267 (C. C. A. 4th, 1926), 1926 Am. Mar. Cas. 941 (state taxes held to be prior to all maritime liens).

⁵⁷Bottomry bonds have never attained the importance in America that they enjoy in England. This is so, perhaps, because in England a material man being without an implied lien could protect his priority only by taking such a bond, which unfortunately was given a very low ranking even then, because of the high rate of interest required. Such American decisions as there are, continue to give bottomry bonds a very low rank. *The Olga*, *supra* note 30; *The Aina*, 40 Fed. 269 (E. D. N. Y. 1889); *The Dora*, 34 Fed. 348 (E. D. La. 1889).

⁵⁸*Provost v. Selkirk*, Fed. Cas. No. 11,455 (N. D. Ohio 1878); *The Dora*, *supra* note 57; *The Andree*, *supra* note 33.

⁵⁹*In re Insurance Co. of Pa.*, 22 Fed. 109 (N. D. N. Y. 1884); *The Mame*, 184 Fed. 968 (D. Conn. 1911). *Contra*: *The Guiding Star*, 18 Fed. 263 (S. D. Ohio 1883). But cf. *Provost v. Selkirk*, *supra* note 58; *The Minnie V.*, 24 F. (2d) 604 (D. Mass. 1928), 1928 Am. Mar. Cas. 238.

salvage.⁶⁰ There are still other liens which occur infrequently in decisions involving questions of priority.⁶¹

C. Allied Questions Affecting Priority

Several allied questions which affect the relative rank of maritime liens must be considered. Probably the most important and the most frequently occurring in the books is the rule granting equal rank to one who pays a maritime lien claimant with that of the lien paid, provided that payment was made for the purpose of satisfying the lien and was actually used for that purpose.⁶² There seems to be some question, however, whether there must be a "necessity" for the payment,⁶³ and the lienholder who himself accepts a note and mortgage is, in some jurisdictions, considered to have waived his lien.⁶⁴ Similarly an officer in a corporation owning ships can have no lien on those ships as he is presumed to look to the credit of the corporation.⁶⁵ There is a quasi lien for state taxes which is accorded a high priority.⁶⁶

⁶⁰The *Canada*, 7 Fed. 119 (D. Ore. 1881); *The Director*, 34 Fed. 57 (D. Ore. 1888). *Contra*: *The Olga*, *supra* note 30.

⁶¹*The Emily Souder*, *supra* note 54 (custom house fees, consular fees, medical attendance on sailors); *Provošt v. Selkirk*, *supra* note 58 (demurrage, brokerage services); *The Olga*, *supra* note 30 (port dues and pilot towage); *The Aina*, *supra* note 57 (hospitalization of crew, lien for survey, cost of cable, consulage); *The J. B. Ketcham*, 286 Fed. 56 (C. C. A. 6th, 1923), 1923 Am. Mar. Cas. 994 (lien for services in removing a vessel as a menace to navigation); *The Lancastrian*, 290 Fed. 397 (E. D. N. Y. 1923), 1923 Am. Mar. Cas. 840 (repatriation expenses, wages due deserters); *The Eugenia Emilia*, 298 Fed. 340 (D. Mass. 1924), 1924 Am. Mar. Cas. 538 (use of chronometer).

⁶²"Money advanced upon the credit of the boat, to pay off claims of a maritime nature, entitled to liens in admiralty, and actually used for that purpose, are entitled to the same rank in the distribution as the claims which were thus paid off." *The City of Camden*, 147 Fed. 847, 848 (S. D. Ala. 1906). See also *The Cimbria*, *supra* note 17; *The Little Charley*, *supra* note 6; *Nippert v. Williams*, 42 Fed. 533, 542 (D. Ky. 1890).

⁶³*The Alcade*, *supra* note 12 (requiring a necessity). *Contra*: *The Minnie and Eunna*, 21 F. (2d) 991 (D. Md. 1927), 1927 Am. Mar. Cas. 1768.

⁶⁴*Page v. Hubbard*, Fed. Cas. No. 10, 663 (D. Mass. 1857); *Carter v. The Byzantium*, Fed. Cas. No. 2,473 (D. Me. 1858); *The Alfred J. Murray*, 60 Fed. 926 (D. Md. 1894); *The Yankton*, 7 F. (2d) 384 (D. Mass. 1925), 1925 Am. Mar. Cas. 1275. *But see* *The Motorship Mariner*, 1924 Am. Mar. Cas. 1463 (D. Mass. 1924).

⁶⁵*The Murphy Tugs*, *supra* note 45; *The City of Camden*, *supra* note 62.

⁶⁶*The A. Brooke Taylor*, *supra* note 56.

At an early date it was settled that priority, in point of time of filing the libel, does not affect the priority of the lien.⁶⁷ The date of accrual is the crucial date. One of the few strictly procedural points of importance today is that rule of some districts, notably, the Eastern District of New York⁶⁸ requiring all claims on which priority is demanded, to be filed before the sale of the vessel, the idea being, presumably, to protect those who have borne the burden of the suit from latecomers who would bide the event and then reap the reward of the labor of others.

In *The President Arthur*^{69a} a vessel was libeled under a claim for repairs and supplies. Certain non-maritime counter claims were set up by way of cross-libel. The court held that, as there was at the same time, a note held by the libellant in excess of the counter claims, that the cross libel should be dismissed without prejudice to an action at law. The Admiralty jurisdiction is undoubtedly very limited, but if the court once assumes jurisdiction to determine the validity of the liens, it would seem an injustice to refuse to allow any possible counter claims without reference to other coverage.

In *The Ulrica*,^{69b} there was a series of liens with the last lienor in possession, thus having both a maritime and a common law lien. The Court, seeming to feel a double fortification, decided in favor of the last lienor.

Where a maritime lien exists either a court of bankruptcy or of equity will enforce such a lien with effect similar to that of a court of admiralty;⁶⁹ and the lien is enforced without prior provision for the costs of the suit in bankruptcy other than those of proof of claim.⁷⁰

There is a further question which does not fall strictly within the bounds of maritime liens but is closely allied thereto. Where there is a forfeiture to the government for violations of various laws it is almost universally held that the holders of maritime liens, when not *in pari delicto*, rank prior to the claim in forfeiture.⁷¹

⁶⁷The *Arcturus*, *supra* note 11; The *Lady Boone*, 21 Fed. 731 (E. D. Ark. 1884); The *Julia*, 57 Fed. 233 (E. D. S. C. 1893); *Saylor v. Taylor*, *supra* note 25a.

⁶⁸Rules of the District Court of the United States for the Eastern District of New York, in Admiralty XI, Miscellaneous No. 40.

^{69a}42 F. (2d) 288 (S. D. N. Y. 1930), 1930 Am. Mar. Cas. 1079.

^{69b}224 Fed. 140 (D. N. J. 1915).

⁶⁹*In re Scott*, Fed. Cas. No. 12,517 (N. D. Ohio 1869).

⁷⁰*In re New England Transportation Co.*, *supra* note 16.

⁷¹The *St. Jago de Cuba*, *supra* note 12 (violations of Slave Trade Acts); The *Maria*, Fed. Cas. No. 9,975 (D. Ore. 1864); The *Ranier*, Fed. Cas. No. 11,565

II. THE LAW OF PRIORITIES IN EUROPE

Although probably the law of priorities of the various European states have little value as precedents in actions in our courts today,⁷² still some examination of them is important, for one of the purposes of this article is to show that much of the difficulty with the law of priorities of maritime liens was caused by the introduction of the principles of civil law into the common law courts.

a. *France*

Considering first, then, the civil law as applied in the courts of France, there seems to be some question today whether under that law there can be an action *in rem* at all, without which there can be no counterpart of our maritime lien which is probably based on a right in the *res*.⁷³ The French code⁷⁴ does provide for certain maritime

(D. Ore. 1868) (violation of Steamboat Inspection Laws); *The Jennie Hayes*, 37 Fed. 373 (D. Ia. 1889) (failure to have name painted on bow); *North American Commercial Co. v. United States*, 81 Fed. 748 (C. C. A. 9th, 1897) (killing seals in violation of law); *The Melissa Trask*, *supra* note 42 (violations of rules regarding space on passenger ship); *The Winona*, 1928 Am. Mar. Cas. 108 (E. D. S. C. 1928) (sale to an alien contrary to law); *The Ermis*, 33 F. (2d) 763 (S. D. Fla. 1929), 1929 Am. Mar. Cas. 1588 (violations of Tariff Laws). Several cases have arisen in connection with the prohibition laws. *The Eugenia Emilia*, *supra* note 61; *The Pilot*, 1925 Am. Mar. Cas. 683 (D. Mass. 1925); *The Minnie V.*, *supra* note 59; *The Thomaston*, 26 F. (2d) 279 (D. Md. 1928), 1928 Am. Mar. Cas. 845; *The Leona M. Sproul*, 1930 Am. Mar. Cas. 584 (S. D. N. Y. 1930).

⁷²The John G. Stevens, *supra* note 10, at 126, "In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the comparative rank of various maritime liens, and because the general maritime law is in force in this country, or in any other, so far only as administered in its courts, or adopted by its own laws and usages." Query: whether the above could be considered a statement of the modern view of admiralty courts?

⁷³The *Kongsli*, 252 Fed. 267 (D. Me. 1918) in which the court held that there was no lien *in rem* arising out of collision under French law.

⁷⁴CODE DE COMMERCE. LIVRE DEUXIÈME DU COMMERCE MARITIME. TITRE PREMIER DES NAVIRES ET AUTRES BATIMENTS DE MER. ART. 190. Les Navires et autres bâtiments de mer sont meubles. Néanmoins, ils sont affectés aux dettes du vendeur, et spécialement à celles que la loi déclare privilégiées.

ART. 191 Sont privilégiées, et dans l'ordre où elles sont rangées, les dettes ci-après désignées:

1°. Les frais de justice et autres, faits pour parvenir à la vente et à la distribution du prix;

liens, and it also provides a statement of their priority as do other European codes.⁷⁵

b. *England*

As it is understood that the law of the United States is derived from the civil rather than common law, as a general proposition,⁷⁶ English law will be discussed only in so far as it is radically different from the law of the United States.

The best statement of the English law is to be found in the last chapter of Maclachlan on Merchant Shipping.⁷⁷ This chapter gives

2°. (L 11 Avril, 1906). "Les droits de pilotage, remorquage, tonnage, cale, amarrage et bassin ou avant bassin:

3°. Les gages du gardien et frais de garde du bâtiment depuis son entrée dans le port jusqu' à la vente:

4°. Le loyer des magasins où se trouvent déposés les agrès et les appareils:

5°. Les frais d'entretien du bâtiment et de ses agrès et appareils, depuis son dernier voyage et son entrée dans le port:

6°. Les gages et loyers du capitaine et autre gens de l'équipage employés au dernier voyage:

7°. Les sommes prêtées au capitaine pour les besoins du bâtiment pendant le dernier voyage et le remboursement du prix des marchandises par lui vendues pour la même objet:

8°. Les sommes dues au vendeur, aux fournisseurs et ouvriers employes à la construction si le navire n'a point encore fait de voyage; et les sommes dues aux créanciers pour fournitures, travaux, main-d'oeuvre, pour radoub, victuailles, armenet et équipement, avant le départ du navire s'il a déjà navigué:

9°. Abrogé par L 10 Juillet, 1885.

10°. Le montant des primes d'assurance faites sur le corps, quille, agrès, appareils, et sur armenet et équipement du navire, dues pour le dernier voyage:

11°. Les dommages—intérêts dus aux affréteurs pour le défaut de délivrance des marchandises qu'ils ont chargées ou pour remboursement des avaries souffertes par les dites marchandises par la faute du capitaine ou de l'équipage.

Les créanciers compris dans chacun des numeros du présent article viendront en concurrence et au marc le franc, en cas d'insuffisance du prix.

(L 10 Juillet 1885). Les créanciers hypothécaires sur le navire viennent dans leur ordre d'inscription, après les créanciers privilégiés.

⁷⁵See *The Olga*, *supra* note 30, where in a footnote at p. 330 the provisions of the Italian CODE DE COMMERCE are set out in full, which seem to correspond to the sections of the French CODE DE COMMERCE, ARTS. 190 and 191. Art. 674 of the Italian Code provides for liens and Art. 675 provides, in essence, the following priorities: (1) Costs; (2) Salvage; (3) Port dues; (4) Pilotage, Services of watchman; (5) Wharfage; (6) Supplies; (7) Wages; (8) General Average; (9) Bottomry; (10) Insurance premiums; (11) Cargo liens; (12) Vendors liens; and (13) Common Law Mortgages.

⁷⁶The English law also is probably an earlier adoption of the Civil Law. SAUNDERS, MARITIME LAW 54, "The Contract of Bottomry has been adopted from the civil law, for to the common law it was unknown."

⁷⁷MACLACHLAN, LAW OF MERCHANT SHIPPING, (De Hart & Bucknill, 6th ed. 1923) c. XV., p. 568.

what is probably the best general statement of a system of priorities extant. The author provides two classes of liens, those in the nature of rewards, i.e., bottomry, wages, masters' disbursements, and salvage, which rank inversely; and liens in the nature of reparation, to which the rule "*qui prior est tempore, potior est jure*" is applied. There are no other special rankings as to time.

The most striking difference between the English and American law is the lack of maritime lien for repairs and supplies in the English courts.⁷⁸ The theory is that unless possession is retained and a statutory common law lien acquired, the material man should have required a bottomry bond, even though at a high rate of interest, to protect his claim.

It is interesting to note that under English law the master has a lien for his wages, and for disbursements except where he made himself liable.⁷⁹ In America the master is considered to have looked to the credit of the owner, not the vessel, and is not considered to have a maritime lien.

Otherwise, in general, the English law, though not so voluminous, is in much the same state as the American.⁸⁰ Perhaps the leading case is *The Aline*,^{80a} in which the well known Dr. Lushington discussed the fundamental principles of priorities at length. This opinion is much cited in the American decisions, and it has been the cause of some difficulty. The court there laid the foundation of the unfortunate doctrine that a lien holder becomes, in fact, a part owner in the venture.

III. APPLICATION OF THE CONFLICT OF LAWS

An interesting point which has arisen in several cases, is the application of the theory of conflicts of laws to priorities among maritime liens. In illustration of the problem, suppose three liens, created in three different states; A, B, and C, in each of which by its own law a given lien is superior to all other liens. Suppose State C is the state of the forum. State C can subordinate a lien created by its

⁷⁸In the House of Lords. *The Sara* [1889] 14 A. C. 209.

⁷⁹*The Panthea*, 1 Asp. Mar. Cas. (N. S.) 133 (1871).

⁸⁰The Canadian decisions in so far as reported seem to follow the English cases. See MAYERS, ADMIRALTY LAW AND PRACTICE (1916). For further comparison of the English law see the following English cases: *The Linda Flor*, Swabey, Adm. 309 (1857); *The Elin*, 8 Prob. Div. 129 (1883); *The Chioggia*, [1898] Prob. 1.

^{80a}1 W. Rob. 111 (1839).

own law, but it can not affect the respective rankings of liens prior by the law of States A and B, unless by the law of the forum. Unfortunately there is little law on the point. The law creating priorities should to some extent be affected by the accepted general theory of liens. As noted earlier in this article⁸¹ the American courts have interpreted maritime liens both as rights in the property and as rights against the property. Considering a maritime lien as a right in the property, the ordinary rule of the conflict of laws is that such a right is governed by the law of the place of creation of the right.⁸² Unfortunately such does not seem to be the rule in this situation.⁸³ The application of the law of the forum seems to be the best solution. Although lienors will be forced to submit the rank of their liens to every jurisdiction in which the ship may be present, and in some cases to the complete extinction of its maritime nature, the application of the law of the form would secure a greater uniformity with resultant predictability.

Yet another view is expressed in *The Olga*^{82a} where Judge Addison Brown says:

"The vessel is Italian, and the provision of the Italian Code should, therefore, be observed by comity, as respects the claims of those on board the vessel, as among themselves, including the claim of the master. . . . As respects the liens arising upon the contracts made by the master within this jurisdiction, and the priorities of such liens in respect to all the claims on the ship, our own law, as the law of the place of the contract as well as of the forum, should, I think, prevail."

The reference to contract would lead to the belief that lienors were not there considered as part owners in the *res*.

CONCLUSIONS

Because of the wealth of decisions in the field, any conclusions as to change in the existing law are given with much trepidation. It is doubtful whether such sweeping changes as are contemplated in the concluding sentences of this article can be accomplished without the aid of a Congressional act.

⁸¹See *supra* notes 10 and 12. The *jus in re* theory would seem to be based on the civil law and derived directly from it. The theory based on merit in keeping the ship active in commerce may be derived from later common law decisions; *cf.* the ideas expressed by Herbert, *op. cit. supra* note 3.

⁸²See GOODRICH, *CONFLICT OF LAWS* (1927) 348.

⁸³The *Secundus*, 15 F. (2d) 711 (E. D. N. Y.) 1927 Am. Mar. Cas. 641.

^{82a}*Supra* note 30, at 330.

Judge Beach makes his article⁸⁴ a plea for the payment of all liens in inverse order of their accrual. Such a theory has the merit of simplicity and predictability, but it is not in accord with the ordinary doctrine of the common law. As before noted, it is peculiarly difficult to apply to tort cases where the basis of priority is said to be implied ownership. If so radical a change could be made, it is suggested that all liens be paid according to the date of accrual.

However, certain distinctions as to class seem to be too well recognized to be easily overcome. It is the thought and suggestion of this article that a system of priority similar to that said to be the English law,⁸⁵ described in Maclachlan, would be the solution of priority problems.

Such a system provides for the priority of certain liens in which there is said to be some inherent merit (perhaps a visceral reaction), and for the payment of all other liens according to the time of accrual.⁸⁶ To take care of time priority problems it is suggested that the year, forty day and season rules be continued, not as hard and fast rules of thumb, but, as they were originally intended to be, measures of a reasonable time of priority, subject to the sound discretion of the trial court.

With regard to those liens which have inherent merit sufficient to create a priority, and which should rank each other in respect of their inherent merit, the following are suggested: (1) Wages, including masters' wages, earned subsequent to salvage; (2) Salvage (limited to cases in which there is risk, either of life or property to the salvor); (3) Wages, including masters', earned prior to salvage; and (4) Bottomry. These liens should be paid in the order named and in inverse order of accrual. All other liens should rank according to date of accrual except where contemporaneous, in which case *pro rata*. It should always be provided, however, that the taxable costs of court shall be allowed first claim as a necessity to the administration of justice.⁸⁷

This system of priority would provide, at least, in a large measure, much desired predictability. Provision is made for the favoring of

⁸⁴Beach, *op. cit. supra* note 3.

⁸⁵MACLACHLAN, *op. cit. supra* note 77, at 568, 569. Such an idea is not entirely foreign to our law. See *Norwich v. Wright*, 13 Wall. 104, 122 (U. S. 1871).

⁸⁶Such a theory is not wholly inconsistent with the leading cases. The *Jerusalem*, Fed. Cas. No. 7,294, at 566 (D. Mass. 1815), opinion by Story, J., where the rule "*qui prior est tempore, potior est jure*" is mentioned, but held not to apply. The case was one of the priority of a bottomry bond and priority was given because of inherent merit.

⁸⁷*Supra* note 55.

certain liens without becoming involved in an academic discussion such as the relative merit of the lien for pilotage over wharfage, which, at best, is a fine-spun distinction. By allowing time priority to be governed by rule only in so far as it is the measure of a reasonable period of credit, plus a reasonable period of grace, and subject to the sound discretion of the Court, questions as to whether the forty day rule of New York harbor applies to trips to Connecticut, or only as far as Long Island, will be obviated.⁸⁸

It is submitted that the present system of priorities among maritime liens is in need of revision, and that a system similar to that suggested in the conclusions of this article would satisfy conflicting interests, be practical, and work a complete justice.

⁸⁸*In re* New England Transportation Co., 220 Fed. 203 (D. Conn. 1914).