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AN INTRODUCTION TO AMERICAN ADMIRALTY*

G. H. ROBINSON

I

THE ORIGIN AND HISTORY OF ADMIRALTY LAW

Admiralty law is a body of concepts, international in character like "international law" itself, or the "law merchant", which, like them, has its special history, both in and outside of our Anglo-American "law". In this general and international sense, admiralty law has its roots in a more remote past than other branches of our law. It has also its own classic expositions, its ancient codes and usages; and no discussion of the immediate topic of present day admiralty law in America can be entered upon without considering this ancient and international background.

The writings which embody this common tradition of the law of the seas; the admiralty classics, so called, are guide posts in man's efforts to subject the wide waters to his uses. Set down by different peoples, they record the rise and fall and succession of sea empire. If the enterprising Phoenicians of the eastern end of the Mediterranean left a code it has not come down to us. But that of another eastern Mediterranean seafaring people, the Rhodians, is constantly referred to as the earliest, dated at about 900 B.C. It is often stated to have become the basis of the sea law of Greece, and of Rome, when those ancient lands entered upon maritime ventures.¹ An authoritative admiralty lawyer has denied, however, that there was a Rhodian code, or that it was ever adopted into the Roman law.² He, like Justice Story,³ asserts that in both particulars the legend is based on a spurious work dated no earlier than about 1500 A.D.; and insists that the maritime law of Rome is to be credited to the Roman juriconsults. At any rate the Roman law or civil law influence on the admiralty is large,

*The material published here will constitute the first three chapters of a HORNBOOK ON ADMIRALTY.

¹See an article *Admiralty Law* by Judge A. C. Coxe, long an admiralty specialist in the United States District of Southern New York, in (1908) 8 COL. L. REV. 172, 177.

²R. D. Benedict, *The Historical Position of the Rhodian Law* (1909) 18 YALE L. J. 223.

³Story's *Literature of the Maritime Law* (1818) is at p. 93 of his MISCELLANEOUS WRITINGS edited by W. W. STORY (Boston, 1854).

particularly in the procedure and in the absence of the lay element, the jury, at trial.⁴

Another "code" included among the admiralty classics is that of Oleron, which has greatly affected both the modern European and Anglo-American admiralty. Oleron is an island off ancient Guienne, now and for centuries in France, but the laws were promulgated by Eleanor, Henry the Second's queen, mother of Richard the Lion of England, who was Duchess of Guienne. Richard introduced the code to England.⁵ In 1896 this code still had standing in England. In that year an English judge remarked in the course of his opinion:⁶ "If . . . we examine the sources of the English law, as, for instance the laws of Oleron, Wisbuy, and others . . ." The "others" included what he called that "most valuable and remarkable code known as the Ordinance of Louis XIV of August, 1681."

Of this French work, an American admiralty judge⁷ said that the laws of Oleron "formed the bases of the celebrated ordinance of Louis XIV, and are admitted in England and America as authority." He continued: "Next in importance may be cited the laws of Wisbuy. Wisbuy was the ancient capital of Gothland, an island in the Baltic Sea . . . The magistrates of the city had jurisdiction or rather the arbitrament of all causes or suits relating to sea affairs. Their ordinances were submitted to in all such cases and passed for just at all the ports of Europe from Muscovy to the Mediterranean. These laws, which some contend, are more ancient than the laws of Oleron, are quoted today in the admiralty courts of this country, and the maritime codes of many countries of Europe have been based on them.

"Another celebrated code of sea laws was established by the Hanse, or 'League' towns . . . Though to a great extent a reenactment of what had existed before, the laws of the Hanse Towns are still quoted with respect in the admiralty tribunals of the world.

"These three codes, the laws of Oleron, the laws of Wisbuy, and the laws of the Hanse Towns are the most important of the ancient codes . . . They are the three arches upon which rests the modern admiralty structure."⁸

Mention should also be made of the *Consolat del Mar* which was

⁴The point is discussed in a later chapter of the intended book.

⁵An English text of the code is to be found in SAYRE'S CASES ON ADMIRALTY (1929) p. 1; in PETER'S ADMIRALTY, Appendix III; and in 30 Fed. Cas. 1171.

⁶Lord Esher in *The Gas Float Whitton*, [1896] Prob. Div. 42, 47.

⁷Coxe, D. J.

⁸See (1908) 8 COL. L. REV. at p. 172, and again at 178: translations of the various codes are to be found in Appendix to PETER'S ADMIRALTY DECISIONS, Vol. I and also Vol. II.

put into print at Barcelona in 1494 by an editor who, "Moved by the sight of many corrupt readings" determined, "upon consultation with shipmasters and merchants" to collate various prior versions of what were the accepted customs among the shipmen of the Mediterranean. In England, as one author puts it, beside "the received" law of the sea, embodied in the old codes, there were (other) writings upon admiralty law which were accessible for professional use prior to the first English book.⁹ But although the records of the Admiralty Court in England run back to 1530, it was not until 1590 that William Welwod published his *Sea Law of Scotland*, the first British work.

Since this "weake piece of labour", as Welwod himself called it, other British books have become classics. Selden's *Mare Clausum* of 1635, Godolphin's *View of the Admiralty Jurisdiction*, second edition 1685, give the development of the admiralty law in England. Volumes 6 (1892) and 11 (1897) of the *Selden Society Publications* with introductions by R. G. Marsden¹⁰ are valuable to the student of the history of the subject. A birdseye view of English admiralty history is that of T. L. Mears.¹¹ Of late there has been considerable activity in working at the history and sources of the admiralty both in this country and in England. The labors of the late Judge C. M. Hough, himself a great maritime lawyer, and others, have presented the maritime activities of the admiralty judges of our American colonies.¹²

Yet this body of international maritime "law", however much there is unity in its tradition, is scarcely to be conceived of as a system which a court is under mandate to follow. For our own tribunals, Mr. Justice Holmes puts the matter in a somewhat belligerent fashion: "In deciding this question we must realize that however ancient may be the traditions of the maritime law, however diverse the sources from which it has been drawn, it derives its whole power in this country from its having been accepted and adopted by the United States", and, obeying the urge to phrase making, he added: "There is no mystic overlaw to which even the United States must bow."¹³ An eminent practitioner reminds the judge that "There is, however, a very plain and definite law, to which even the United States must

⁹W. Senior, *Early Writers on Maritime Law* (1921) 37 L. Q. REV. 323.

¹⁰Author of COLLISION AT SEA, a standard work.

¹¹Printed as an introductory chapter of the third edition of ROSCOE, ADMIRALTY JURISDICTION AND PRACTICE (London, 1903); the same material is to be found in 2 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY, 312-364 (1908).

¹²See *infra* note 20.

¹³Majority opinion in *The Western Maid*, 257 U. S. 419, 432, 42 Sup. Ct. 159, 66 L. ed. 299 (1922).

how if it is to succeed in maritime affairs, and that is the general maritime law, or common law of the sea and the established practices and requirements of the business."¹⁴ An earlier judge of our Supreme Court put the problem more sympathetically to the obvious advantages of conformity with the rest of the world:

"Undoubtedly no single nation can change the law of the sea. That law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power but because it has been generally accepted as a rule of conduct. Whatever may have been its origin whether in the usages of navigation, or in the ordinances of maritime states, or in both it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world."¹⁵ The subject is thus reminiscent of the ancient question: "How far is 'international law' law?"¹⁶ and of

¹⁴G. L. Canfield, Note (1922) 20 MICH. L. REV. 535.

¹⁵Justice Strong in *The Scotia*, 14 Wall. 170, 187, 188, 20 L. ed. 822 (1872). See also in the same vein: *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585 (1872); *The Lottawanna*, 21 Wall. 558, 572, 578, 22 L. ed. 654 (1874); *The Scotland*, 105 U. S. 24, 26 L. ed. 1001 (1881); and *The Manhanset*, D. C. 18 Fed. 918, 920-23 (D. C. Va. 1884).

¹⁶Bradley J. in *The Lottawanna*, 88 U. S. 558, 572, 22 L. ed. 654 (1874): "But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of

the query which is raised in any case where a forum is asked to vindicate "rights" based on occurrences which take place beyond the confines of the territorial boundaries of the court's sovereign. In this latter question the court relies on "comity".¹⁷ Why any nation accepts the common customs of the sea rests on no less or greater basis. They exist as law in the courts of any nation only as that nation has adopted them.

*The United States has adopted the customary law of the sea
with modifications of its own*

Among the British colonies in North America, there had been admiralty courts in the seaport cities since 1696. In 1768 new Vice Admiralty courts were set up at Halifax, Boston, Philadelphia, and Charleston.¹⁸ Commissions to these various colonial judges bestowed wide authority to deal with both specified and general maritime matters.¹⁹ Activities of the various admiralty judges who sat in New York in the pre-Revolutionary period have been preserved to us by the labors of the late Judge Hough.²⁰ As Hough shows in his Introduction, the New York court had special significance. He says that it is quite erroneous to believe that what the court did was righteously "snuffed out" by the Revolution. On the contrary, its practice, self-

the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations."

¹⁷H. Barry, *Comity* (1926) 12 VA. L. REV. 353; GOODRICH, *CONFLICT OF LAWS* (1927) p. 7; I BEALE, *TREATISE ON THE CONFLICT OF LAWS* (1935) p. 53.

¹⁸H. Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction* (1925) 10 CORNELL L. Q. 460, 461.

¹⁹The text of one of these is set forth in I BENEDICT, *ADMIRALTY PRACTICE* (5th ed. 1925) 660.

²⁰REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715-1788 (Yale Univ. Press, 1925). Judge Hough, at p. 257, n. A. shows that there is very little of what he calls "admiralty remains", either in New England or in Nova Scotia whence tradition says they were taken when Boston was evacuated; or in Philadelphia, or in Charleston.

See also HELEN J. CRUMP, *COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY* (London, 1932), who states that the admiralty work of Massachusetts was done by the ordinary courts.

created as it was, has widely passed on to all the courts of the United States. This early court handled the substantive law with little regard to the English admiralty of the time and, says Judge Hough, "therefore produced beneficial results through the United States courts, which took up the work in the same spirit."

The admiralty clause of the United States Constitution

Notwithstanding this considerable background of local contact with the subject of maritime law, it received scanty advance attention in the Federal Constitutional Convention of 1787.²¹ Although by the end of the year 1778 admiralty courts had been set up in all of the thirteen states, and the Continental Congress had organized a committee to hear appeals in prize cases, none of the original "plans" for the Constitutional Convention mentioned the topic, and the wording of the Constitution on this point appears to have been the work of the "Committee on Detail" which hammered the various plans into final shape.²²

However the language got into the Constitution of the United States, the starting point for the student of American admiralty is with that document. Its Article III, section 1 provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . Section 2. The judicial power shall extend . . . to all cases of admiralty and Maritime jurisdiction." Although a century and a half later a judge said that the purpose of the framers of the Constitution was to place the entire subject under national control,²³ the articles which specifically say so concerning other subjects are differently and more explicitly worded. Article 1, section 8 reads that "*Congress shall have power to regulate*" interstate and foreign commerce, *etc.*²⁴ Early maritime legislation merely used the word "cognizance" of admiralty and maritime jurisdiction,²⁵

²¹Though in 1924, Judge Van Devanter said "The framers of the Constitution were familiar with" it. See *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 Sup. Ct. 391, 68 L. ed. 748 (1924).

²²See Judge Putnam's discussion of this point in (1925) 10 CORNELL L. Q. 461 *et seq.* The present text is based on his refutation of Justice Wayne's statement in *Waring v. Clarke*, 5 How. 441 (1846) that the present wording of the Constitution was in the "first plan". Wayne, J. extensively discusses the sources of our admiralty law.

²³Van Devanter, J. in *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 Sup. Ct. 391, 68 L. ed. 748 (1924).

²⁴The italics are the writer's.

²⁵Act of Sept. 24, 1789, 1 STAT. 76, R. S. §711, 28 U. S. C. A. §371 (JUD. CODE §256) grants the cognizance to the District Courts.

and literally this mere setting off of judicial power in admiralty was scarcely a grant to Congress of legislative authority over the subject matter. Yet Congress has actually proceeded as if it had been given a grant of power and it has actually exercised over matters maritime an authority equivalent in practice to that which it exercises over interstate commerce. This assumption or usurpation has not escaped comment.²⁶ But judicial acquiescence in the Congressional view of the latter's authority has been frequent. In 1924 the Supreme Court said: "Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view. Congress acted upon it, and the courts, including this court, gave effect to it."²⁷ The same opinion continued in like vein to the conclusion that there was "power" in Congress over the entire subject. And in a more recent case,²⁸ the Supreme Court holds that the effect upon state laws of Congressional legislation in the admiralty field is the same as Congressional legislation under the grant of "power" over interstate commerce. This was again asserted in 1934 in what no doubt is the definitive statement of the doctrine. Speaking in a period of federal ascendancy in other particulars, Chief Justice Hughes for the court said: "The purpose was to place the entire subject, including its substantive as well as its procedural features under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States."^{28a} Thus Congressional power where judicial power was extended is complete.

Whatever may be the actual type of cases included in the phrase "all cases of admiralty and maritime jurisdiction"—of which more later—the general admiralty and maritime field is therefore confided by the United States Constitution to the Federal Government, not merely judicially but legislatively as well. As the custodian of the substantive law so labeled, the Federal Government, rather than the states or any one of them, is to say what shall be recognized as the "general maritime law" in the first instance.²⁹ The job of saying what was what early fell to the Federal courts and until comparatively

²⁶See (1919) 33 HARV. L. REV. 300.

²⁷Van Devanter, J. in *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 Sup. Ct. 391, 68 L. ed. 748, (1924).

²⁸*Lindgren v. U. S.*, 281 U. S. 38, 50 Sup. Ct. 207, 74 L. ed. 686 (1930).

^{28a}*The Thomas Barlum (Detroit Trust Co. v. Barlum S. S. Co.)*, 293 U. S. 21, 55 Sup. Ct. 31, 79 L. ed. 36 (1934).

²⁹This of course is Mr. Justice Holmes' view, *supra* note 13, applied to state and federal relations.

lately in the field of "maritime law" legislation was scanty.³⁰ In the large sections of the leading texts and case books which are devoted to "maritime jurisdiction", the material consists of Supreme Court decisions on what cases were and were not within the meaning of the Constitution's phrase. Moreover this judicial construction building up a content for the language of the Constitution was at a time when the Supreme Court was building up its job generally. Taking the English meanings of the words at the time of the Revolution as a standard, the court's connotations of these constitutional phrases have been as widely extended as any other in the document. The early process, indeed, was wholly that of extension. That the words of the Constitution are in any sense a limitation on the Federal Government's authority over the field has been an idea of the last quarter century and is the product of judicial decision on the legislative activities of Congress in the maritime field. In this sense the expansion of admiralty jurisdiction has in recent years met with checks and its progression has been less triumphant in the twentieth century than in the nineteenth. These limitations, however, have been read as part of the relationship between the Federal Government and the states, and the problem involved has been wholly internal.

In so far as our relations with other nations are concerned, the internally appropriate authority to conduct them is the Federal Government. The United States as an international personality may adopt or reject such portions of the international maritime corpus³¹ as it chooses so long as it is prepared to accept the cost of being out of step with other maritime nations. Its treaty power extends to the making of conventions which limit what is otherwise generally accepted admiralty law:³² and the Congressional power to legislate is no less

³⁰C. M. Hough, *Admiralty Jurisdiction of Late Years* (1924) 37 HARV. L. REV. 529. "On the vital point of expounding the constitutional grant, and ascertaining and declaring what are and what are not 'cases of admiralty and maritime jurisdiction', that Court for more than a century has pursued its own method of selection and exclusion choosing what seemed suitable from the whole range of maritime laws (or customs) whether English, continental or colonial sometimes throwing away its first choice, but authoritatively labelling its excerpts for the time being as the maritime law of the United States."

³¹That there is "Corpus Juris maris" is repudiated by Holmes, J. He calls it "not a corpus juris (but) a very limited body of customs and ordinances of the sea". *So. Pac. Co. v. Jensen*, 244 U. S. 205, 220-21 (1917), dissenting opinion.

³²In *The Albergen*, 223 Fed. 443 (S. D. Ga., 1915), an American citizen sued in admiralty for wages due him from a Dutch vessel, and the court held that a treaty granting exclusive jurisdiction to the consuls of the Netherlands barred the suit. See a note in (1916) 29 HARV. L. REV. 219. 2 MOORE, DIGEST INTERNATIONAL LAW (1906) p. 278 ff, gives instances of renunciation of control over foreign vessels, etc. in American harbors. The general subject of consular jurisdiction is fully

unbounded in this particular field. However the change involves the Federal Government's political department in diplomatic controversies, the courts do not question the treaty any more than they question the legislation.³³ No self-imposed constitutional limitation rests upon the United States in the interest of world unity of the maritime law.

The limitations of recent years though leaving Congress free to adopt or reject within the traditional area "admiralty and maritime", have taken the form of judicial decisions which require that its modifications apply uniformly throughout the United States. Domestic uniformity in the admiralty field has become a constitutional requirement which the court has hammered out with persistence since the World War. Though not a new idea the doctrine was so sharply stated in 1917 in *Southern Pacific Co. v. Jensen*³⁴ that the admiralty law of the present may be called the post-Jensen period. Much of the older law has been affected either by the decision itself or by the statutes³⁵ which Congress has passed in acceptance of the fact that uniformity is imperative.³⁶ The year 1920 witnessed the modification of the Merchant Marine Act, the passage of the Federal Death Act, the new Seaman's Act, a new Maritime Lien Act, a Ship Mortgage Act. In that same year the Supreme Court issued new Rules of Practice in Admiralty. In 1927 Congress passed a Harbor Workers' Act on a workmen's compensation basis. Of lesser general interest are the Acts of 1920 and of 1925 in which our government has largely abdicated its sovereign immunity as a ship owner.^{36a}

treated in RESEARCH IN INTERNATIONAL LAW (1932) Part II, *Legal Position and Functions of Consuls*, especially Article II. In a volume of the same title, 1929, Part III *Territorial Waters*, the Research Committee discuss the position, especially in Articles 16 *et seq.*, of merchant ships in territorial waters.

³³The Constitution of course makes treaties the "law" on a par with statutes. A statute repeals a treaty so far as the courts are concerned. National courts administer their own law as declared by Congress or other legislatures. *Cf.* The *Zamora*, 32 T. L. R. 436 as noted in (1916) 30 HARV. L. REV. 166.

³⁴244 U. S. 205, 37 Sup. Ct. 523, 61 L. ed. 1084 (1917).

The doctrine was not really new in 1917, having been set forth in *The Lottawanna*, 21 Wall. 558, 575 (1874), when Bradley, J. stated: "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with and operating uniformly in, the whole country." It was possible for Hughes, C. J., for a unanimous court, to say in the *Thomas Barlum*, *supra* note 28a, in 1934: "But the grant presupposed 'a general system of maritime law' which was familiar to the lawyer and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna . . .*"

³⁵See (1931) 44 HARV. L. REV. 226, n. 11, an article by the present writer.

³⁶See (1931) 44 HARV. L. REV. 226, n. 9; a sketch outline of the Federal legislation based on the "grant" of "judicial power" is set forth by Hughes, C. J. in the *Thomas Barlum* 293 U. S. 21, 55 Sup. Ct. 31, 38, 79 L. ed. 36 (1934).

^{36a}See *Responsibility of the United States on Maritime Claims Arising out of*

This activity of Congress has mirrored the revivification of a United States Merchant Marine in which Congress itself has played a direct and, it must be conceded, a costly part. Up to the Civil War, our tonnage rose steadily. Ships of the finest construction were turned out of our yards. The "Yankee Clipper" was a factor in world trade as the great days of sail were ending. Ashore, M. F. Maury studied winds and currents, and afloat, great sailors drove great ships across the waters as no ships had ever before been driven. But the switch to steam carried sea supremacy to the British Islands and, by the outbreak of the World War, the flag which the clippers of Watson's and McKay's building had carried was a rare sight in distant ports. The World War called for more ships and the call took on a frantic note as the German submarines did their work. Ship yards grew over night and spewed ships. At vast cost the flag was at sea again and if it is still costly to keep it there we have now a merchant marine. This flood of new interest on the subject the writer invokes as the justification for the present work.

II

MARITIME JURISDICTION

In dealing with American admiralty, it is customary to devote the opening chapters to the subject of admiralty jurisdiction. "Jurisdiction" is a term which has to do with two things. It means the power to give juristic significance to events—usually those which occur within the territory of the sovereign who is said to "have jurisdiction" in this sense, to say what the legal results of the events shall be. The phrase also means that a forum of a particular sovereign may feel that it can appropriately give a judgment on occurrences which have taken place anywhere. Having "jurisdiction" may here be a matter of service, *etc.* The two senses are not always distinguished and they are not always set off in discussions of jurisdiction. They are not set off in the fundamental document in American admiralty, the Constitution of the United States. But admiralty jurisdiction in the first sense rests upon a combination of various items of which the most obvious is some sort of maritime flavor in the facts constituting the subject matter of the suit. In addition, certain purely legalistic formulas, which have to do with the forum in which the suit may or must be brought, make up "jurisdiction" in the judicial sense. In both aspects of jurisdiction the discussion again starts with Article III, section I

the Operation of Government Owned Vessels, comment (1930) 39 YALE L. J. 1189-1202.

of the United States Constitution, that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Section 2 reads "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." Since the general context is concerned with the setting off of the Federal establishment as against those of the states, it might be supposed that the states and their courts are excluded from the field. This, however, is not the fact.

Notwithstanding that the maritime field is federal both judicially and legislatively, state authority cannot be ignored. As part of what has turned out to be a fundamental, and, so far, permanent adjustment of the state-federal limits, Congress in 1789 enacted³⁷ "That the district courts shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." From this it does not necessarily follow that the common law remedy should be pursuable in the state courts, as the Federal courts themselves also administer common law remedy. But this clause has been so interpreted as to prevent the ouster of the state tribunals and it makes necessary as part of the question of jurisdiction an examination of what was saved to them by the phrase "common law remedy". Briefly, and at this point only incidentally, the state courts are denied only that remedy which appropriates the ship herself to the indemnification of the other party—the so-called action in rem.³⁸ Actions which seek personal judgments even though based upon admiralty causes, are left to the states. For such remedies, the plaintiff party, the libellant, in the nomenclature of the present subject, has a choice of forum and may invoke a state court or an admiralty court. Speaking of "jurisdiction" therefore in the sense of court competency, the constitutional and the statutory provisions amount to this: the in rem action is exclusively for the admiralty

³⁷1 STAT. 76, R. S. §711, 28 U. S. C. A. §371.

³⁸"It is well settled that in an action in personam the state court has jurisdiction to issue an auxiliary attachment against the vessel . . . The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing—in which the vessel itself seized and impleaded as the defendant and is judged and sentenced accordingly. By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes and not merely the title or interest of a personal defendant . . . Actions in personam with a concurrent attachment to afford security for the payment of a personal judgment are in a different category." Hughes, J. in *Rounds v. Cloverport Foundry and Machine Co.*, 237 U. S. 303, 35 Sup. Ct. 596, 59 L. ed. 966 (1915).

courts, that is, the Federal District Courts of the United States sitting in admiralty. The suit in personam may be brought either in the same Federal courts, sitting either in admiralty or at common law:³⁹ or in the state courts. As New York City is the foremost American seaport, the bulk of admiralty litigation centers in the courts which sit in and around New York harbor. A larger share of maritime common law remedy litigation falls to the state courts of New York than to other states and more maritime cases fall to the Federal courts sitting in New York City than to other Federal courts. In New York City alone there are two United States Districts, the Southern and the Eastern Districts for New York. In the Southern there are eight judges and in the Eastern four. Ten Federal Circuit Courts of Appeals review the decisions of the District Courts. That sitting at New York City is the Circuit Court of Appeals for the Second Circuit. From the Circuit Courts of Appeals cases may go to the Supreme Court of the United States and as the state courts are obliged by the Federal courts' reading of the Constitution to conform to the maritime law uniformity doctrine there is also a review by the Supreme Court of the United States of state court rulings on maritime law. In so far as courts, whether state or Federal, are called upon to interpret Federal legislation, their construction of its import and their application of its provisions are also subject to its review. Consequently, the United States Supreme Court sitting at Washington, draws to itself all ultimate questions concerning the admiralty law both statutory and non-statutory. Even in so far as that law may be affected by treaty arrangements with foreign nations this same court is the apex for the determination judicially if not politically of the rights and liabilities of litigants.⁴⁰ "Jurisdiction", in the sense of the law giving juristic results to maritime occurrences, is also Federal since the *corpus juris maris* is allotted by the Constitution to the United States rather than the states. But it cannot be said that the substantive outcome of a given suit is unaffected by the choice of a state forum. By bringing the suit in a state court, a complaining party

³⁹Suits on the common law side of the Federal courts are governed by the usual requirements for Federal jurisdiction.

⁴⁰In *The Appam*, 243 U. S. 124, 37 Sup. Ct. 337, 61 L. ed. 633, Ann. Cas. 1917 D, 442 (1917), the Supreme Court entertained libels for the recovery of a British ship taken by a German Cruiser at sea and by her captors brought to the United States. Notwithstanding that the whole matter was under diplomatic negotiation and the Germans relied on treaty provisions, the court construed the treaty for itself and decreed restitution. See 2 HYDE, *INTERNATL. LAW* (1922) p. 738 for the view that the court should have kept hands off in favor of the state department's handling of the situation.

may affect the "law" applicable to events maritime in character. This is strikingly shown in the cases where the victim of a personal injury has himself been contributorily negligent. If he sues in admiralty, his negligence costs him only a diminution of damages,⁴¹ but if he sues in a New York State court, the Court of Appeals there has made it cost him more since it applied the common law rule against him.⁴² What the Supreme Court of the United States thinks of this is only inferentially to be deduced as yet, but the United States Circuit Court of Appeals at New York in *Port of New York Stevedoring Corporation v. Castagna*⁴³ in dealing with a case on its common law side said: "The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of forum. In the case at bar, plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common law court with the same right as he would have entered the admiralty court". Since the Supreme Court refused certiorari in the *Castagna Case*,⁴⁴ its position on the point is merely argumentative.⁴⁵

⁴¹The *Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586 (1890).

⁴²*Meleeney v. Standard Ship Building Co.*, 237 N. Y. 250, 142 N. E. 602 (1923). This case has been competently matched against the newer concept of the admiralty corpus by George C. Sprague, *Divided Damages* (1928) 6 N. Y. U. L. Q. REV. 15, who concludes that: "The true determinative question would seem to be whether the rule of divided damage is a matter of right or a matter of procedure. If . . . of right then upon established principles it should follow the maritime tort litigants into the common law courts." He asserts that "It is a part of the right connected with every maritime tort and not a mere procedural remedy, dependent upon the forum," and that "since (*Belden v. Chase*) the principles of the admiralty law have been more clearly defined and established and *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255 (1922); *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372 (1918); *Southern Pacific v. Jensen*, 244 U. S. 205 (1917); *Knickerbocker-Ice Co. v. Stewart*, 253 U. S. 149 (1920) have been decided. The principles underlying these cases are contrary to the decision in *Belden v. Chase* (150 U. S. 674 (1893)) and it is suggested have modified it."

⁴³280 Fed. 618, 624 (1922).

⁴⁴258 U. S. 631 (1932).

⁴⁵See the writer's *Personal Injury in The Maritime Industry* (1930) 44 HARV. L. REV. 223, at 247 *et seq.* The conflict of laws doctrine assigns contributory negligence to the "right" rather than to the "remedy". See BEALE, CONFLICT OF LAWS §385; RESTATEMENT, CONFLICT OF LAWS §385, Comment C: "If by the law of the place of the wrong contributory negligence is not a complete defense, but reduces the amount of damages, it has the same effect if suit is brought in another state." *Fitzpatrick v. International Ry.*, 252 N. Y. 127, 169 N. E. 112 (1929), is specifically interesting in coming from the same court as the *Meleeney* case. *Fitzpatrick* was injured in Ontario and the provincial statute apportioned damages. The court said: "The act gives a right . . . not recognized by the common law . . . [It] goes beyond a matter of procedure"; and affirmed a judgment for the plaintiff based upon a charge in accordance with the Ontario Act. See Note (1930) 43 HARV. L. REV. 1134; (1930) 39 YALE L. J. 901.

Cases of Admiralty-Maritime Jurisdiction

What are the factors which cause a case to fall within that corpus of law governing the "admiralty and maritime jurisdiction"? Since in our federation scheme the residuary powers remain vested in the states, and the Federal Government is one of limited and delegated authority, the Supreme Court technique for determining into which catch basin a given matter is to fall does not presume Federal cognizance. It must be shown. Consequently the party invoking the admiralty jurisdiction must bring his case within the category of causes of "admiralty and maritime jurisdiction." Conversely, if the case fall under an accepted maritime category the litigant who invokes a state court must establish that, notwithstanding he has a maritime cause of action, he is merely seeking a "common law remedy". These two points so run together in the cases that they are here mentioned in the same breath. Frequently, the definition of what is a case of admiralty and maritime jurisdiction is decided by a negation of state jurisdiction.

Construction Principles

Yet notwithstanding the foregoing there has been what might be called a nationalistic bias in the Federal Courts in throwing the particular case into this or that pigeonhole of the maritime category. Their development of the maritime category coincided with the period in which the Federal Supreme Court was enlarging the Federal scope as contrasted with that of the states and establishing its own place among the branches of the Federal Government. Naturally enough, in the court's reaching out for power, it often leaned its own way. In respect to admiralty matters, the famous Justice Story in 1818 laid down the following: "The language of the Constitution will therefore warrant the most liberal interpretation and it may not be unfit to hold that it had reference to that maritime jurisdiction which commercial convenience, public policy, and national rights, have contributed to establish with slight local differences all over Europe."⁴⁶ These factors in our own country have made for an extension of jurisdiction which is one of the most notable things connected with the present subject. So far had this gone, that Justice Story's conclusion in 1818, in the opinion last quoted that admiralty and maritime jurisdiction "comprises all maritime contracts, torts, and injuries", furnishes little light without further examination of the meaning of the common adjective "maritime".

⁴⁶The quotation is from Story's famous opinion of *De Lovio v. Boit*, 2 Gall. 299, Fed. Cas. No. 3776 (1815) in which he reviews the meanings of the phrase "admiralty and maritime jurisdiction".

The English heritage as a test of "maritime"

The Supreme Court's attitude toward its task of reading the Constitution is early illustrated by its treatment of the English tradition. Maritime jurisdiction in our country today is little concerned with how our English forebears handled the topic at the time the Constitution makers used their language. As early as 1815 in *DeLovio v. Boit*,⁴⁷ Story took stock of our English heritage. In the manner in which we "adopted" the common law of England by choosing what we felt appropriate, he elected to disregard the narrow reading of contract jurisdiction which Lord Coke had forced upon the English admiralty. A decision of the Supreme Court later stated: "But in England . . . the general rule (was) that the jurisdiction of the admiralty was confined to the high seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land though relating to marine affairs. With respect to contracts this criterion of locality was carried so far that with the exception of cases of seamen's wages and bottomry bonds no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea and was to be executed on the sea.

"Of course under such a construction of the admiralty jurisdiction a policy of insurance executed on land would be excluded from it. But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England but is to be interpreted by a more enlarged view of its essential nature and objects and with reference to analagous jurisdiction in other countries constituting the maritime commercial world, as well as to that of England."⁴⁸ In 1934 Chief Justice Hughes declared: "This authority was not confined to the cases of admiralty and maritime jurisdiction in England when the Constitution was adopted. *Waring v. Clarke*, 5 How. 441, 457. The limitation which had been imposed upon the high court of admiralty in the course of its controversy with the courts of common law were not read into the grant."⁴⁹ American judicial admiralty conceptions

⁴⁷*Supra* note 46.

⁴⁸Mr. Justice Bradley in *New England Mut. Ins. Co. v. Dunham*, 78 U. S. 1, 11 Wall. 1, 20 L. ed. 90 (1870). Both he and Justice Story held a marine insurance to be a "contract maritime by nature regardless of the place of its execution." The English background and our early departure from its limitations is set forth by Nelson, J. in *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344, 385 (1848).

⁴⁹The Thomas Barlum, *supra* note 28a.

have thus been developed according to the needs of the country as perceived by the court, rather than by adherence to British tradition. Our admiralty jurisdiction on the contract side is now completely denuded of any question of where the contract was made,⁵⁰ and while we have made our tort jurisdiction to rest on the locality of the occurrences, that is, upon the water, we have utterly departed from the pre-Revolutionary English limits in defining the character of the water. Since not only tort jurisdiction but also in some measure contract jurisdiction depends on the nature of the waters, it becomes appropriate to discuss our present "admiralty and maritime" jurisdiction with reference to the waters involved. It can be stated in terms of the waters upon which events must occur in order to be within the general jurisdiction in tort. On the contract side as well as the tort side, dealings with vessels which would undoubtedly be within the admiralty jurisdiction if the vessels were in one body of water may not be if they are in another, such as for instance, a land-locked lake.

*Admiralty waters of the United States*⁵¹

The waters upon which our admiralty jurisdiction obtains represents a comparatively early break away from the English tradition. The English view as we have seen limited jurisdiction to the waters of the sea or waters not within the *fauces terrae* within the ebb and flow of the tide. Until the advent of the steamboat upon the western rivers, the question whether the United States would adhere to this remained quiescent. In 1825 Story, J. for a full court clung to the older order,⁵² as he did again in 1837.⁵³ In 1847 in *Waring v. Clarke*⁵⁴ which involved a collision on the Mississippi River ninety five miles above New Orleans, the court took jurisdiction but was at pains⁵⁵ to say that the jurisdiction "extends to tide waters, as far as the tide flows though that may be *infra comitatus*." Three judges dissented and Justice Woodbury's opinion formidably stressed the point that the decision gave admiralty jurisdiction over territorial waters of a state. This last was true and it has remained true ever since. In consequence

⁵⁰In 66 L. R. A. 198 (1901) *Admiralty Jurisdiction of Contracts* is the subject of an extended note which is both historical and expository in character. Again in 1904 appears a note in 70 L. R. A. 353 on *What Contracts Will Support Maritime Lien*.

⁵¹See J. B. Waite, *Admiralty Jurisdiction and State Waters* (1913) 11 MICH. L. REV. 580-87.

⁵²The Thomas Jefferson, 10 Whcat 428, 6 L. ed. 358 (1825).

⁵³The Steamboat Orleans v. Phoebus, 11 Peters 175, 9 L. ed. 677 (1837).

⁵⁴5 How. 441, 12 L. ed. 226 (1847).

⁵⁵46 U. S. 441, 5 How. 441, 464, 12 L. ed. 226 (1847).

all tidal harbors, however much they are territorial waters of a state, are within the admiralty jurisdiction. But the latter has been extended beyond the merely tidal waters. In 1851 *The Propeller Genesee Chief v. Fitzhugh*⁵⁶ litigated a collision which had occurred on Lake Ontario. Pleading that the place of collision was within the territorial boundaries of New York State not on the high seas nor any arm of the sea, river, etc. where the tide ebbed and flowed, the answer specifically denied admiralty jurisdiction. Chief Justice Taney, having elaborately reviewed the authorities, nevertheless retained the case. The libellant relied upon an act of February 26, 1845⁵⁷ which provided that the District Courts should have the same jurisdiction concerning steamboats or other vessels of twenty tons and upward employed in navigation between ports in different states upon the lakes and navigable waters connecting them as the courts had in case of vessels employed upon the high seas and tide waters. The Chief Justice, in holding this act to be constitutional, laid down a new test. "If it is a public navigable water on which commerce is carried on between different states or nations the reason for the jurisdiction is precisely the same" as in the case of tidal waters. The English rule was phrased in terms of tide, he said, merely because the tidal stream was the only navigable stream. "In England tide water and navigable water are synonymous terms, and tide water . . . meant nothing more than public rivers. . . In other words it is confined to public navigable rivers."⁵⁸ In 1866 *The Hine*⁵⁹ involved a collision in the Mississippi off St. Louis and of course far from the tide water on which the Thomas Jefferson decision floated. Yet the Supreme Court upheld the jurisdiction of admiralty against a state statute. Justice Miller for the court stated that *The Genesee Chief* had established principles upon which admiralty jurisdiction extended to all the public navigable

⁵⁶12 How. 457, 13 L. ed. 1058 (1851). See Smith, *The Genesee Chief* (1923) 9 A. B. A. J. 527.

⁵⁷5 STAT. 726, 28 U. S. C. A. §770. 285 U. S. 22, 52. See *Crowell v. Benson*, 285 U. S. 22, 55 (1931): "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute."

⁵⁸The tidal test was long since abolished in England. 24 VICT. c. 10 (1861); MARSDEN, COLLISIONS AT SEA, (3rd ed.) 210.

⁵⁹4 Wall. 555, 18 L. ed. 451 (1866).

rivers of the interior of the country. He showed that the inland rivers were not covered by the Act of 1845⁶⁰ which concerned only the rivers connecting the lakes, but rested upon the original grant of power in the Constitution which covers the entire navigable waters of the United States.

Thus to the question, what waters are within the admiralty jurisdiction so that events occurring on them may have cognizance in admiralty courts, the answer is, all waters whether fresh or salt, tidal or non-tidal, which are navigable in fact. The test concerns the waters, not the commerce upon them.⁶¹ To insist that the commerce upon the waters should be interstate or foreign in order to establish the jurisdiction is a "complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country."⁶² In so saying, Taft, C. J. was reiterating Mr. Justice Clifford in *The Belfast*⁶³ who in 1868 said: "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend on the power of Congress to regulate commerce: . . ." Again, in *Ex parte Boyer*,⁶⁴ the court said: "and it makes no difference that . . . one or the other of the vessels was at the time of the collision on a voyage from one place in the state of Illinois to another place in that state".

But though the commerce need not be interstate the waters must not only be navigable but be navigable for interstate or foreign commerce. In the *Daniel Ball*⁶⁵ it was held that the Grand River, a navigable water wholly within the state of Michigan was within the admiralty jurisdiction. It was a stream capable of bearing for forty miles the *Daniel Ball*, a 123 ton steamer, and formed by its junction with

⁶⁰Justice Henry B. Brown in an article on *Jurisdiction of the Admiralty in Cases of Tort* (1909) 9 COL. L. REV. 1 at p. 2 remarks that "The validity of this act was both upheld and denied by the Supreme Court. In the great case of the *Genesee Chief* . . . the power to pass the act under the commerce clause of the Constitution was denied; but the act was recognized . . . for the reason that the Lakes and interior waters were subject to the general admiralty and maritime jurisdiction of the United States . . ." The article discusses the further history of the 1845 act which was described as "obsolete" in the *Robt. W. Parsons*, 191 U. S. 17, 31 (1903).

⁶¹Justice H. B. Brown in *The Robert W. Parsons*, 191 U. S. 17, 26 (1903), lists other cases dealing with the admiralty character of various bodies of water.

⁶²*London Guarantee, etc. Co. v. Industrial Accident Comm.* 279 U. S. 109, 124, 49 Sup. Ct. 296, 73 L. ed. 632 (1929).

⁶³7 Wall. 624, 640 (1868).

⁶⁴109 U. S. 629, 3 Sup. Ct. 434, 27 L. ed. 1056 (1884).

⁶⁵10 Wall. 557 (1870).

Lake Michigan, a continuous highway for commerce both with other states and with foreign countries. In this opinion, the rule was broadly announced that "those rivers must be regarded as public navigable rivers in law which are navigable in fact" and that "they constitute navigable waters of the United States in contradistinction from the navigable waters of the states when they form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water."⁶⁶ The same principle was applied in *The Montello*⁶⁷ to the Fox River in Wisconsin although its navigability was interrupted by rapids and falls over which portages were required, and to the Chicago River in *Escanaba Co. v. Chicago*.⁶⁸

That a waterway otherwise meeting these tests is artificial is no bar to the jurisdiction. In 1884 in *Ex Parte Boyer*,⁶⁹ a writ of prohibition was asked to bar an admiralty court from dealing with a collision which took place in the Illinois and Lake Michigan Canal connecting the Chicago River with the Illinois River and the Mississippi. Mr. Justice Blatchford denied the petition saying that this canal was public water of the United States "even though the canal is wholly artificial and is wholly within the body of the state and subject to its ownership and control."⁷⁰ Only sixty feet wide and six feet deep, the canal in question was built following a grant to Illinois of Federal lands for the canal; and the Act of Congress declared that the canal should be "a public highway". The size, or lack of size, of the canal in the *Boyer* case and its financial history made the *Boyer* decision easier than that of the *Robert W. Parsons*⁷¹ in 1903 in which the New York State Courts sustained their own jurisdiction under a New York Act to enforce a lien in rem for repairs on a canal boat navigating the Erie Canal. Arguing that such a state act was unconstitutional, because the admiralty law applied, the boat owner sued out a writ of error on which the Supreme Court reversed the state holding. Justice Brown for the majority wrote that the state court's decision was "either because the cause of action arose upon an artificial canal or because a canal boat is not a ship or vessel contemplated by the maritime law, and within the jurisdiction of the admiralty court". He

⁶⁶10 Wall. p. 563. ⁶⁷20 Wall. 411 (1874).

⁶⁸*Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442 (1882). See also *Miller v. The Mayor*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. ed. 971 (1883); *In re Garnett*, 141 U. S. 1, 8, 11 Sup. Ct. 840, 35 L. ed. 631 (1890).

⁶⁹109 U. S. 629, 3 Sup. Ct. 434, 27 L. ed. 1056 (1884).

⁷⁰109 U. S. p. 632.

⁷¹191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73 (1903).

held that the state court was wrong on both points; that there was no distinction in principle between navigable waters natural and navigable waters artificial.⁷² He relied on *Ex Parte Boyer*⁷³ as settling the jurisdiction of the admiralty court over the waters of any artificial canal⁷⁴ which is the means of communication between ports and places in different states and territories, in which class the Erie fell.⁷⁵ The majority thus voted for full admiralty jurisdiction over the canal. Three dissenters voted for merely limited jurisdiction and were for denying it in the very case which involved a repair bill on a vessel designed and used for mere local traffic within the state. In 1932 the New York Barge Canal was navigable waters within the admiralty and maritime jurisdiction without more than passing comment.⁷⁶

In the *Parsons* case, the whole court agreed that it was "not intended to intimate that if the waters though navigable are wholly territorial and used only for local traffic, such for instance, as the interior lakes of the State of New York, they are to be considered as navigable waters of the United States".⁷⁷ This had already been decided in *The Montello*⁷⁸ in 1874. In 1890 in *Stapp v. Steamboat Clyde*⁷⁹ the Minnesota court upheld a state statute similar to that of New York in the *Parsons* case in a litigation which arose out of supplies delivered to a steamboat navigating Lake Minnetonka, an inland lake lying wholly within the limits of Minnesota.

So far "navigable waters" have been defined merely in terms of geography. There remains for discussion the question of what is meant

⁷²Judge Brown cited *The Avon*, 1 Brown's Ad. 170, Fed. Cas. 680 (1873) in which Judge Emmons took jurisdiction of a collision happening upon the Welland Canal, as the earliest with the exception of *Scott v. Young American*, Newberry's Ad. 101 (1856), of the canal cases in this country. But he added the doctrine was "no novelty in England".

⁷³*Supra* note 69.

⁷⁴In *White Oak Transportation Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U. S. 341, 42 Sup. Ct. 338, 66 L. ed. 649 (1922) a steamer ran ashore on the south bank of the Cape Cod Canal and later sank diagonally across it. The canal company libelled the ship which cross libelled the canal company. No question is made of the jurisdiction in admiralty.

⁷⁵The *R. W. Parsons*, *supra* note 71, at p. 28; "... the Erie Canal though wholly within the state of New York, is a great highway of commerce between parts in different states, and foreign countries..." The canal was built with New York money but the item received no comment and is obviously immaterial.

⁷⁶*Marine Transit Co. v. Dryfus*, 284 U. S. 263, 272, 52 Sup. Ct. 166, 76 L. ed. 282 (1932).

⁷⁷Such of them however which connect with the New York Barge (Erie) Canal are within the admiralty jurisdiction. *Cf. Ex parte Wheeler*, 1 F. Supp. 402 (E. D. N. Y. 1932), involving an explosion on board a small vessel while lying in Cayuga Inlet at the southern end of Lake Cayuga.

⁷⁸8 U. S. 430, 441, 442.

⁷⁹43 Minn. 192, 45 N. W. 460.

by "navigable" in respect to capacity to bear floating vehicles. If stated in terms of the steamship Leviathan's forty foot draft, or the Queen Mary's, few harbors are "navigable". In terms of canoe traffic a vastly different answer is got from that when "navigability" is stated in terms of canal-boat traffic. Yet navigability is a "question of fact", the courts say. In the definition of navigability one thing is clear however: the rules of the local state law are not controlling. "Navigability when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts".⁸⁰ In making the rulings on navigability, these courts, however, are not always dealing with admiralty matters. Frequently they have before them questions of proprietary rights in rivers or their beds, or questions involving the Federal Government's interstate commerce interest in respect to dams and bridges on and over waterways. But on what constitutes navigability, the cases are interchangeably cited with the admiralty cases. In *United States v. Holt Bank*,⁸¹ a suit to quiet title to the bed of a drained lake, Van Devanter, J. said "The rule long since approved by this Court in applying the constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law: that they are navigable in fact when they are used or are susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flat boats, nor on an absence of occasional difficulties in navigation but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello*, 20 Wall. 430, 439; *U. S. v. Cress*, 243 U. S. 316; *Economy Light and Power Co. v. United States*, 256 U. S. 113, 121; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Brewer Elliott Oil and Gas Co. v. U. S.*, 260 U. S. 77, 87."

This formula, which is really that of the *Daniel Ball*⁸² an admiralty jurisdiction case, makes it necessary to bring before the court the history and characteristics of the particular stream. This is shown by such cases as *The Montello* in which the United States libelled the *Montello* for not having the license required by a Federal statute⁸³

⁸⁰U. S. v. Holt Bank, 270 U. S. 49, 55, 46 Sup. Ct. 197, 70 L. ed. 465 (1926).

⁸¹*Supra* note 80.

⁸²10 Wall. 557, 77 U. S. 557 (1870).

⁸³Act of July 7, 1838, 5 STAT. 304.

of vessels operating upon "the navigable waters of the United States." The steamer was used solely on the Fox River in Wisconsin and although Mr. Justice Field remarked⁸⁴ "We are supposed to know judicially the principal features of the geography of our country, and as part of it, what streams are public navigable waters of the United States", he added that the court's researches toward making the fiction a reality left them in doubt. He remanded the cause for further proceedings saying "the parties will be able to present by new allegations and evidence, the precise character of Fox River as a navigable stream". Four years later, the case was again before the court.⁸⁵ In an opinion which illustrates the technique of decision on navigability, Mr. Justice Davis for the court then held the Fox River to be navigable and the Montello subject to the regulation. He went into an elaborate discussion of the history of the voyages of Marquette and Joliet, the explorers, over the Fox River and its portage by which the traders went from the Great Lakes to the Mississippi by aid of specially constructed boats from which their crews often jumped overboard and pushed in the shallow water. Notwithstanding the portages the court said the river was "navigable" even before a canal replaced the portages. "It has always been navigable in fact, and not only capable of use but actually used."

Obviously no Leviathan ran on Fox River but it was usable by the special craft adapted for it. In casting the test of navigability in terms of the craft, little was said about them except that "Vessels of any kind that can float upon the water whether propelled by animal power or by the wind, or by the agency of steam are or may become the mode by which a vast commerce may be conducted and it would be a mischievous rule that would exclude either in determining the navigability."⁸⁶ Yet Justice Davis agreed that not every small creek in which a fishing skiff or gunning canoe can be made to float is navigable, and the court added "it must be generally and commonly useful for some purpose of trade and agriculture."⁸⁷ In *Leovy v. United States*⁸⁸ the *Montello* case, which is constantly referred to, was invoked in the damming of a stream which the Government asserted was navigable. The court held it was not navigable merely because it could float "a skiff or small lugger" and discharged into an interstate stream. As the competing interest was that the dam was erected by a public official acting on a program of swamp reclamation, the decision

⁸⁴78 U. S. 471, 414. (1870).

⁸⁵The *Montello*, 87 U. S. 430 (1874). ⁸⁶*Ibid.* at 442.

⁸⁷The opinion quoted from Chief Justice Shaw in *Rowe v. Bridge Corp.*, 21 Pick. 344 (1838). ⁸⁸177 U. S. 621, 631 (1900).

may have less significance in a question of admiralty jurisdiction. *Economy Light Co. v. United States*⁸⁹ which concerned a dam also, involved the navigability of the Desplaines River, a link, like the Fox River, in a pre-Revolutionary portage route from the Lakes to the Mississippi which had been disused since about 1825 when the fur trade fell off. Yet despite rapids, shallow water, boulders and obstructions, the Circuit Court of Appeals held the river to be navigable and the Supreme Court agreed⁹⁰ saying that the lower court had "correctly applied the test laid down by this court in the *Daniel Ball*, 10 Wall. 557, 563: and the *Montello*, 20 Wall. 430, 440-443" which the court reviewed.

These cases also establish what might be called an indelible navigability. For in the *Economy Light* cases the court added⁹¹ that "a river having actual navigable capacity in its natural state⁹² and capable of carrying commerce between the states is within the power of Congress to preserve for future transportation even though it be not at present used for such commerce, and be incapable of such use according to present methods either by reason of changed conditions or because of artificial obstructions". In addition to the title-quieting case of *United States v. Holt State Bank*,⁹³ the Supreme Court had before it, on the topic in 1931, *United States v. Utah*⁹⁴ which concerned the navigability of various rivers in Utah. The decision leads one to believe that navigability is not a matter of the whole stream. A part may be non-navigable. Nor is the actual fact of present navigation or lack of it so much as its susceptibility of use the test which determines the stream's character. The court quoted the *Montello* that "the capability of use by the public . . . affords the true criterion of the navigability of a river rather than the extent and manner of that use."

From the foregoing it will appear that the navigability test is not clearly stated in terms of current, depth of water or in terms of the craft. The possibility that a riverway is "navigable" by "rafts of lumber" was accepted by Judge Davis in the *Montello*.

It should not be assumed from this discussion of "navigable waters of the United States" that only domestic waters fall within the admiralty scope of "jurisdiction", at least in the court-competency sense of that word. The reader is warned that the series of cases just dis-

⁸⁹256 U. S. 113 (1921).

⁹⁰*Ibid.* at 121.

⁹¹*Ibid.* at 123.

⁹²The constant use of this phrase "natural state" is curious in view of canal cases, *supra* notes 71, 72.

⁹³*Supra* note 80.

⁹⁴283 U. S. 64 (1931). At p. 75 the court pointed out that the title to the beds of navigable streams passed to Utah on its admission while the bed of those then non-navigable remain in the U. S.

cussed are really but part of the adjustment of our state and federal set up, which furnishes so many maritime jurisdiction problems. The cases cited have concerned inland waters over which the United States government is sovereign in every international sense. But waters of the high seas in the sense that they are non-territorial to any sovereign are most certainly admiralty waters of the United States⁹⁵ in the sense that our courts apply the general admiralty corpus in dealing with events which occur upon them. So also are waters within the territorial sovereignty of a foreign power. Our courts have jurisdiction, in the sense of court-competency at least, of cases involving events in either type of these non-American waters, though, as will be seen later, the precise character of the general admiralty corpus which our courts apply in these cases is not necessarily the same as the version of it which governs in our own waters. In *The Avon*,⁹⁶ jurisdiction was taken of a collision which occurred upon the Welland Canal in Canada. As early as 1843 in *Smith v. Condry*,⁹⁷ the Supreme Court took jurisdiction of a collision which occurred in the port of Liverpool. In *Panama Railroad Co. v. Napier Shipping Co.*,⁹⁸ the ship's injury was sustained in a foreign port but she filed a libel in the United States courts.⁹⁹ Said Mr. Justice Brown: "The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon navigable waters of the United States, *The Commerce*, 1 Black. 574; *Holmes v. O. and C. Railroad*, 5 Fed. Rep. 75; *The Glatsof Chief*, 8 Fed. Rep. 767, the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."¹⁰⁰ More recently in *Royal Mail and P. Co. v. Lloyd Brasileiro*,¹⁰¹ our admiralty court took jurisdiction of a collision in Belgian territorial waters between an English and a Brazilian ship, while in *Galef v. United States*¹⁰² the collision took place in the Harbor of Hamburg.

⁹⁵The question of what law to apply is discussed by the author in an article in (1930) 44 HARV. L. REV. 232. See 2 BEALE, CONFLICT OF LAWS, §404 *et seq.*; RESTATEMENT, CONFLICT OF LAWS § 404 *et seq.*

⁹⁶Brown's Adm. 170, 2 Fed. Cas. 255 (N. D. Ohio, 1873). The opinion fully reviews the authorities to its date.

⁹⁷1 How. 28.

⁹⁸166 U. S. 280, (1896).

⁹⁹The ship was British but the defendant was a New York corporation.

¹⁰⁰166 U. S. 285.

¹⁰¹27 F. (2d) 1002 (E. D. N. Y. 1928).

¹⁰²25 F. (2d) 134 (D. C. S. C. 1928).

III

THE VESSEL

Merely because events occur upon navigable waters does not put them within the admiralty. Transactions, whether torts or contracts, occurring on these waters, are "maritime" only when in some way connected with a "vessel". On the tort side it is one of the stock illustrations that a collision between two houses torn loose from their foundations in a flood and floating on a river is not within the admiralty jurisdiction. But "vessels in navigable waters are within the jurisdiction of the admiralty."¹⁰³

Since 1866 Congress has declared that "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water":¹⁰⁴ and this definition is in a context giving general provisions for the construction of "any act of Congress". Yet the section has not relieved the courts of the burden of deciding when the thing in question is a "vessel" within the general admiralty jurisdiction. The topic has a dependency upon the waters. "If it be once conceded . . . that navigable canals used as highways for interstate or foreign commerce are navigable waters of the United States, it would be an anomaly to hold that such jurisdiction did not attach to the only craft navigating such canals." This is from the opinion in the *Robert W. Parsons*.¹⁰⁵

In the *Robert W. Parsons*, already noticed on the point that the Erie Canal was navigable water within the admiralty jurisdiction, the Supreme Court stated¹⁰⁶ that the "crucial question" was "whether the exclusive¹⁰⁷ admiralty and maritime jurisdiction of the federal courts attaches to canal boats—in other words, whether they are ships or

Whether our courts will take jurisdiction of a case involving foreigners depends largely upon whether the latter have a common forum: see *The Troop*, 118 Fed. 769 (1902), *aff'd* 128 Fed. 856 (C. C. A. 9th, 1909) and Coffey, *Jurisdiction over Foreigners in Admiralty Courts* (1925) CALIF. L. REV. 93. The last two cases cited in the text applied our American Limitation of Liability Act in the Belgian collision and our American division of damage rule in the German one. This Galef case is sharply questioned in a note (1929) 27 MICH. L. REV. 206 which argues that by ordinary conflict of laws rules *lex loci delicti*—Hamburg—should govern. The Belgian collision case is noted (1929) 41 HARV. L. REV. 434; (1929) 77 U. OF PA. L. REV. 406.

¹⁰³Cardozo, J. in *Reinhard v. Newport Corporation*, 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324 (1921).

¹⁰⁴14 STAT. 1866, U. S. Comp. St. (1916) §3, I. U. S. C. A. §3.

¹⁰⁵*Supra* note 71, at 29.

¹⁰⁶191 U. S. 28.

¹⁰⁷Exclusive in the sense that jurisdiction *in rem* was meant. The case arose on a New York statute giving an *in rem* action for repairs.

vessels within the meaning of the admiralty law." The argument that because the boat was horse drawn it could not be a vessel, the court rejected as appealing "less to the reason than to the imagination". It held the boat to be within the admiralty, saying: "In fact, neither size, form, equipment or means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged."¹⁰⁸ Concerning mere size, the Supreme Court continued: "So far as the Congress of the United States have incidentally spoken upon the subject, they have fixed a criterion of size as to what shall be considered a vessel within the admiralty jurisdiction far below the tonnage of an ordinary canal boat. By the original Judiciary Act of 1789, section nine, 1 Stat. 73, c. 20, jurisdiction was given to the District Courts of all seizures made on waters which are navigable from the sea by vessels of ten tons or more burthen; and by the act of February 26, 1845, 5 Stat. c. 20, 726 (now obsolete), *The Eagle*, 8 Wall. 15, admiralty jurisdiction was given to vessels navigating the Great Lakes and their connecting waters of twenty tons burthen and upwards. By section 4311, Rev. Stat., vessels of twenty tons and upwards, enrolled and licensed, and vessels of less than twenty tons, not enrolled and licensed, shall be deemed vessels of the United States; and by section 4520 all vessels of fifty tons or upwards are required to ship their seamen under written articles." This extract shows that Congress has frequently defined "vessel", especially, and for the application of this or that particular statute. Thus general expressions often afford but little clue to the actual handling of the problems which the courts solve by making a definition of "vessel". "What is a vessel?" has not been answered in such a fashion that the answer in one instance is applicable to all others; and as the cases go "a vessel" for one purpose is not a vessel for another purpose. Furthermore many of the decisions are interpretations of "vessel" or a kindred word as used in a statute; and the word is given a connotation merely in the light of the special purposes of the enactment.¹⁰⁹ There may be a variable between the treatment of the same structure for contract

¹⁰⁸191 U. S. 30. The court added: "The application of this criterion has ruled out the floating dry dock, the floating wharf, the sailor's Bethel moored to a wharf But it has been held . . . to include . . . in America . . . steamers of five tons burthen, engaged in carrying freight and passengers on navigable waters. *The Pioneer*, 21 Fed. Rep. 426; *The Ella B.*, 24 Fed. 508; a barge without sails or rudder used for transporting grain, *The Wilmington*, 48 Fed. Rep. 566; a floating elevator, *The Hezekiah Baldwin*, 8 Ben. 556."

¹⁰⁹See a note (1927) 36 YALE L. J. 415, where this is brought out with illustrations.

jurisdiction and for tort jurisdiction. The status of an incomplete structure which when completed will unquestionably be a vessel is an illustration. For contract purposes it is no vessel. No maritime flavor attaches to a contract for work done on the fabric even after it is launched into the water. The Supreme Court held in *The Francis McDonald*¹¹⁰ that no maritime lien arose in favor of a builder who completed a ship after her launching by a prior builder who failed to finish her.

Yet in *Tucker v. Alexandroff*¹¹¹ for a non-admiralty purpose the same court had said that the launching made the structure a "ship". For admiralty jurisdiction in tort moreover, the launching made it so far a vessel that the injury of a workman on board a newly launched ship was specifically stated to be within the admiralty jurisdiction in *Grant Porter Ship Co. v. Rhode*.¹¹² Just when a newly built ship becomes a "vessel" for contract jurisdiction in admiralty is not stated by the Supreme Court in the *Francis McDonald*.¹¹³ It merely held the contract in question not to be maritime. But the facts show the launched and incomplete hull was towed from the yard of the original builder in New London, Conn. to that of the libellant in New Jersey. Had it had adventures during the tow or had the towing company

¹¹⁰*Thames Towboat Co. v. Schr. Francis McDonald*, 254 U. S. 242, 41 Sup. Ct. 65, 65 L. ed. 245 (1920); (1921) 21 COL. L. REV. 281.

¹¹¹183 U. S. 424, 22 Sup. Ct. 195, 46 L. ed. 264 (1902): a vessel when launched was a ship within the meaning of a treaty by which the United States engaged to apprehend deserters from a ship. The decision is now confined to its precise facts.

¹¹²257 U. S. 469, 42 Sup. Ct. 157, 66 L. ed. 321, 25 A. L. R. 1008 (1922). The case went off in favor of applying a state compensation act but only on the ground that it was a "local" matter and the workman's right to damages in admiralty was abrogated by the state act. See also *Hoof v. Pacific American Fisheries*, 279 Fed. 367 (C. C. A. 9th, 1922) also holding that injury on an incomplete but floating ship was within the admiralty jurisdiction.

In *Taylor v. Lawson*, 60 F. (2d) 165 (E. D. S. C. 1932) it was held that a man injured on an uncompleted vessel while building was under the Longshoreman's Act. (1933) 46 HARV. L. REV. 711, is critical, but the case rests itself squarely upon the Rhode decision. The decision however was reversed in 64 F. (2d) 521 (C. C. A. 4th, 1933). The court said that the work not being maritime the state act could apply. Certiorari was denied in 290 U. S. 639, 54 Sup. Ct. 56, 78 L. ed. 555 (1933).

¹¹³The court worded its question "Was appellant's contract to furnish materials, work, and labor for her completion, made after the schooner was launched but while not sufficiently advanced to discharge the functions for which intended within the admiralty and maritime jurisdiction? The District Court thought not and so do we". The italicized lines may give some clue to the question in the text. The court also describes her as not "in condition to carry on any service" when received by the libellant.

raised a question of maritime lien for its services the jurisdiction problem would have been raised in an embarrassing form. As Judge Hough commented,¹¹⁴ "She was enough of a ship for (towing), and doubtless could have incurred a maritime lien for collision en route, but was not sufficiently a vessel to be liable for her own finishing."

*New Bedford Dry Dock Co. v. Purdy Claimant of the "Jack O'Lantern"*¹¹⁵ involved merely the question whether the libellant's work metamorphosing a carfloat into a floating dance hall was a job of ship construction or a job of ship repair. If a repair job it was of course a maritime contract: the authorities agree on that. The court held the particular contract to be a repair undertaking and consequently maritime. The same sort of amusement vessel was involved in litigation in *The Showboat*¹¹⁶ concerning the character of the contracts of those who furnished tables, chairs, piano, dishes, etc. The court held her to be a vessel: and the opinion is a valuable summary of the cases although it shows a recent case contra to its holding that an anchored show boat is a vessel.¹¹⁷ The court added: "We are not disposed to enlarge the compass of the rule" of the *McDonald* case classing new ship construction contracts as non-maritime. The Jack O'Lantern while the rebuilders worked on her structure was already a vessel, not merely a mass of material to be shaped into a ship. In these ship construction cases the intention of the owner not to use the ship in her uncompleted state is obvious if the intent for use is an adequate test. The intent for use test furnishes some clue to the present status of a structure which concededly has been a vessel and may even again be such but is now being put to some special use. Old vessels are often cheaply bought for use as hotels, for dance halls, for show boats and recently for what the moving picture people called a "prop".¹¹⁸ *The*

¹¹⁴In *Admiralty Jurisdiction—Of Late Years* (1924) 37 HARV. L. REV. 529, 534.

¹¹⁵258 U. S. 96, 42 Sup. Ct. 243, 66 L. ed. 482 (1922). Cf. Blatchford, J. in the *Hendrick Hudson*, Fed. Cas. No. 6355. He denied a salvage recovery for aid to a hulk, floating and towable but used as a hotel saying "The service did not fairly and legitimately concern any right or duty which appertained to commerce or navigation or to structure engaged in commerce or navigation. Whether the structure in question would or would not be liable in rem, in the admiralty, for a tort or injury committed on navigable waters depends on different considerations . . ." 11 Fed. Cas. 1086 (1869). ¹¹⁶47 F. (2d) 286 (D. C. Mass. 1930).

¹¹⁷*Hayford v. Doussony*, 32 F. (2d) 605 (C. C. A. 5th, 1929). The court felt that the *Evansville-Chero Cola Case*, *infra* note 127, governed.

¹¹⁸See "Old Ironsides"—*The Llewellyn J. Morse*, 25 F. (2d) 973 (D. C. Cal. 1928). The old vessel was used in making the picture called "Old Ironsides". Men were hurt, and the question arose in respect to a limitation of liability available to a "vessel". Her status was inferentially not that of a vessel but limitation was denied on another ground.

*Hendrick Hudson*¹¹⁹ laid down the working principles as early as 1869. An old steamboat, stripped of its boilers, engines, paddle wheels and in service as a saloon and hotel grounded while being towed from one location to another, and was assisted by the libellant who sought a salvage award. In denying it, Judge Blatchford¹²⁰ said: "Although this hulk or structure had once been a vessel in the full sense of the term . . . and although its form and shape under water continued to be those of a vessel . . . This hulk was not in any proper sense engaged in commerce or navigation."¹²¹

Judge Blatchford was in the Supreme Court when that tribunal decided *Cope v. Vallette Dry Dock Co.*¹²² also a salvage case, in which the Court denied jurisdiction because the drydock saved was not a "vessel". An oblong box with a flat bottom and perpendicular sides, it was moored but sparred off from the river bank on the Mississippi, and sunken to let vessels in, and then pumped out to raise them out of water. It had no propulsive apparatus. "It was not designed for navigation and could not be practically used therefor." It was also "permanently moored"¹²³ but on this occasion had broken its moorings. Said the court: "A fixed structure such as this drydock is, not used for the purpose of navigation is not a subject of salvage service . . . The fact that it floats on the water does not make it a ship or a vessel, and no structure that is not a ship or a vessel is a subject of salvage." Thus specifically the *Vallette* case is a decision on what may be the subject of salvage. But it has constantly been referred to on the general question of what is a vessel.

Whether the dry dock was not a vessel because it was permanently moored or because it was not designed for navigation has been the subject of some comment. In a case discussing general jurisdiction, Judge Rellstab in *Berton v. Tietjen and Lang Dry Dock Co.*¹²⁴ reviewed the cases and remarked:¹²⁵ "In the Vallette Dry Dock Case the phrase 'permanently moored' though appearing in the head note and used in the opinion, can hardly be said to have been employed as controlling the distinction between what was and what was not a vessel within the meaning of the admiralty law." He went on to say that "not mere ability to float constitutes a vessel but the purpose of being used, or the actual use in navigation as a means of transportation, are the essential requirements." A libel for injury, by a ship, to a floating dry dock was, however, sustained in *United States v. Bruce*

¹¹⁹11 Fed. Cas. 1085, Fed. Cas. No. 6355, 3 Ben. 419 (1869).

¹²⁰Afterward Mr. Justice Blatchford. ¹²¹11 Fed. Cas. 1086.

¹²²119 U. S. 625, 7 Sup. Ct. 342, 30 L. ed. 532 (1887).

¹²³119 U. S. 627.

¹²⁴219 Fed. 763 (D. C. N. J. 1915). ¹²⁵*Ibid.* at 773.

*Dry Dock Co.*¹²⁶ Said the court: "In our opinion the cause of action . . . was within the admiralty jurisdiction since the tort complained of was maritime in its nature and accrued in navigable water. A floating dry dock is used exclusively for the repair of ships. It has no connection with commerce on land."

In *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co.*¹²⁷ in 1926, the precise question was whether or not the statute limiting liability to the value of the "vessel"¹²⁸ applied to a wharf boat¹²⁹ used to transfer freight between steamboats and the land and from one boat to another. The Supreme Court's decision that it was not a vessel is noticeably influenced by its reading of the purposes of the particular statute. But it cites the *Vallette* and the *Parsons* cases and confirms the view that the use at the occasion determines the status of the structure as a "vessel" rather than any permanent definition of vessel. The wharf boat here in question could have been used as a scow and if so used would have been a vessel within the scow

¹²⁶65 F. (2d) 938 (C. C. A. 5th, 1933).

¹²⁷271 U. S. 19, 46 Sup. Ct. 379, 70 L. ed. 805 (1926), noted in (1927) 36 YALE L. J. 415.

¹²⁸The act provided that under certain conditions the liability of the owner of a vessel should not exceed the value of his interest in the vessel. The history and policy of the statute is set out in (1935) 35 COL. L. REV. 246. At p. 264 the writer sets out a bill for modification of the limitation. This passed during the summer of 1935: see the amendment of August 29, 1935 to R. S., §4283, 46 U. S. C. A. §183. It now provides that the total liability of the owner, etc. "for the entire loss of life or personal injuries caused without the fault or privity of such owner . . . shall be in amount not less than an amount equal to \$60 for each ton of tonnage . . ." or the owner's interest if it be a greater amount. See 1935 A. M. C. 1261 and J. E. Purdy, *The Recent Amendments to the Maritime Limitation of Liability Statutes* (1935) 5 BROOKLYN L. REV. 42.

¹²⁹The boat which was over forty years old had been towed from Arkansas to Indiana to Kentucky to Indiana again. It was 243 feet long, 48 wide, 6 deep; of wood with a side sheathing of concrete. At the time of the occurrences litigated it was secured to the shore with four or five cables and merely moved up and down the levee with the stages of the river. It had no motive power and it had connection with the city's water and electric and telephone systems. In *Hayford v. Doussony*, 32 F. (2d) 605 (C. C. A. 5th, 1929) the "Pirate Ship" was secured to the dock, not like an ordinary ship, but with cables and clamps, the cables having eight or ten turns around clusters of piling. A permanent gangway was built ashore with a house over it extending to the wharf. Electric wires and waterpipes connected the structure with the shore. The structure was used only as a dance platform. The court considered that the *Evansville* case governed. In *The Showboat*, 47 F. (2d) 286 (1930), the Massachusetts District Court felt that as the mooring was less permanent and the wiring easily detachable the pleasure boat was a "vessel."

cases, of which there are many.¹³⁰ At the time, however, it was actually a shore structure so far as its use was concerned.

A scow moored and used to store oars and sails of small boats landing at it and as a means of access to a wharf and thence ashore was held not to be a vessel¹³¹ because stationary and never employed in transportation. So too a floating structure permanently so moored that dump carts could run over it to a boat, was not a vessel¹³² but "By its nature, build, design and use it belongs to that considerable class of cases such as dry docks, floating saloons, bath houses, floating hotels, floating boathouses, and floating bridges, all of which have been held not to be vessels within the maritime law". These same "scows" if used in transportation would however be vessels when so used; in *The Sunbeam*¹³³ "The Sunbeam was a scow engaged in carrying stone about the harbor of New York and unloading its cargoes and similar cargoes from other scows at places where sea walls were being built." A raft has been held to be a "vessel" for maritime lien for collision;¹³⁴ but a raft was not a vessel when a seaman libelled in rem for wages.¹³⁵ More recently, however, the Supreme Court held a contract to tow a raft within the admiralty jurisdiction. In *Knapp Stout Co. v. McCaffrey*,¹³⁶ Brown, J. said "That a contract to tow another vessel is a maritime contract, is too clear for argument, and there is no distinction in principle between a vessel and a raft". Yet though a raft is a vessel for this purpose he added "whether the performance of such a contract gives a lien upon the raft for the towage bill admits of more doubt: indeed the authorities as to how far a raft is within the jurisdiction of admiralty are in hopeless confusion, but for the purpose of this case we may admit such lien exists."

In recent years the question of what is a vessel has been embarrassed by the advent of new types of structures. In New York a workman was hurt while caring for an anchored hydroplane of his employer which he waded out to turn around. If he were injured by a vessel, the jurisdiction of the admiralty would exclude that of the State Compensation Board. In *Reinhardt v. Newport Flying Service Corporation*,¹³⁷ Cardozo, J. for the court held that "the craft, though

¹³⁰*Charles Barnes Co. v. One Dredge Boat*, 169 Fed. 895 (E. D. Ky. 1909), lists many cases of scows.

¹³¹*Woodruff v. One Covered Scow*, 30 Fed. 269 (E. D. N. Y. 1887).

¹³²*Ruddiman v. A Scow Platform*, 38 Fed. 158 (S. D. N. Y. 1889).

¹³³195 U. S. 468 (C. C. A. 2d, 1912).

¹³⁴*Seabrook v. A Raft*, 40 Fed. 596 (D. C. S. C. 1889).

¹³⁵*Raft of Cypress Logs*, Fed. Cas. No. 11527 (W. D. Tenn. 1876).

¹³⁶177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921 (1900).

¹³⁷232 N. Y. 115, 133 N. E. 371; 18 A. L. R. 1324 (1921). The case was noted (1921) 10 CALIF. L. REV. 232; (1922) 22 COL. L. REV. 272; (1922) 31 YALE L. J. 437.

new, is subject, while afloat to the tribunals of the sea. Any structure used or capable of being used for transportation on water is a vessel." And he added that all that remained was "to ascertain the uses and capacities of the structure to be classified". He concluded "A hydro-plane, while afloat, upon waters capable of navigation is subject to the admiralty because location and function stamp it as a means of water transportation. Such a plane is indeed two things—a sea-plane and an aeroplane. To the extent that it is the latter, it is not a vessel for the medium through which it travels is the air"¹³⁸ *Crawford Bros. No. 2 supra*.¹³⁹ To the extent that it is the former, it is a vessel, for the medium through which it travels is the water." A recent English decision, *Watson v. R. C. A. Victor Co.*,¹⁴⁰ dealt with the case of a sea-plane whose S. O. S. message was picked up by Watson's trawler while the latter was off Greenland. Watson searched the area stated by the S. O. S. as the sea-plane's position and finally located it "on a rocky isle surrounded by the ice-pack," where it had foundered. The passengers and crew were able to scramble ashore with equipment worth £3000 which Watson saved. "Can a sea-plane be regarded as in the nature of a ship or vessel so as to bring it and its cargo within the law relating to salvage at sea?" asked the court. It answered: No.

As the subject of admiralty jurisdiction, a "vessel" is the most obvious structure connected with commerce and navigation and so far the discussion has dealt only with what may or may not be a "vessel". A series of recent decisions however have enlarged at least on the tort side the list of structures over which the jurisdiction extends. The background for this lies in our American doctrine that while injury to a ship—even by a shore structure—¹⁴¹ is within the ad-

¹³⁸W. W. Cook, *Substance and Procedure in the Conflict of Laws* (1933) 42 YALE L. J. 333, at 338 remarks that "In his opinion Cardozo, J. apparently assumes that there is a single definition of 'vessel' for all purposes of admiralty law, and thus by a process of what fairly may be called 'mechanical jurisprudence' reaches his conclusion". Cook also remarks that under the decision "We thus have the somewhat curious result that the crew are entitled to compensation under the state compensation law for injuries received while the plane is 'in the air' but not for those which occur while the plane is 'on the water'."

¹³⁹215 Fed. 269 (W. D. Wash. 1914), noted (1914) 28 HARV. L. REV. 200. It held that no maritime lien arose on the repair of an aeroplane.

¹⁴⁰Aberdeen Sheriff's Court, 50 L. T. R. 77 (1934), reported also in 1935 A. M. C. 1251.

¹⁴¹On admiralty jurisdiction for claims arising out of injuries to vessels by land structures see *Dorrington v. Detroit* 223 Fed. 232 (C. C. A. 6th, 1915); *Greenwood v. Westport*, 53 Fed. 824 (D. C. Conn. 1893), cases of negligent operation of bridges; *Stevens v. Western Union Tel. Co.*, Fed. Cas. No. 13371 (E. D. N. Y. 1876), negligently located cable entangling the propeller. See for a more recent

miralty, the mere fact that the injury complained of is by a ship does not of itself make the cause of action maritime. In England the rule is otherwise.¹⁴²

In our American admiralty law, it follows that injury by a vessel to a shore structure furnishes the latter with no maritime cause of action. A familiar instance is that of a bridge smashed by a vessel. In such a case the bridge owner has no maritime remedy.¹⁴³ "As the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was non-maritime." But if injury by a ship is not the test of jurisdiction here neither is the test merely that of injury to a ship, for the category has been made to include other structures than vessels. Recent decisions hold that even if the thing injured by a ship is on land, if it is an aid to navigation a maritime remedy may be had against the ship. In *The Blackheath*,¹⁴⁴ a libel in rem was filed against a British vessel which had wrecked a channel light. "The beacon stood fifteen or twenty feet from the channel of Mobile River or Bay, in water 12 or 15 feet deep, and was built on piles firmly driven into the bottom." The court conceded that it was part of the realty, but nevertheless held that there was admiralty jurisdiction. Justice Holmes for the court said that it was an injury to a government aid to navigation "only technically land" and purported to "distinguish" the older cases. Justice Brown,¹⁴⁵ who concurred in the result, denied the distinctions saying "I accept this case as practically overruling the former ones and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (sec. 7) extending the jurisdiction . . . to 'any claim for damages done by any ship'". Justice Brown's view

case *Burke v. So. Bell Tel. Co.*, 42 F. (2d) 742 (D. C. Ala. 1930), injury to vessel's stack by low-hanging wire, noted (1931) 44 HARV. L. REV. 460.

¹⁴²See a note (1929) 42 HARV. L. REV. 563 which shows that in England and on the continent the damage done by a vessel is within the jurisdiction and sets forth a proposed act for an extension of jurisdiction to injuries by ships to land structures. See J. M. Stinson, *Admiralty Jurisdiction of the courts of Great Britain, France and the United States* (1921) 16 ILL. L. REV. 10; and a note to *Cleveland etc. R. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. ed. 508 (1907) in (1908) 21 HARV. L. REV. 536.

¹⁴³*Martin v. West*, 222 U. S. 191 (1911). See *The Blackheath*, 195 U. S. 361 (1904).

¹⁴⁴195 U. S. 361, 25 Sup. Ct. 46, 49 L. ed. 236 (1904).

¹⁴⁵See C. M. Hough, *Admiralty Jurisdiction of Late Years* (1924) 37 HARV. L. REV. 529 for an appreciation of H. B. Brown as an admiralty lawyer. "He ended the line that began with Story and embodied the admiralty tradition."

has not prevailed however,¹⁴⁶ and in *The Raithmoor*¹⁴⁷ Holmes, J. reaffirmed the *Blackheath* decision on its narrower ground. The beacon which the *Raithmoor* injured was incomplete at the time of the collision but Holmes, J. denied that this fact had any bearing on the jurisdiction. He asserted that its incompleteness made no difference in the jurisdiction. "We regard the location and purpose of the structure as controlling from the time the structure was begun", he said; and decided that its "locality and design gave it a distinctly maritime relation".

Thus a new line of catchwords has been developed and the simple statement that maritime jurisdiction does not extend to injury to any "land" structures cannot be made. Yet it can scarcely be said to extend to any land structure which is in aid of navigation. In *The Panoil*¹⁴⁸ although the dike hit by the steamer was built by the United States government in aid of navigation the court said that so far as maritime jurisdiction was concerned: "We think the principle of those cases (*Blackheath, Raithmoor*) does not go so far". This dike in the *Panoil* case was submerged in navigable waters. Extending 700 feet at right angles to the channel it was designed "to slacken the current, induce deposits of sediment and eventually build out the shore; and in this way improve the channel." Although it does not appear to have reached the shore,¹⁴⁹ the court said it "constitutes an extension of the shore, and must be regarded as land." On the other hand in *The City of Ellwood*,¹⁵⁰ the private owners of a cluster of piling sued the United States¹⁵¹ for injury to the piling by government vessels. In granting jurisdiction, the court said "Although driven into the bottom of the river and attached in that way only to the land they were com-

¹⁴⁶In *Cleveland Terminal v. Valley R. R. Co.*, 208 U. S. 316, 320, 28 Sup. Ct. 414, 52 L. ed. 508, 512, 13 Ann. Cas. 1215 (1908), noted (1908) 21 HARV. L. REV. 536, the court specifically repudiated Justice Brown's view and reasserted that "bridges, shore docks, protection piling, piers, etc. (of the Cleveland Terminal Co.) pertained to the land". The decision in *The Troy*, 208 U. S. 321, 28 Sup. Ct. 416 52 L. ed. 512 (1900) was to the same effect. Judge Brown in *Jurisdiction of the Admiralty in Cases of Tort* (1909) 9 COL. L. REV. 1, 13, discusses prophetically the embarrassments concerning wharves and piles, etc. which are entailed by the American rule. See Judge Hough's comment (1924) 37 HARV. L. REV. 529, 531, on how deeply Mr. Justice Brown "sympathized" with the discontent of the bar over the rule "which relegates to law redress for injuries done by a floating ship to objects firmly affixed to land, though that land be under water."

¹⁴⁷241 U. S. 166, 36 Sup. Ct. 514, 60 L. ed. 937, (1915); (1924) 37 HARV. L. REV. 531; (1927) 36 YALE L. J. 1015.

¹⁴⁸266 U. S. 433, 45 Sup. Ct. 164, 69 L. ed. 366 (1924).

¹⁴⁹*Cf.* *The Oskaloosa*, *infra* note 152.

¹⁵⁰268 U. S. 33, 45 Sup. Ct. 411, 69 L. ed. 832 (1924).

¹⁵¹Under an act approved Mar. 9, 1920, c. 95, 41 STAT. 525.

pletely surrounded by navigable water and were used as aids to navigation." The use was for mooring merely. The case may be taken to determine that mooring piles are within the jurisdiction even though they are privately owned. Yet the point has not been conceded in the lower courts.¹⁵² In so far as United States government property is concerned recent litigation has taken a different form, and the Federal owner has found it worth while to invoke a jurisdiction other than the admiralty. When the steamer Gansford struck a jetty wall at the mouth of the Mississippi, the local United States attorney proceeded against her under the River and Harbor Act.¹⁵³ In *The Gansford*¹⁵⁴ the court stated that the injury being to "a structure which is to be regarded as land was not cognizable in a court of admiralty"; but held nevertheless that the libel in the law side of the court in rem against the vessel for damages was a proper proceeding under the particular statute invoked.¹⁵⁵

Whatever the difficulties of setting off the maritime structures it is clear from the foregoing discussion that anything labelled a "land structure" is outside the maritime jurisdiction. If it is injured its owners cannot avail themselves of the admiralty remedies: nor invoke them with respect to contracts concerning it. That remedy peculiar to the admiralty of suing in rem and making the offending ship a security for the damage is closed to them. Damage to piers and other water front property by ships is frequent. If the vessel is under a compulsory

¹⁵²In the Baron Jedburgh, 299 Fed. 960 (W. D. Wash. 1923), the court decided that injury to *private* mooring posts was not within the jurisdiction. And in *The Oskaloosa* 284 Fed. 978, 1923 A. M. C. 44 (E. D. La. 1921) the court had decided that injury to mooring posts was not and the Supreme Court affirmed on memo, 260 U. S. 699, 43 Sup. Ct. 91, 67 L. ed. 470 (1922).

¹⁵³Act of March 3, 1899; 30 STAT. 1152, 1153, etc., 33 U. S. C. A. §408, 411-12. It imposes a fine for damage by a vessel to any sea wall, wharf or pier built by the United States and imposes liability for the actual damage done enforceable by a libel *in rem* in admiralty. Although the court considered that the act did not violate on the locality rule because it was penal in nature, it would seem that the locality test for admiralty jurisdiction applies equally to crimes as well as torts. See 35 STAT. 1142, 18 U. S. C. A. §451 (1909); *Atlantic Trans. Co. v. Imbroveck*, 234 U. S. 52, 60 (1914).

¹⁵⁴17 F. (2d) 613 (1927); 25 F. (2d) 736 (1928). The quotation in the text is from the opinion in 32 F. (2d) 236 (C. C. A. 5th, 1929). *Certiorari* was denied 280 U. S. 578, 50 Sup. Ct. 66, 74 L. ed. 587 (1929).

¹⁵⁵If the structure *is* land so that no admiralty jurisdiction can attach, a state might protect its wharf or pier property or indeed any private property of similar sort by a similar statute. For if the matter in question is non-maritime, a lien *in rem* may be created by a state though it must be enforced against the ship in admiralty: see *Martin v. West*, 222 U. S. 191, 32 Sup. Ct. 47, 56 L. ed. 159 (1911); and *Rounds v. Cloverport Foundry Co.*, 237 U. S. 303, 35 Sup. Ct. 396, 59 L. ed. 966 (1914).

pilot as is usually the case in harbors there can be no recovery in personam¹⁵⁶ against the owners although there would be a basis for a suit in rem against the offending ship if the injury were to a vessel.¹⁵⁷ But there is no maritime jurisdiction in rem or in personam for the owners of the land structure and there has been not a little discontent with the present rule.¹⁵⁸ In 1930 a Committee of the Maritime Law Association recorded that it favored the extension of admiralty jurisdiction to cover damage caused to land structures by vessels,¹⁵⁹ and in April of that year the Committee on Admiralty of the American Bar Association held meetings jointly with the Maritime Law Association's Committee.

The further question of structures which are on land but are used for maritime purposes is sharply raised concerning dry docks, particularly in instances where men have sustained injuries while repairing a vessel in a drydock. In the *Anglo-Patagonian*¹⁶⁰ maritime jurisdiction was upheld notwithstanding that the workman was injured, not on the vessel but upon a scaffold erected on her outside. The contention that the accident happened on land and was not cognizable, the court said, rested on "no sustainable basis". Yet the dock in the case was a hole in the ground into which the ship floated. The result however was tacitly accepted by the Supreme Court in *Gonsalves v. Morse Dry Dock and Repair Co.*¹⁶¹ in Justice McReynolds' remark: "In the *Robert W. Parsons*, 191 U. S. 17, 33, this court held that repairs to a vessel while in an ordinary dry dock were not made on land".¹⁶² In the *Gonsalves* case, the repairs were made upon the ship while in a floating dry dock. "Clearly the accident did not occur upon land. The doctrine followed in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 627 that 'no structure that is not a ship or vessel is a sub-

¹⁵⁶*Homer Ramsdell Co. v. La Compagnie Genl. Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. ed. 1155 (1901), noted (1902) 15 HARV. L. REV. 405.

¹⁵⁷*The China*, 7 Wall. 53, 19 L. ed. 67 (1868).

¹⁵⁸Ernest Bruncken, *Tradition and Common Sense in Admiralty* (1929) 14 MARQ. L. REV. 16, states the arguments. Mr. Bruncken is secretary of the Milwaukee Harbor Commission.

¹⁵⁹*Cf.* its DOCUMENT No. 158 dated January 17, 1930; and its further DOCUMENT No. 172 of May 1931.

¹⁶⁰235 Fed. 92 (C. C. A. 4th, 1916). In *The Warfield*, 120 Fed. 847 (1903), the Court took a contrary view.

¹⁶¹266 U. S. 171, 45 Sup. Ct. 39, 69 L. ed. 80 (1924).

¹⁶²The *Anglo-Patagonian* opinion based itself on *The Robt. W. Parsons*, *supra* note 71, adding that under that case if the dry dock company had a maritime "contract" we perceive no reason why its employees engaged in making the repairs may not sue in admiralty. See G. W. Stumberg, *Tort Jurisdiction in Admiralty* (1926) 4 TEX. L. REV. 307 at 311, a discussion of the case.

ject of salvage',¹⁶³ has no application. That admiralty jurisdiction in tort matters depends upon locality is settled".¹⁶⁴ The dismissal of the libel was reversed. Whatever limitation may be intended by the words "ordinary dry dock" as used in the quotation from the *Robert W. Parsons, supra*, was specifically disclaimed by the Supreme Court in 1919 in *North Pacific S. S. Co. v. Hall Bros. Marine Ry. S. B. Co.*¹⁶⁵ when, after referring to *The Parsons* it said that the admiralty jurisdiction extended to repair contracts independent of whether they were made upon a vessel "afloat, while in dry dock, or while hauled up by ways upon land."

When the Federal Harbor Workers' and Longshoremen's Act was enacted in 1927, the "coverage" section specifically included injury upon "navigable waters of the United States (including dry dock)". How far this phrasing has affected the problem is discussed at a later point. In *Taylor v. Lawson*,¹⁶⁶ the act was declared by a District Court to extend to injury of a man working on a new ship put into dry dock after launching, but the District Court's view did not prevail. In reversing, the Circuit Court of Appeals said: "Such work is not maritime in the accepted meaning of that term" citing *Grant Smith-Porter Ship Co. v. Rhode* 257 U. S. 469,¹⁶⁷ and other cases which, it concluded, "Make it clear that a state has power to provide compensation for injuries suffered by a workman employed in the construction of a vessel afloat upon navigable waters." The particular subject of the Harborworkers' Act is, however, more fully discussed in a subsequent chapter, dealing specifically with it and it is only incidentally touched on here. In *Norton v. Vesta Coal Co.*,¹⁶⁸ a man

¹⁶³The impact of the Supreme Court's more recent decisions upon the minds of the "inferior" federal courts is seen in *U. S. v. Bruce Dry Dock Co.*, *supra* note 126, which sustained a tort action in admiralty in behalf of a floating dry dock. The court said "it has no connection with commerce on land" and cited *The Raithmoor, Gonsalves v. Morse Dry Dock Co.*, *Doullut & W. Co. v. U. S.*; adding "*Cope v. Vallete D. D. Co.* is not to the contrary: it merely holds that a floating dry dock is not a subject of salvage service, because not a ship or vessel."

¹⁶⁴266 U. S. 172.

¹⁶⁵249 U. S. 119; 39 Sup. Ct. 221, 63 L. ed. 510 (1919), noted in (1919) 32 HARV. L. REV. 853.

¹⁶⁶60 F. (2d) 165 (E. D. S. C. 1932), noted (1933) 46 HARV. L. REV. 711; *sub nomine* U. S. Casualty Co. v. Taylor 64 F. (2d) 521 (C. C. A. 4th, 1933) the holding was reversed, *cert. denied*, 290 U. S. 639, 54 Sup. Ct. 640, 78 L. ed. 1485 (1933).

¹⁶⁷*Supra* note 112.

¹⁶⁸63 F. (2d) 165 (C. C. A. 3rd, 1933) *cert. granted*, 290 U. S. 613, 54 Sup. Ct. 60, 78 L. ed. 536 (1933). In 291 U. S. 641, 54 Sup. Ct. 376, 78 L. ed. 1089 (1934), the court said: "Per curiam: As it appears that the government has now adopted the conclusion that the decision below is correct... the writ of certiorari herein is dismissed."

injured while at work on a vessel which had been hauled out of water completely by use of a marine railway was denied compensation under the new act. The majority of the court said Congress meant a " 'dry dock' in the common acceptance of the term" and "we take Congress at its word." The dissenter's reasoned opinion described the various methods of getting at the ship's hull and stressed the language of the act, not on "dry dock" merely but on "any" dry dock as showing an intent to include all the several instrumentalities for accomplishing the maritime work.¹⁶⁹

¹⁶⁹He concluded "Although the question whether, under the statute, the term 'any dry dock' includes a marine railway is debatable, as shown by opposite decisions in *Colonna's Shipyard v. Lowe* (D. C.) 22 F. (2d) 843 and *Continental Casualty Co. v. Lawson* (D. C.) 2 F. Supp. (2d) 459, and by a permissible inference from the decision in *North Pacific S. S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U. S. 119, 128, 39 Sup. Ct. 221, 63 L. ed. 510, I am of the opinion that the judgment below, on a finding that a marine railway is not included, should be reversed."