ENT PROBLEMS IN ADMIRALTY JURISDICTION

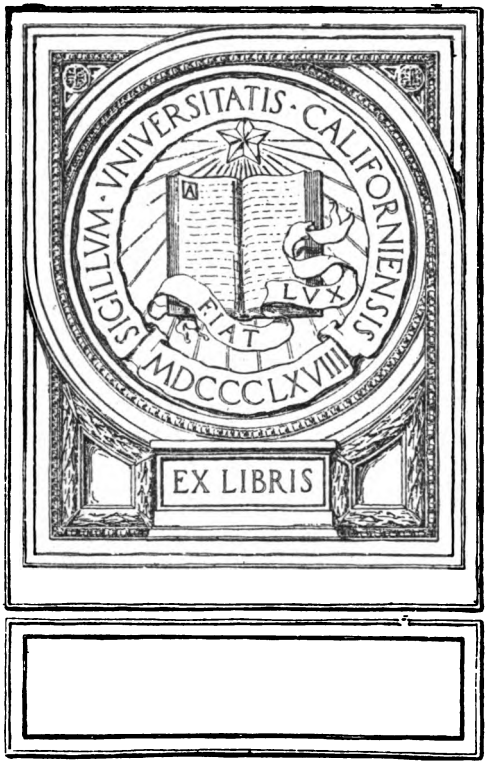
BY
EDGAR TREMLETT FELL

A DISSERTATION

Submitted to the Board of University Studies of The Johns Hopkins University in Conformity with the Requirements for the Degree of Doctor of Philosophy

1920

BALTIMORE
1922



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PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

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PREFACE

Along with the development and progress of the American people there has been a constant evolution of law in an effort to keep pace with the advances made. This evolution has been a slow one in most instances. In 1914 the greater part of all the Admiralty and Shipping law of the United States was built upon and dealt with conditions arising out of the old clipper ship days. For nearly a half century the American flag had disappeared from the seas. The law as it stood was anachronistic. With the building of the enormous American merchant fleet of today, the law was again called upon. Many and sudden changes were necessary, both legislative and judicial. So rapid and complex have these been, that, as yet, great uncertainty prevails.

A large field for research and study has opened up. With this in mind, I have attempted to gather up some of the loose ends and center my efforts upon certain fields which have presented particularly difficult problems of jurisdiction. These have been treated in three separate chapters, each constituting a complete study, yet necessarily related to each other through the common question of the derivation and extent of Federal jurisdiction.

I am particularly indebted to Dr. W. W. Willoughby for his many suggestions and helpful criticisms of this work. United States District Judge John C. Rose, of Baltimore, very kindly offered me much material, which was made use of, and as well pointed out some of the minor problems which had escaped my notice. Professor Calvert Magruder, of the Harvard Law School, has given much of his time in reading the proof sheets and calling attention to certain court decisions which might otherwise have been overlooked.

E. T. F.

June, 1920.

RECENT PROBLEMS IN ADMIRALTY JURISDICTION

CHAPTER I

The Constitutionality of State Legislation Affecting Admiralty and Maritime Matters

Introductory: The Sources of Admiralty and Maritime Jurisdiction in the United States

Ever since the adoption of the Federal Constitution in 1789 a conflict has been waged in the Supreme Court of the United States over the nature and extent of the admiralty and maritime jurisdiction of the State Common Law Courts as distinguished from the exclusive jurisdiction of the Federal District Courts. Indeed it can almost be said that no provision of the American Constitution has undergone a more picturesque and striking exposition and development than has Article III, Section II, Clause I, which provides that the judicial power of the United States shall "extend . . . to all cases of admiralty and maritime jurisdiction." The whole history of the expansion of American Shipping and Navigation is reflected in a long series of decisions handed down in an effort to keep pace with the growing demands for an adequate body or system of law to cope with the immense and complex number of cases arising under this provision.

But were this Constitutional grant of power the sole factor to be taken into consideration in determining the limits and extent of admiralty jurisdiction, the task would certainly be a far simpler one than it is. Immediately after the adoption of the Constitution, the First Congress enacted the Judiciary Act for the purpose of providing a Federal Judicial system in conformity with the express grants of power enumerated.

Sections 24 and 56 of the Judicial Code vested in the Federal Courts exclusive jurisdiction "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.*"

Thus, although no express provision to that effect is found in the Constitution, a concurrent jurisdiction between the Federal District Courts and the State Common Law Courts is established in certain classes of cases. It is this provision of the Judiciary Act that has given rise to suits in which important constitutional questions have been involved. This, so called, saving clause transferred to American jurisprudence the historical contest for jurisdiction that was carried on in English law between the Courts of Admiralty and the Courts of Common Law.

For the purpose of giving a proper historical background and in order to understand the American decisions as well as the attitude of the Supreme Court in those cases which have marked the boundary line between the concurrent jurisdiction of the State Courts and the exclusive jurisdiction of the Federal Courts, a short account of the history of the acquisition of jurisdiction by the common law courts of England in what were anciently considered solely admiralty matters, will prove of value. And this will also serve to explain the action of the First Congress in enacting the saving clause, the constitutionality of which has never been directly questioned. In fact its validity has been repeatedly defended by the most eminent jurists.

The Ancient Jurisdiction of the Admiral.—"The jurisdiction of the English Admiralty, as actually exercised in its earliest days, and for centuries afterwards, was most extended, various, and ample embracing all maritime causes of action, civil and criminal, of contract and of tort, and all causes of action arising on sea or beyond sea in foreign countries."[1]

[1] The Emulous, 1 Gal., 563; Benedict, Admiralty, p. 27.

This ancient jurisdiction of the Admiralty was not derived from statutes, but from the acts and records of prerogative and from commissions and ordinances of the kings. So liberal had been the grants of jurisdiction to the Admiral on the part of the early monarchs, and the Admiralty had gained such strength that it was emboldened to encroach upon other jurisdictions and to usurp that which did not belong to it.

The first successful complaint against this usurpation came in the year 1389, and a statute of that year[2] attempted to limit the jurisdiction of the Admiral strictly to things "done upon the sea." Thus the Common Law Courts gained some of the original jurisdiction of the Admiralty, and a large number of actions ex contractu, where the contract, although maritime in nature, was made and entered into on land, passed over to the exclusive jurisdiction of the Common Law Courts.

A second statute,[3] two years later, drove the Admiralty jurisdiction from its claims over the sea between high and low water mark, when the tide was out, and from its claims in the tideless rivers, streams and ponds.

From this time on, prohibitions of jurisdiction were repeatedly sent from Westminster to the Admiralty Court and these furnished the immediate cause for the long and bitter strife between the Common Law Courts and the Admiralty, which lasted through the sixteenth and seventeenth centuries, and which was so characterized by jealousy and passion. It is true that a temporary truce was obtained in 1575 by an agreement made on the subject of prohibitions in which the Common Law Judges made several concessions to the requests of the Admiralty. The tone of this agreement, however, was such that it would lead to the supposition that the Common Law Courts were asserting a legislative or prerogative power in the matter of jurisdiction.

Under the dominance of Lord Coke, the Common Law Courts denied the validity of the agreement of 1575 and they

[2] 13 Richard II, cap. 5.
[3] 15 Richard II, cap. 3.

imperiously took over more and more of the jurisdiction of the Admiralty in maritime matters. This led to a formal complaint on the part of the admiralty in 1611 in which a long list of grievances was set forth. An examination of the chief of these grievances presented by the Admiralty will reveal the extent to which it was claimed that its original jurisdiction had been encroached upon by the Courts of Westminster.

The first of these was to the effect that the Common Law Courts had assumed jurisdiction over the maritime contracts by the use of a legal fiction that all these contracts were written or made on land and hence beyond the Admiralty's cognizance.

The English courts had even extended this fiction to foreign contracts and had continually denied to the Admiralty the causes arising under them.

In the matter of practice and procedure, the right to take recognizances and stipulations was forbidden on the ground that the Admiralty was not a Court of Record and hence without the necessary power to take them.

The Admiralty had been deprived of jurisdiction over charter parties, a strictly maritime contract.

The jurisdiction over inland waters, although tidal, had been denied on the ground that they were really causes which arose within the "body of the country" and triable only in common law courts. However, nothing was done to remedy these grievances until 1632 when Charles I and his Council, by a formal agreement, granted concurrent jurisdiction to the Admiralty Courts (1) in cases of contracts made on or beyond the seas; (2) in suits for freight, mariner's wages, breach of charter parties for foreign voyages;[4] (3) in suits for building, repairs, salvage or provision of ships' necessaries, provided that the action when brought in Admiralty should only be one in rem.

[4] However, in suits on charter parties where the penalty was demanded, or where the question was as to the existence of the charter party, or whether a release had been granted, the jurisdiction of the common law courts remained exclusive.

This agreement also gave jurisdiction to the Admiralty to inquire into and remove hindrances and obstructions in navigable rivers, and to entertain suits on contracts and torts arising thereon below the first bridges. The power to issue the writ of habeas corpus for parties in the above-mentioned suits was granted to the Admiralty.

During the period of the Protectorate the Admiralty enjoyed the benefits of an even more enlarged jurisdiction as a consequence of the ordinance of 1648, but after the Restoration a general reversal took place and even the Agreement of 1632 went non-observed.

And so it was,[5] that at the time of the American Revolution a very restricted and narrow platform of Admiralty jurisdiction remained, so that in England the Court was confined to the following very inconsiderable class of cases:— to enforce judgments of foreign courts of admiralty, where the person or the goods were within the reach of the court; mariners' wages, where the contract was not under seal, and was made in the usual form; bottomry, in certain cases and under many restrictions; salvage, where the property was not cast on shore; cases between part owners disputing about the employment of the ship; collisions and injuries to property or persons on the high seas; droits of the admiralty.

The system of admiralty law as administered in the Colonies in America was substantially the same as that of England and courts of admiralty jurisdiction[6] were established in the several colonies. The framers of the Constitution were then well aware of the ancient controversy between the common law courts and the courts of admiralty over the extent of the jurisdiction of the latter. It was undoubtedly difficult for them to conceive of an exclusive admiralty jurisdiction without a concurrent jurisdiction in the common law courts which were to continue in America under the new government. These same Courts, under the British rule, had long

[5] Benedict, Adm., p. 55; see also 3 Black Com., 106, and Waring et al vs. Clarke, 46 U. S., 441–453.

[6] Called Vice Admiralty Courts, created by commissions from the British High Court of Admiralty.

had the undoubted right to try maritime cases such as arose in suits, for mariners' wages, on policies of marine insurance, and in other actions ex contractu, and in actions of tort arising upon the sea.

And so it is that, "the grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that, before the Constitution, were subject to the concurrent jurisdiction of the courts of admiralty and the common law courts. The first Congress so construed it, as the saving clause in the Judiciary Act conclusively shows." [7]

The effect of the enactment of this saving clause is to permit suitors, at the present time, by choice to try their cases in the common law courts of the state instead of one of the Federal District Courts, provided that the common law offers a remedy which it is competent to give. The interpretation of this provision has led to a number of opinions by the Supreme Court of the United States.

But before examining this concurrent jurisdiction of the State common law courts, the author believes that a brief review of the history of the growth and expansion of the admiralty jurisdiction of the United States Courts since 1789 will in itself serve to clarify some of the jurisdictional difficulties which will appear in the subsequent discussion.

Expansion of Federal Admiralty Jurisdiction Since 1789.[8]—There are two broad classes of cases falling within the federal admiralty jurisdiction: first, those depending on locality, that is, arising upon the high seas and other navigable water, and second, those depending upon subject matter.

At the adoption of the Federal Constitution, it had become the settled law of England, that the only waters over which the Admiralty had jurisdiction were those where the tide ebbed and flowed and which, being tidal waters, were outside the body of any country, that is to say, were waters which

[7] From the opinion of Mr. Justice Pitney in the Jensen Case, 244 U. S., 205.

[8] The material for this section is largely drawn from the notes of lectures by Judge John C. Rose given in the University of Maryland Law School, Baltimore, Md., 1916–1917.

were not within the territorial bounds of any country. It is a geographical fact that in England those rivers in which the tide ebbs and flows are navigable and that no others are. Until the great inland navigable waters in the United States were opened up to commerce the courts in this country had no reason to inquire whether the English rule rested upon any reasonable basis. In 1825 and during the next twenty years, the Supreme Court and the District Courts, in repeated decisions, declined to extend the admiralty jurisdiction to non-tidal waters.

But finally, in 1853, the Supreme Court in the Genesse Chief[9] reached the conclusion that the English rule which made a distinction between tide waters and waters which were not tide waters meant the same thing as a distinction between navigable and non-navigable waters and that the latter was the true rule and that to adhere to the English tidal rule was to mistake shadow for substance. Thus jurisdiction in this country was made dependent upon the navigable character of the water, and the settled law now is, that the admiralty jurisdiction extends over all waters which are, in fact, navigable for any purpose of commerce, and over which it is possible to make some part of a journey which from them may be continued by water to other states or the high seas.[10] This throws open to federal jurisdiction not only the inland rivers and lakes but the canals as well, whether those waters are entirely within the bounds of a particular state or not.

However it is by no means essential that the particular transaction over which the admiralty jurisdiction is exercised shall have anything to do with commerce of any kind. If the waters may be used for commerce the jurisdiction attaches to all the transactions which concern their navigation, whatever may be the purposes for which the navigation is, in fact, carried on.

Furthermore, the legislative power of Congress was thus greatly extended. It is undoubtedly true that in the early

[9] 12 How., 443.
[10] The Daniel Ball, 10 Wall., 557.

history of the United States both Congress and the courts based the federal authority to legislate with reference to matters of maritime interest upon the commerce clause of the Constitution. In none of the early cases raising the question of the power of Congress is the grant of judicial power in Article 3, Section 2 invoked as recognizing an implied legislative power.

But in later cases Congress is explicitly recognized as having a legislative power flowing directly from the grant to the federal courts of admiralty and maritime jurisdiction. Quoting from Ex parte Garnett:[11]

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country and the power to make such amendment is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but, in maritime matters, it extends to all matters and places to which the maritime law extends.[12]

We come now to consider the jurisdiction as dependent upon subject matter. Speaking generally, any tort committed on navigable waters of the United States may give rise to a case within the Admiralty jurisdiction if it be a tort having some relation to a vessel or its owners. The test of jurisdiction is now asserted to be the locality of the person or thing injured and not the locality of the origin of the injury.[13]

And the Admiralty in this country has jurisdiction over matters of contract, which the courts hold to be maritime in their nature. The place of the execution of the contract or of the performance is immaterial. The primary rule is that in order that a contract shall be maritime, it shall, as to its subject matter, have some relation to or connection with a ship. It might have such relation and not be maritime, but it is not maritime unless it has.

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[11] 141 U. S., 1.

[12] See also Providence & N. Y. SS. Co. vs. Hill Mfg. Co., 109 U. S., 578, Willoughby on the Constitution, vol. ii, p. 1118.

[13] The Black Heath, 195 U. S., 361; Poughkeepsie, 162 Fed., 494.

One leading exception must be noted: the American courts follow the old English rule that a contract for work and materials in building a ship is not one within the admiralty jurisdiction, whereas on the other hand a contract for repairs or alteration is.

A ship within the admiralty meaning is anything which is intended to be used for navigation or which, whether so intended or not, is capable of being navigated, and is, at the time of the happening of the events out of which the controversy arose, actually being navigated. If it is not intended for navigation and is, at the time of the happening of events out of which the controversy arose, not actually being navigated, it is not a ship within the admiralty meaning of the word.

Nevertheless, a ship does not cease to be subject to admiralty jurisdiction while lying at a wharf or in a dry dock or while resting on the bottom during low tide. A boat in an unfinished condition or one wholly unfit for navigation is not a ship within the meaning of Admiralty.

State and Federal Legislation: Southern Pacific Company vs. Marie Jensen, 244 U. S., 205

This brief survey of the field of admiralty jurisdiction therefore brings us back to the question of the concurrent jurisdiction of the State Courts which is saved to them in all cases where the common law is competent to give a common law remedy.

One of the particularly interesting points which has arisen is as to what was meant by the phrase "common law" as used in the above-mentioned saving clause and still further as to how far state legislation can change this "common law" so as to create new rights and remedies enforceable within the meaning of the saving clause.

The most important case within the last decade involving the extent of the concurrent jurisdiction of the State Common-law Courts and particularly raising the question as to

whether the Constitution and laws of the United States prevent a state court of common law from applying the State Statutes in an action in personam arising upon navigable water within the State, there being no act of Congress applicable to the controversy, is the case of The Southern Pacific Co. vs. Marie Jensen, decided May 21, 1917.

On August 15, 1914, Christen Jensen, a stevedore, was accidently killed while operating a small electric freight truck in the process of unloading the cargo of the steamship El Oriente, owned and operated by the Southern Pacific Company. At the time of the accident the ship was moored to a pier in the North River, New York, lying in navigable waters of the United States.

An award was made to Marie Jensen, the widow, under the Workman's Compensation Act of New York State against the Southern Pacific Company. The validity of this award was contested by the Company in a suit brought in a State Court of New York State, the appeal from which was finally taken to the Supreme Court of the United States.

The Supreme Court by an opinion of five to four reversed the award made by the New York Court and held that the New York Workman's Compensation Act, so far as it applied to employees whose work was maritime in nature, was unconstitutional. Mr. Justice McReynolds delivered the opinion of the court. Mr. Justice Holmes and Mr. Justice Pitney each wrote dissenting opinions which were concurred in by Mr. Justices Brandeis and Clarke.

This opinion in the Jensen case constituted in the minds of many lawyers a most striking departure from the general principles of admiralty and maritime jurisprudence heretofore developed under the American system. And upon the other hand, among those supporters of the majority opinion of the court, it was usually conceded that this opinion, granting its correctness, was a step considerably in advance of any that the Supreme Court had before taken in similar cases. The far-reaching results of this opinion were immediately

recognized and Congress at the earliest opportunity passed an Act intended to overrule and nullify the effect of the Jensen decision. How far this Act was successful in accomplishing its purpose is left for a later treatment.[14] Suffice it to say that the principles and precedents that were enunciated by the Court in the Jensen case still bear the weight of authority in a consideration of the proper law governing the constitutionality of state legislation affecting maritime matters.

A determination, then, of the legal factors which will, in the future, determine the constitutionality of state legislation in similar matters, such as State Old Age Pension Acts and Unemployment Acts when extended to maritime employees, can only be obtained by a careful analysis of the majority opinion as written by Mr. Justice McReynolds.

Analysis of the Opinion.—The first general principle laid down in the decision is that Congress has paramount power, under the constitutional grant, to fix and determine the maritime law which shall prevail throughout the country, and second, that, in the absence of a controlling Federal Statute, the general maritime law, as accepted by the Federal Courts, is applied.

However, the Court is next forced to admit that state legislation to some extent may change, modify, or affect the general maritime law, for it had formerly held that a State law of Pennsylvania regulating pilotage fees was enforceable in the absence of any conflicting statute. This was on the ground that the mere grant of the power to regulate commerce did not forbid the States from passing laws to regulate pilotage when Congress had not itself acted.[15]

The second admission is, that in certain cases, a state law may even give a substantial right of such a character that it will be enforced in the Federal Admiralty Court, as, for instance, a right arising under the pilotage law of New York State.[16]

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[14] See page 45.
[15] Cooley vs. Board of Wardens, 12 Howard, 299 (1851).
[16] Ex parte McNeil, 13 Wall., 236 (1871).

The next instance given of a state law which changed the general maritime law was in the well-known Lottawanna case.[17] It was there decided that the general maritime law did not give a lien on a ship for supplies furnished in her home port but that a law of the State of Louisiana giving a lien in such a case would be enforced in the Federal Court, provided that all requirements of the state law had been complied with in recording the lien. This doctrine was again restated and adhered to in 1892 by Mr. Justice Gray in the J. E. Rumbell Case.[18]

Another and far-reaching change in the general maritime law, it is conceded, was permitted when a Delaware law providing a right of recovery for death arising from tort was enforced in a Federal Admiralty Court even when the death had occurred as a result of a collision on the high seas, where both ships belonged to corporations of the State of Delaware. The court, through Mr. Justice Holmes, explicitly stated that Delaware had the power to enact the law and extend it to its ships on the high seas, since Congress had not acted.[19] And in a subsequent case, the French law, giving a right of action for wrongful death, was enforced in a United States admiralty court against a French transatlantic navigation company, even though the general maritime law as applied by our courts gave no such right.[20]

Just so far, says Mr. Justice McReynolds, have the several states been permitted to enact laws altering the general maritime law. Then there follows a line of cases in which the Supreme Court has on the other hand declared certain state laws unconstitutional in that they contravened an applicable Act of Congress or affected the general maritime law beyond certain limits.

Thus, there is established an indefinite line of demarcation between these two classes of cases, beyond which a state cannot go in enacting maritime legislation or legislation bearing

[17] The Lottawanna, 21 Wall., 558 (1874).
[18] 148 U. S., 1.
[19] The Hamilton, 207 U. S., 398.
[20] La Bourgogne, 210 U. S., 97.

upon maritime matters. This second forbidden class is illustrated by a case in which a state statute of California created the right of an action in rem against the vessel for breach of a maritime contract. The attempt to establish this right in one of the state common law courts was made but the Supreme Court held that the law was unenforceable in the state court in that it attempted to invest that court with a process strictly and exclusively of an admiralty nature. The Common Law Court had no jurisdiction under the saving clause as "it is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding in rem, as used in the Admiralty Courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."[21] The next case cited in support of this rule is the American S. B. Co. vs. Chase,[22] decided in 1872. This citation must have been made by McReynolds solely for the following statement from Justice Clifford's opinion, since the real import of the case seems to have been entirely overlooked.[23] On page 530 there is the dictum that, "Jurisdiction to enforce maritime liens by proceedings in rem is exclusive in the admiralty courts. State Courts are incompetent to afford a remedy in such a case as they do not possess the power to issue the appropriate process to enforce the lien."

Another type of state statutes which come within the forbidden second class of regulations, that is, those that are deemed to go beyond the line of demarcation of the concurrent jurisdiction of the State Courts, can be seen in the case[24] where a Washington State law creating a lien on foreign vessels for work done or materials furnished was not enforced in a Federal Admiralty Court.[25]

Then also in a subsequent case,[26] the local law of New York as established in certain New York State decisions was

[21] The Moses Taylor, 4 Wall., 411.
[22] 16 Wall., 522.
[23] See below, page 31.
[24] The Roanoke, 189 U. S., 185.
[25] For a discussion of the opinion in this case, see pages 35, 36.
[26] Workman vs. New York, 179 U. S., 552.

held to abrogate the general maritime law in the field of maritime tort law, and hence the state decisions could not be applied in an admiralty case brought in the Federal Court in which it was attempted to set up the defences recognized by the New York local law in that particular class of maritime torts.

After this outline of the general scope of these two main classes, the constitutional and the unconstitutional state laws, and the attempt to draw a line between them by the statement that "no such legislation is valid if it contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations," the majority opinion in the Jensen case impliedly states as its chief proposition that the New York Workman's Compensation Act falls within this second class and is therefore unconstitutional so far as it applies to workmen engaged in maritime occupations. The inference is that workman's compensation is a matter requiring uniform federal legislation, when it applies to maritime pursuits, and that the State of New York had gone too far in applying its own compensation law where only a federal law, if it existed, could be applied.

Having thus, without any definitely expressed reasoning, relegated the matter of workmen's compensation to the class of laws requiring national legislation and therefore prohibited to the States, a comparison is made of cases arising in matters of interstate commerce, in which state legislation has been held unconstitutional on similar grounds. The opinion assumes that the same principles that have been applied in these cases will be applicable to the concurrent jurisdiction problem in admiralty and maritime matters.

Hence, in support of the unconstitutionality of the New York Workman's Compensation Act, a convenient quotation from one of the interstate commerce cases[27] is selected:

[27] Bowman vs. Chicago & N. W. R. Co., 125 U. S., 465.

"where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states . . . Congress can alone act upon it. . . . The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." A citation of references to two other interstate commerce cases[28] completes this, the second main argument in the case; that is, the analogy to the limitations imposed on the States where matters of interstate commerce are involved.[29]

The third main argument of the Jensen opinion might be entitled the Practical Argument, and is to this effect. If one State can enact such a law as New York has, other States can likewise subject foreign ships to local laws.[30] The consequence would be the destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish. And it is implied that the condemnation of the law of the State of Washington in the Roanoke case, which attempted to create a materialman's lien on a foreign vessel, was founded upon this same argument, that it would result in a lack of necessary uniformity.[31]

The fourth point of the decision was, that the Jensen case did not come within the saving clause because the remedy which the New York Compensation Statute gave was not one known to the common law. This would mean apparently that a state court, in a case brought within its concurrent jurisdiction, can not apply statutory law, but only the common law presumably as it existed at some previous time, in other words, state statutes cannot be considered a part of the common law or capable of changing the common law.

To establish this contention, the opinion cites the case of the Hine vs. Trevor[32] in which a collision occurred on the

[28] Vance vs. Vandercook Co., 170 U. S., 438; Distilling Co. vs. Western Maryland R. Co., 242 U. S., 311.

[29] For discussion of this analogous reasoning see below, page 33.

[30] Note the New York Workman's Compensation Act in no way subjects *the ship* itself to local law.

[31] See below, page 35.

[32] 4 Wall., 555.

Mississippi River and the boat Hine was damaged. An Iowa statute gave a lien against the boat at fault, authorizing a sale without any process against the wrongdoer. The case was brought in a State Court of Iowa to enforce this lien in rem. But it was held to be unenforceable in the common law court as being purely an admiralty proceeding. However, it was admitted that if an action in personam was given by the State law to the same effect as the Iowa statute, it could be enforced in the State Court (page 571). Probably the following statement made by Mr. Justice Miller in the Hine case was the one relied upon by Mr. Justice McReynolds: "It could not have been the intention of Congress by the exception in that section (ninth of Judiciary Act) to give the suitor all such *remedies* as might afterwards be enacted by State Statutes."

The Belfast Case[33] is given as a second authority. Here an Alabama Statute gave a lien to be enforced by an action in rem "praying process in admiralty" for the enforcement of contracts of affreightment in the State Courts. And again the Court held such a process to be exclusively within the jurisdiction of the Federal Courts, saying that, "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem as practiced in the admiralty courts. Observe the language of the saving clause under consideration. It is to suitors, not to the State Courts, nor to the Circuit Courts of the United States."

The case of the American S. B. Co. vs. Chase is again cited, probably for the dictum quoted above, while the real importance of the case is overlooked.[34]

The fourth case in support of the contention that no such remedy exists at common law as is given by the Workman's Compensation Act, is that of the Glide,[35] where an action was brought in a Massachusetts State Court to enforce a lien for labor and materials furnished a tugboat in her home port.

[33] 7 Wall., 624.
[34] See page 31.
[35] 167 U. S., 606.

Here, also, the Court denied the power of the State Court to enforce the lien, and a very complete quotation is made by the court from the earlier case of the Yankee Blade.[36]

> The maritime "privilege" or lien is adopted from the civil law and imports a tacit hypothecation of the subject of it. It is a "jus in re" without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the State Courts, though by analogy loosely termed proceedings in rem, are evidently not within the category.

The final argument of the majority opinion was that the remedy of the New York Workman's Compensation Act was not consistent with the policy of Congress to encourage investments in ships as manifested in the Acts of 1851 and 1884.[37] However, as Congress acted, immediately after this decision, on the matter and sought to permit the State Courts to enforce the State Workman's Compensation Laws in maritime cases by an explicit grant to that effect, it would seem that Mr. Justice McReynolds and the majority of the court had misconceived the policy of Congress.

At this same term the Supreme Court decided the case of Walker vs. Clyde Steamship Company,[38] an almost similar case arising under the New York law. The opinion, after a statement of facts, merely refers to the Jensen Case as the guiding principle and reverses the action of the State Court.

Discussion of the Opinion.—In view of the fact that four Justices of the Supreme Court dissented from the Jensen opinion, and that Congress immediately attempted, by positive legislation, to overcome the effect of the decision, it will not prove amiss to enquire further into the salient doctrines enunciated therein, with the object of revealing some of the doubts held as to their correctness.

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[36] 18 Howard, 82, 89.

[37] Acts of 1851 (9 Stat. L., 635, chap. 43), and 1884 (Rev. Stat., 4283–4285; Comp. Stat., 1916, §§ 8021–8023; § 18, Act of June 26, 1884, 23 Stat. L., 57 chap., 121; Comp. Stat., 1916, § 8028).

[38] 244 U. S., 255.

The first argument in the case was that the New York Compensation Act changed and modified the general maritime law to such an extent that it fell within a class of state legislation which could not be enforced. But enforced by what court? At the very outset it would seem that the majority of the Supreme Court was laboring under the impression that the Jensen Case was one in which a right of action arising under a state law was sought to be enforced in a Federal Admiralty Court. This is not so; the original action was brought in a State Court under the concurrent jurisdiction to recover under a statute of that State. The very use of the term general maritime law apparently shows this misconception of the Supreme Court, and a lack of distinction between cases brought in State Courts and those brought in Admiralty. It is the Federal Admiralty Courts that, in the absence of Congressional Statutes on the point at issue, apply the general maritime law. Certainly the general maritime law is not a part of the common law in the sense that it has been incorporated as a whole therein. The two systems are distinct. As long as there is no conflict between the rules applied in the common law and the rules of general maritime law, the common law courts will, it is seen, often apply a principle of maritime law to a case in point, especially where there is no rule of common law applicable.[39]

[39] Effect of general average Bond, Conrad vs. De Montcourt, 138, Mo. 311.

Rights of Contribution and General Average, Stilworthy vs. McKelvy, 30 Mo. 149; Albany Ins. Co. vs. Whitney, 70 Pa. St., 248; Nelson vs. Belmont, 21 N. Y., 36; Minick vs. Holmes, 25 Pa. St., 366.

Rights under Contracts of Affreightment, Gun Co. vs. Lehigh Valley T. Co., 123 Wis., 143.

Liability of Owners for assault by Master or seaman, Gabrielson vs. Waydell, 135 N. Y., 1.

Duties of Mate, Copeland vs. Insurance Co., 2 Metc. (Mass.), 432.

Abandonment and Constructive Total Loss, Bryant vs. Ins. Co., 6 Pick, 131; Dunning vs. Ins. Co., 57 Me., 108.

Forfeiture of Wages, Freeman vs. Walker, 6 Me., 68; Noble vs. Steele, 42 Me., 518.

Wreck as terminating wages, McGilvery vs. Stackpole, 35 Me., 283.

Capture as terminating wages, Smith vs. Gitvers, 4 Day (Conn.), 105.

But when the rules of common law and the rules of maritime law conflict, the State Courts have held that the common law rule must prevail. In Sawyer vs. Eastern Steamboat Co., 46 Me., 400, an action for damages for collision was brought. The court said:

It is not denied that the courts of common law have a concurrent jurisdiction with courts of Admiralty in cases of this kind. If however a party elects the common law remedy, he thereby voluntarily submits to the legal principles and modes of proceeding which prevail in the courts affording that remedy. By such election both parties become entitled to the common law administered as it exists and also to have a trial by jury.[40]

Masters liability for negligence of seamen, Kennedy vs. Rydall, 67 N. Y., 379.

Suits in State Courts by Seamen for expenses of medical attention, Moseley vs. Scott, 2 Oh., Dec. 449; Scarff vs. Metcalf, 107 N. Y., 211; Sanders vs. Stimpson Mill Co., 32 Wash., 627; Holt vs. Cummings, 102 Pa., 212.

[40] The court then quotes from a charge which had been requested but refused, as follows: "If they should find that the persons in charge of the steamer saw the schooner in season to notify her of their approach, by ringing the bells or blowing the whistle, before the schooner saw the steamer and in consequence of neglecting to do so the collision occurred, then they would be in fault and the defendants should pay damages." Continuing the court said: "It is now contended that this construction, as a matter of law should have been given. Our inquiry then is, is this requested instruction in accordance with the principles of the common law? It by no means follows that such is the common law, even if it should appear that Courts of Admiralty and Maritime jurisdiction have decided that proper care and prudence require that under similar or the same circumstances stated in the request it was the duty of the steamer to blow her whistle or ring her bell. The law by which such courts are controlled may have its precise rules by which to determine with accuracy a question of duty or fault, and by these rules the judgment of such courts may be bound. These rules may be such as to commend themselves to judicial wisdom and yet be no part of the common law. . . . These technical rules or usages of the sea as established or recognized by the maritime law are important facts to be presented to the jury . . . but they are not rules of the common law." Then speaking of the duties imposed upon users of the highways, "These laws, if they exist by statute or at common law, may be given to the jury as such, but if they are the laws of another jurisdiction, whether foreign, maritime, or any such as do not prevail as law without proof (as a fact) . . . then the presiding Judge cannot properly be called upon to state them as rules absolutely existing for the guidance of the jury."

A conflict of the two systems of rules arose in another case[41] involving the authority of a master to pledge the credit of the shipowner. By the general maritime rule the master cannot bind the owner in the home port unless the owner is absent and unable to be communicated with. But the State Court held that "whatever the doctrine of the maritime law, by the analogies of the common law the duties and relations of the master furnish presumptive evidence of his authority to purchase supplies."

Then there are a large number of cases at common law in which the State Courts refused to apply the admiralty rule of an equal division of damages for collision in which both vessels are at fault and other similar rules of liability in maritime law, holding that the common law rules of contributory negligence were the rules that governed.[42]

Therefore the law which the State Courts are bound to apply in cases brought within their concurrent admiralty and maritime jurisdiction is not the general maritime law, and indeed under the saving clause itself, this jurisdiction is limited to cases in which the common law is competent to give a common law remedy.

[41] Crawford vs. Roberts, 50 Cal., 235; cf. also Reynolds vs. Nielson, 116 Wis., 483; Andrews vs. Betts, 8 Hun., 322; Kalleck vs. Deering, 161 Mass., 469.

[42] N. Y. Harbor Towboat Co. vs. N. Y. S. E. & W. R. Co., 148 N. Y., 574; Broadwell vs. Swigert, 7 B. Mon. (Ky.), 39, saying that however just the maritime rule may be, it is for the legislature and not the courts to adopt it, "The common law rule is the rule by which this court and the courts of Kentucky are to be governed"; Owners of Steamboat, Farmer vs. McCraw, 26 Ala., 189; Duggins vs. Watson, 15 Ark., 118; Brown vs. Gilmore, 92 Pa. St., 40 (dictum); Kelley vs. Cunningham, 1 Cal., 365; Lord vs. Hazeltine, 67 Me., 399 —"The rules of Admiralty on the subject of collision do not concur in all respects with those of the common law. This being an action at common law, tried by a jury, the presiding judge properly instructed them, in substance, that if the collision were the fault of the Plaintiff, or of both parties, or of neither, the plaintiff could not recover"; Galena Packet Co. vs. Vandergrift, 34 Mo., 55; Meyers vs. Perry, 1 La. Ann., 372; Carlisle vs. Holton, 3 La. Ann., 48; Arctic Fire Ins. Co. vs. Austin, 69 N. Y., 470; Baker vs. Lewis, 33 Pa. St., 301; Union S.S. Co. vs. Nottingham, 17 Gratt., 115; "The Admiralty rule . . . does not prevail in the courts of common law and is inconsistent with common law principles" (dictum).

Just how the New York Common Law courts, by enforcing the New York Workman's Compensation Act, thereby changed and altered the general maritime law it is difficult to see. The New York law attempts to force nothing upon the Federal District Courts.

Furthermore, the Jensen Case was never one where the question arose as to whether an Admiralty Court could exercise its judgment in enforcing a state statute, and thus change the general maritime law (which it applies in the absence of federal statute law) by adopting the state law.

And yet, in the deciding opinion, it is classed with certain cases nearly all of which were cases brought originally in an admiralty court attempting to have this federal side of the concurrent jurisdiction recognize and enforce state laws. It is conceded that had the Jensen Case been brought in the U. S. District Court, sitting as an admiralty court, then a question might have arisen on the grounds set forth in the opinion of Mr. Justice McReynolds, as to the enforcement of the New York Workmen's Compensation law therein.

Three of the cases cited in the opinion, as falling within one of these two classes, namely, of state laws upheld, and state laws not enforced, were indeed cases brought in a common law court. An examination of these however will reveal no grounds whatever for a refusal to permit a State Court to apply its Compensation Act to maritime employees.

The first of these is Cooley vs. Port Wardens.[43] Here a State Court of Pennsylvania was permitted to enforce a state law regulating pilotage fees. A second, is the case of the American S. B. Co. vs. Chase,[44] which for some remarkable reason was cited as an example of a state law which was not allowed to be enforced, and in support of the contention "that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits."[45] Indeed any dictum to be found in this decision to

[43] 12 Howard, 299.
[44] 16 Wallace, 522.
[45] This was probably done in reference to the dictum in that case which has been quoted on page 23.

this effect is entirely beside the point at issue for this was a case brought in a common law court of the State of Rhode Island in personam, to recover for death arising out of a maritime tort. The deceased while sailing upon navigable waters of the United States had been run over and killed by a steamboat, and a Rhode Island Statute gave a right of recovery for this death. The Supreme Court, after expressing a doubt as to whether such a right of action survived in Admiralty, decided that a recovery could be had in the State Court under the provisions of the state law, because the case was not a question of the law to be applied in admiralty, but one of a case brought in a State Court under the state statute.

And further, this decision would seem to hold that a State Court will have jurisdiction in every case in personam, when in the same circumstances an Admiralty Court would have jurisdiction.

This is upheld in the case of Leon vs. Galceran[46] of which no mention whatever is made in Justice McReynolds's opinion. Justice Clifford there held that "the common law is as competent as the Admiralty to give a remedy in all cases where the suit is in personam against the owner of the property."

As the case of the Steamboat Co. vs. Chase seems to be a case almost identically in point with the Jensen Case, it is very difficult to understand how the majority opinion could have overlooked its real import while repeatedly citing it in support of the unconstitutionality of the New York Compensation Act, when extended to maritime causes brought in a state common law court.

The third case of an attempt to enforce a state statute in a State Court, which is cited in the Jensen decision, was that of the Moses Taylor.[47] Here indeed is exemplified the only type of state legislation which the state common law courts have been estopped from enforcing, that is, the state laws which attempt to create an action in rem enforceable in a common law court against the vessel. This, as before stated,

[46] 11 Wall., 191.
[47] 4 Wall., 411.

is on the ground that the process in rem against the ship is distinctly an admiralty process.[48] But a lien not upon the rem is enforceable in State Courts.[49]

The Moses Taylor decision can have very little weight on the point at issue as the New York law in the Jensen Case did not create a process in rem against the vessel at all.

The analogy between this type of legislation and some of the state legislation affecting interstate commerce which is set forth by the Court in its opinion, and which is advanced as the second chief reason for its decision, has been strongly attacked by Mr. Justice Pitney in his dissenting opinion. He says:[50] "although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the States." As authority for this statement he cites the Second Employers' Liability Case.[51]

It will be remembered that the argument of the majority opinion was based on a quotation from the case of Bowman vs. Chicago & N. W. R. Co.[52] Even granting the possible analogy between the rules of concurrent jurisdiction in interstate commerce and in maritime matters, it would be undoubtedly unfair to accept this statement as a controlling one without a further investigation into that case. There the Supreme Court held invalid as a regulation of interstate com-

[48] It may be interesting to note that the Moses Taylor is the only maritime lien case that has come to the Supreme Court in which a process in rem given by a State Statute is denied enforcement in a common law court. All the other cases were attempts to have state statutes creating liens and processes in rem recognized and enforced in Federal Admiralty Courts.

[49] "An action in personam with concurrent remedy of attachment to secure payment of a personal judgment is within the jurisdiction of the State court even though such attachment, if auxiliary to the remedy in personam, runs specifically against the vessel under a state statute providing for a lien" (Rounds vs. Cloverport Foundry, 237 U. S., 303).

[50] 244 U. S., 244.

[51] 223 U. S., 1.

[52] See page 24.

merce a state law forbidding common carriers to transport intoxicating liquors from a foreign state into the enacting state, without first obtaining certain certificates of license from state officials. The real question at issue, briefly put, was whether, when Congress fails to provide a regulation by law, commerce shall be free from positive regulation, or whether the State can legislate. The state law was held improper as,—"It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states."

This part of the opinion in the Bowman Case therefore excepts just such state laws as the New York Workman's Compensation Act from the very rule expressed elsewhere in the opinion and relied upon by Mr. Justice McReynolds in the Jensen decision.[53]

A striking case, upon the very point at issue and one which validates such a law as the Compensation Act, is Sherlock vs. Alling.[54] This case is not mentioned in the majority opinion of the Jensen Case. Here was a case in which an action was brought in a State Court of Indiana by personal representatives to recover, under an Indiana Statute, damages for death resulting from a collision of steamboats on the Ohio River. And it was held by the Supreme Court that the state statute could be enforced in the State Court as not being a prohibited state regulation of commerce. This was on the ground that the "statute imposes no *tax,* prescribes no *duty,* and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State. . . . General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling is not open to any valid objection because it may affect persons engaged in foreign or inter-State commerce. . . . Legislation in a great variety of ways

[53] See page 27.
[54] 93 U. S., 99.

may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

If it was intended that the decision in the Jensen Case should overrule this Indiana case of 1876 as it apparently does, it is hard to understand why no mention was made of that important previous decision. Certainly the analogy to interstate commerce as an argument was an extremely unfortunate and ill conceived one. For in making any comparison between these two jurisdictions of the Federal Government it should be remembered that Article III, section 2, clause 1, of the Constitution is merely a grant of judicial power in admiralty and maritime cases, whereas the commerce clause, Article I, section 8, clause 3, is an express grant to Congress to regulate interstate commerce. It is difficult to see how the implied power of federal legislation arising under the Admiralty judicial grant in the former can have a greater limiting effect on the power of state legislation than the latter express grant of legislative power.

A consideration of the third argument advanced against the validity of the New York Compensation law by the Court, that is, the resulting destruction of uniformity, has already revealed a strikingly erroneous assumption.[55] The opening sentence of the argument is as follows: "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation Statute, other states may do likewise." The ship, El Oriente, in the Jensen Case was in no way itself subjected to any liability by the New York law, and as an instrument of commerce the ship was not hindered or delayed in the continuation of its maritime operations, as was the ship Roanoke in the case[56] which is given in the argument as an example in point.

There, the ship itself was held in port while it was sought in an admiralty court to enforce a lien in rem created by a Washington State Statute, for work done and materials fur-

[55] See page 25.
[56] The Roanoke, 189 U. S., 185.

nished. The Court stated that the general maritime law itself gave a lien against a foreign ship for necessaries furnished, without the necessity of the state statute, and that the statute, by declaring every contractor and subcontractor an agent of the owner, was an attempt on the part of the state to change the general maritime law which the federal court had to apply and thus was unenforceable in the admiralty court. The effect of the state law would have been to hold the ship unjustly while subcontractors disputed claims against the contractor. The opinion of Mr. Justice Story in the Chusan[57] is cited, in which he refused to apply to a Massachusetts vessel a law of the State of New York requiring a lien for supplies to be enforced before the vessel left the state. In cases of supplies furnished to foreign ships, he said, "the jurisdiction of the courts of the United States is governed by the Constitution and laws of the United States, and is in no sense governed, controlled, or limited by the local legislation."

Certainly there is no such attempt in the Jensen Case to make the New York law govern the jurisdiction of a United States Court, nor in any way to hold in port a vessel under libel proceedings.

If it did, then it is conceded that the necessity of uniformity in such legislation would preclude the enforcement of the Compensation law.

But these cases do not say that the jurisdiction of the State Courts is governed by federal or general maritime law or that the State has no jurisdiction because the vessel was a foreign vessel.

The fourth point of the majority opinion in the principal case was that the remedy which the Compensation Statute attempted to give was of a character wholly unknown to the common law, and hence not one coming within the meaning of the common law. No argument whatever is offered in explanation of this bare statement and merely the three cases of the Hine, the Belfast, and the Glide[58] are cited. As the

[57] 2 Story, 455 (1843).
[58] Cf. above, page 26.

remedy attempted to be given by the state law in each of these was an action in rem in the state court against the ship itself, it is difficult to see how any rule, applicable to the remedy in the Jensen Case, is established.

Peculiarly, the case of the American S. B. Co. vs. Chase[59] is again cited in support of this fourth contention, when in that very case it was argued that the right of recovery for death under the Rhode Island law was not a common law right such as was meant by the same clause, since the right had been created since the Judiciary Act. This argument was overruled by the Court and recovery was permitted in the State Court, Mr. Justice Clifford stating: "Actions to recover damages for personal injuries prosecuted in the name of the injured party were well known, even in the early history of the common law. Such actions, it must be admitted, did not ordinarily survive, but nearly all the States have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned."

It is submitted that there is no valid reason why a state statute providing a remedy for death resulting from tort should be enforced and not one providing for death by accident.

What then is really meant by the saving clause when it speaks of a common law remedy? In the first place, if as has often been said[60] there is no common law of the United States, certainly it must be admitted that each individual State possesses a common law. Therefore a "common law remedy" must mean a state common law remedy. The next step is,—as held in the American S. B. Co. vs. Chase Case,—that the state common law remedies in this concurrent jurisdiction are not limited to those which existed prior to the Judiciary Act.[61]

As a third point, it must be observed that the saving clause does not limit the state concurrent jurisdiction to common

[59] 16 Wall., 522.
[60] Wheaton vs. Peters, 8 Pet., 591; Western U. Tel. Co. vs. Call Pub. Co., 181 U. S., 92.
[61] Knapp & Co. vs. McCaffrey, 177 U. S., 638.

law *rights of action* but only to common law *remedies*. Is it to be assumed that the framers of the Judiciary Act intended that the law applied in the State Courts should remain forever a stationary body of law becoming more and more inadequate to the enormous expansion of the maritime activity of the country? And, as Mr. Justice Holmes asks in his dissent, "if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate," why does not the saving clause import a similar, but subordinate power, in the State to legislate?"

> Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.[62]

If, then, the statute law gives a new right of action, certainly the common law is as competent as the Admiralty to give a remedy in all cases where the suit is in personam against the owner of the property.[63] And it has been held, in an opinion by Mr. Justice Holmes in 1913,[64] that Admiralty has jurisdiction of a suit in personam by an employee of a stevedore against the employer to recover for injuries sustained through the negligence of the latter while engaged in loading a vessel lying at the dock in navigable waters.

Conversely, the extent to which the common law State Courts have been permitted to go in entertaining a suit in personam with an auxiliary attachment of a vessel in the enforcement of a common law remedy is well illustrated by the case of Knapp vs. McCaffrey.[65]

Here, even a bill in equity in a state court to foreclose a common law lien upon a raft for towage services was held to be a proceeding to enforce a common law *remedy* and hence within the saving clause, as a remedy which the common law is competent to give. This shows clearly that the

[62] Munn vs. Illinois, 94 U. S., 113, 134.
[63] Leon vs. Galceran, 11 Wall., 185.
[64] Atlantic Transport Co. vs. Imbrovek, 234 U. S., 53.
[65] 177 U. S., 638.

saving clause does not limit the jurisdiction of the State Courts to common law actions, for certainly a suit in equity is not a common law action. The decision of the Courts of Illinois, the State in which the case was tried, held that liens for the enforcement of which there was no special statutory provision were enforceable in equity. Thus a common law remedy was created, enforceable under the saving clause although the action was one in equity.

It is, therefore, the opinion of the writer that the majority of the Supreme Court in the Jensen Case was in error in each one of the five principal arguments set forth in its decision and which have been enumerated above.

The decision in the Jensen Case was handed down on May 21, 1917, and soon thereafter the attention of the 65th Congress, then in session, was directed to the case and its unfortunate effect on State Workmen's Compensation Acts. The result was that on October 6 of the same year, the Congress enacted an amendment[66] to sections twenty-four and two hundred and fifty-six of the Judicial Code. This amendment changed the saving clause[67] so as to read as follows: ". . . saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, *and to claimants the rights and remedies under the workmen's compensation law of any state.*"

Effect of the Jensen Decision in Matters not Involving State Compensation Acts.—Before taking up a discussion of this Amendment to the saving clause and its failure to accomplish its purpose by reason of its unconstitutionality, the writer desires to call attention first to a subsequent case decided by the Supreme Court, which in no way involved a state compensation law but which was decided upon one of the principles enunciated in the Jensen Case.

As the amendment was designed only to validate state legislation in the nature of Compensation Acts the consti-

[66] U. S. Stat L., vol. 40, Part i, chap. 97, p. 395.
[67] See page 12.

tutionality of it was not brought into issue in this latter case. But it is believed that the unfortunate and faulty reasoning of the former case is reflected therein with the result that any attempt to determine what limit can be set in the future upon the federal power derivable from the admiralty clause is cast into considerable doubt.

The case referred to is that of Chelentis vs. Luckenbach S. S. Co.,[68] decided June 3, 1918. Here a member of the crew of the Luckenbach, a ship owned and operated by a Delaware corporation, was injured upon the ship while at sea. He instituted a common law action in a New York State Court demanding full indemnity for damage sustained. The cause was removed to the United States District Court because of diverse citizenship. However the case still remained on the common law side. The question presented depended upon the determination of the following matters: If the seaman, who was injured, had brought his case in admiralty, it was conceded that under all the facts he could recover only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter. But he chose to sue in common law under the concurrent jurisdiction expecting to recover the full indemnity that is allowed by the common law to employees on shore under similar circumstances of injury.

The question then raised was, shall the common law court apply the common law doctrines, or must the common law court apply the principles of general maritime law which govern the federal admiralty courts, simply because this was a maritime injury over which admiralty could have jurisdiction if the case was brought therein.

The Supreme Court, again through Mr. Justice McReynolds, with a dissent by Mr. Justices Pitney, Brandeis and Clark, held that the seamen at common law could recover only maintenance, cure and wages; in other words that in maritime matters of this sort the common law courts must apply general maritime law.

[68] 247 U. S., 372.

The argument, of course, is that the saving clause in saving to suitors a common law remedy says nothing about saving common law rights, hence the only rights which can be enforced in the common law courts, under the concurrent jurisdiction in admiralty and maritime matters, are the rights recognized by the law of the sea, or general maritime law. Quoting from the decision:

> Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law.

These words of the Supreme Court in 1918 sound startlingly similar to the ancient petition of grievances presented by the Admiralty complaining of the encroachment of the common law courts upon the original jurisdiction of the admiralty; and it would seem that again the old quarrels of the English courts have been brought to light and renewed.

This then is the significance of the Jensen Case, amendment or no amendment. If the writer is correct in the conclusion drawn, what a hopeless confusion will result through the extension of this doctrine! For example, is it to be understood that the long line of cases are overruled in which the Supreme Court itself has applied the rules and principles of common law in cases brought by writ of error from State Courts, even where the admiralty rules and principles and rights were different.

In the case of Belden vs. Chase[69] an action was brought at common law for a maritime tort arising out of a collision on the Hudson River over which the United States had Admiralty jurisdiction. If the Court had applied the admiralty rule, there would have been an equal division of damages between the two vessels, since both were guilty of faults contributing to the collision. But since the case was brought at common law the Supreme Court held that the common

[69] 150 U. S., 674 (1893).

law rule that where both ships are culpable neither can recover damages, must be applied.

And in Atlee vs. Packet Co.[70] the Court says:

> But the plaintiff has elected to bring his suit in an admiralty court which has jurisdiction of the case notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different. . . . An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. . . . By the rule of the admiralty court . . . when both have been at fault, the entire damages resulting from the collision must be equally divided between the parties.

Compare this statement of Mr. Justice Miller in 1874 with that quoted above[71] from the Luckenbach Case. It seems impossible to reconcile the two. Does not the Court in the Atlee Case and the Belden Case recognize the intention in the saving clause to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law?

See also the case of the Quebec Steamship Company vs. Merchant,[72] in which the common law rule of liability was applied. Then also the Luckenbach Case is directly opposed to the principles of the Sherlock vs. Alling[73] Case and the American S. Co. vs. Chase Case,[74] in which new rights of action, not remedies, were created by state laws and were allowed to be enforced in the state common law courts under the concurrent jurisdiction. Certainly the Luckenbach Case, if not intending to overrule these cases, casts a great shadow of doubt over the present status of the law.

Further than this, the Luckenbach Case, besides being in conflict with the former law, raises some very important questions affecting the whole system of American admiralty and maritime jurisprudence.

In the first place, since the maritime jurisdiction of the United States in cases ex delicto is determined by the locality,

[70] 21 Wall., 389, 395.
[71] Cf. above, page 41.
[72] 133 U. S., 375.
[73] Cf. above, page 34.
[74] Cf. above, pages 23, 26, 31, 37.

and hence can extend to all navigable waters of the United States, and even to vessels engaged in wholly intra-state commerce, and pleasure craft, and even to cases not arising on a vessel,[75] the following very serious doubt arises. If it is held that the constitutional grant to the United States of admiralty jurisdiction makes the rules of decision of the general maritime law which prevail in the Courts of Admiralty binding upon State Courts exercising concurrent jurisdiction, will not this result in a deprivation of the police power of the States over navigable waters lying wholly within their respective boundaries?[76]

If this is true, and certainly few doubts can be entertained to the contrary, an amazing, though perhaps unconscious, attempt at judicial legislation has been made by these decisions.

Another view of the possible far-reaching effect of the Jensen and Luckenbach decisions is that these cases, holding that admiralty rules of liability must be followed in the common law courts, have in fact invested the common law courts with a new admiralty jurisdiction.[77] And it must be admitted that it is difficult to differentiate between two courts administering the same law although the remedies in one may be limited to common law remedies. Certainly, the effect is, apparently, to allow every common law court to administer the great body of maritime law which right has always heretofore been held to have been granted exclusively to the Federal Courts.[78] And still more remarkable is it since the Jensen opinion itself refers explicitly to this exclusiveness.

It is therefore submitted that the Federal Courts have been in part divested of their exclusive admiralty and maritime jurisdiction. Such an act is unconstitutional and should be beyond the power of any court just as it is beyond the power of any Congress. There is no higher tribunal. Either this

[75] Cf. 3 Story on Const., 527, 530, and in some salvage cases.
[76] Cf. dissenting opinion of Justice Pitney in Jensen case, p. 253.
[77] "Is every County Court a Court of Admiralty?" 53 Am. L. Rev., 749. By Frederic Cunningham.
[78] The Moses Taylor, 4 Wall., 411, 430; cf. Sec. 256, Judicial Code, Mar. 3, 1911; The Hine vs. Trevor, 4 Wall., 555.

is the beginning of a new era in the admiralty jurisprudence of the United States or else these decisions must be set aside or so ably explained by the Court in the future as to render them of little effect. The present situation is uncertain, disturbing, and difficult of solution.

A late case decided October 5, 1920, in the District Court of Maine, Earles vs. Howard,[79] shows the difficulty of the situation. The Court there expressed the opinion that such decisions as the Hamilton and Sherlock vs. Alling were unaffected and that a law of Maine giving damages for death caused by negligence of another could and would be enforced in an Admiralty Court where the death occurred on a vessel in navigable water of the State. To sum up, the situation, therefore, was as follows:

(1) An Admiralty court will enforce a state statute giving damages for death by negligence.

(2) A State common law court can not enforce a State statute giving compensation for injuries received in maritime employments.

(3) The Federal Court sitting as a common law court will not apply the common law rule of damages for an injury received on navigable waters but applies the maritime rule.

In view of the situation and the fact that the general maritime law did not give a right of action for wrongful death at sea and that the measure of damages for wrongful injury was inadequate, the Congress has enacted two recent statutes, designed to readjust matters on a more satisfactory basis.

First, by the Act of March 30, 1920, the personal representative of one killed by wrongful act, neglect or default on the high seas and navigable waters is given the right to maintain a suit for damages in the District courts of the United States in admiralty against either the vessel, person or corporation which would have been liable if death had not ensued. This then is in the nature of a Lord Campbell's Act for general maritime law. It is not designed to be ex-

[79] 268 Fed. R., 94.

clusive as the provisions of state statutes giving rights of the same sort are declared to be unaffected.

Then secondly, by the Merchant Marine Act of 1920, Section 33, seamen suffering personal injuries in the course of employment are enabled to maintain an action for damages at law and the rights and remedies granted by former statutes of the United States in similar cases to railway employees are now extended to seamen.

And this section also restates the Act of March 30 relating to death and makes all similar railroad statutes applicable and regulatory upon the right conferred on the seaman's personal representative.

The Constitutionality of the Amendment

Subsequent to the passage of the Act of October 6, 1917, it was very natural that several cases should arise questioning its constitutionality. Particularly there was the case of The Howell, decided March 6, 1919, in the District Court of the Southern District of New York. A longshoreman was injured while on a lighter in New York harbor and he instituted a libel in rem for the personal injuries received. The employer claimed that by complying with the Workman's Compensation Law of New York, he, by Section 11 of that law, was absolved from any liability arising under the maritime law. The state law provided (Section 11) that the liability of an employer "shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages *at common law* or *otherwise* on account of such injury or death." The District Court held that since the New York Act made the remedy thereunder exclusive and that since Congress had adopted this law by the amendment, the injured person had no remedy in admiralty either in personam or in rem.[80]

And on July 31, 1919, this same attitude was adopted by the District Court for the Western District of New York in

[80] 257 Fed. R., 578.

White vs. John W. Cowper Co.[81] The court held that the effect of the amendment was to deprive the Federal Court of jurisdiction, but in applying to this case said: "I think that since this amendment was not passed until after this cause of action accrued, this court was not deprived of jurisdiction to determine the issues presented."

Another case was that of Rhode vs. Grant Smith,[82] decided June 3, 1919, in the District Court of Oregon. This was a libel in personam to recover for personal injuries. The Oregon Compensation Act did not contain any such clause as Section 11 of the New York Act. Therefore, the only question involved here was whether the amendment itself made the remedy under the Oregon Act exclusive and thereby divested the admiralty courts of their jurisdiction in this matter. The court clearly refused to take this position, saying "that where a party seeks redress for a maritime tort in an *admiralty* court, either in rem or in personam, the rights, obligations and liabilities of the respective parties must be measured by the maritime law as provided by Congress or the general principles thereof, and that the right cannot be barred, enlarged or taken away by state legislation."

Before the constitutionality of the amendment was brought up before the Supreme Court, that Court had in January, 1919, the case of Coon vs. Kennedy,[83] raising the question as to whether the amendment applied retrospectively to injuries received prior to October 6, 1917, and compensable under a state compensation law of New Jersey. The Court however found the writ of error improperly sued out and dismissed it without passing on the point. But a little later in Peters vs. Veasey[84] a similar case came up under the Louisiana Compensation Act, and it was held that the amendment was not intended to apply to a cause of action which arose before the act was passed.

[81] 260 Fed. R., 350.
[82] 259 Fed. R., 304. See also the cases of Hogan vs. Buja, 262 Fed., 224, and Rhode vs. Grant Smith-Porter Ship Co., 263 Fed. R., 204.
[83] 248 U. S., 453.
[84] 251 U. S., 121.

Finally, the constitutionality of the amendment was brought squarely before the Court in the Knickerbocker Ice Co. vs. Stewart Case.[85] A maritime employee of the Company was drowned while at work. The New York State Courts, in view of the amendment, allowed recovery under the New York Compensation Act. Upon appeal to the Supreme Court the question was presented as to whether Congress had the power to adopt state legislation prospectively or not. It was held that this would amount to a transfer of Congressional legislative power to the States and that this power is non-delegable. Considerable difficulty was encountered by the Court in distinguishing the effect of this amendment from a similar result obtained by the Webb-Kenyon Act which seemed to adopt state legislation and was upheld by the Supreme Court in the case of Clark Distilling Co. vs. Western Md. R. R.[86]

In this latter case it was argued that Congress had exceeded its power in enacting the sections of the Webb-Kenyon Act, because the Act submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future state prohibitions and that the law by being prospective would include very different state laws to the detriment of uniformity. The argument that an illegal delegation of power to the state had been made was declared by the Court to rest on a misconception. It was, in effect, not the *will* of the States that made the prohibitions applicable, but the *will* of *Congress,* since the application of state prohibitions would cease the instant the act of Congress ceased to apply.

But the Court, after practically admitting that in upholding the Webb-Kenyon Act it had stretched the power of Congress to the utmost limit, says that its action in that case can be distinguished from its attitude in the Knickerbocker Case because of the exceptional nature of the subject (liquor)

[85] 253 U. S., 149.
[86] 242 U. S., 311.

there regulated, whereas "different considerations would apply to innocuous articles of commerce." It is submitted that this is an arbitrary distinction adopted purely to suit the end in view and that on strictly legal grounds the Clark Distilling Case will support the constitutionality of the amendment of the saving clause as far as the adoption of prospective legislation is concerned.

The second reason of the Court for the unconstitutionality of the amendment was that the very object of the grant of maritime jurisdiction to the Federal Government was "to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union," and "obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

The Hamilton Case was almost overlooked and in fact was brushed aside with a mere recognition that the Court had at that time allowed a state statute to supplement the maritime law to some extent, but that the "doctrine of the Hamilton may not be extended to such a situation" as at present confronted the Court. And in picturing the situation the Court seems to fall again into the same error, which the writer has repeatedly noted in discussing the Jensen Case above.

> But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an Admiralty court.

There is no question whatever about enforcement by an admiralty court. If the amendment had been held constitutional the admiralty courts would never have seen any cases arising under the state acts. It was again purely a case of enforcement of state law in a State Court and this is denied. Prior to these decisions no doubt would have been entertained on the basis of any previous Supreme Court decisions as to

the constitutionality of such an amendment as the Johnson Amendment.

The State Courts would be assumed to have jurisdiction and no amendment would be necessary, as Mr. Chief Justice Marshall has said in the consideration of the extension of judicial power to all cases of admiralty and maritime jurisdiction in the early case of United States vs. Beavans:[87]

> It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.
>
> It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place, subject to the grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts.

And furthermore, said the court in the New Jersey Steam Navigation Co. vs. Merchants Bank:[88]

> The saving clause was probably inserted from abundant caution, lest the exclusive terms in which the power is conferred on the district courts might be deemed to have taken away the concurrent remedy which had before existed. This leaves the concurrent power where it stood at common law.

But the Supreme Court, divided five to four as before, has now decided otherwise, and the result is that the only solution remains in the enactment of a Federal Seaman's Compensation Act. Two bills have been drafted for presentation to the first regular session of the 67th Congress.[89] The author has been associated in the preparation of these bills and believes it will be of interest to point out one or two of the chief

[87] 3 Wheat, 336, 386.
[88] 6 Howard, at 390.
[89] One prepared by the American Association for Labor Legislation and the other by the United States Shipping Board. They are fundamentally of a similar nature, differing chiefly in scale of compensation and death benefit.

difficulties in providing a workable plan of compensation in view of the jurisdictional difficulties.

Pending Federal Seamen's Compensation Acts

Perhaps the most difficult problem presented in the preparation of a Federal Act of this nature is that of determining its scope. When it is seen what a great variety of occupations exist, that are quasi maritime in nature, and in which the employees are frequently shifted from work on or about a vessel to work on piers, wharves, and dock railways, thereby changing their particular status as viewed in the light of two or more jurisdictions, the problem becomes very complicated. And as yet it cannot be said just what employments will be regarded by the court as maritime, and therefore subject only to federal compensation. Therefore the proposed act, in order to save its constitutionality, must of necessity embody general terms. As drafted at present, it will apply:

(1) To employment, as a seaman, on a vessel which is subject to the admiralty jurisdiction of the courts of the United States. (2) To employment, as a shipwright, rigger or in any similar capacity, on or about a vessel, while engaged in work which is subject to the admiralty jurisdiction of the Courts of the United States. (3) To employment in the work of handling cargo or supplies for or out of a vessel engaged in interstate or foreign commerce,[90] after the receipt by the ship-owner or charterer of such cargo or supplies, upon dock, wharf, levee or other landing place at the port or place of loading, for loading on the vessel, and during the unloading of a vessel of its cargo and before the delivery thereof by the ship-owner or charterer, upon dock, wharf, levee or other landing place at the port or place of discharge.[91]

These general terms would, alone, leave many employers in considerable doubt as to whether the act applied in their particular case. To relieve this uncertainty and to reduce the probable large number of suits growing out of it, it is proposed to establish a system of registration controlled by the Department of Commerce and to grant that Department

[90] Note that in enacting this particular clause Congress will derive the legislative power from the commerce clause and not the Admiralty clause.

[91] Certain exceptions have been made as to foreign, to state owned vessels, and to employment on vessels of the United States performed wholly in a foreign jurisdiction.

the power to name and exempt such employments as are not subject to the act.

Of course in some employments it will undoubtedly be necessary for an employer to insure his employees under two funds, the State and the Federal, owing to the fact that at times the men may be employed in purely non-maritime work. As to whether this will result in an undue hardship upon certain employers is yet to be seen, but it is believed that it will not, as similar conditions already exist in railroad employment and as yet the employers so situated there have not generally regarded or found it to be an oppressive burden.

A striking example of such a situation may arise in the work of stevedores and longshoremen. These men incur injuries while at work on vessels in a loading or discharging operation or they may be injured in work wholly performed on land. In such an employment as this two views can be taken by the court in determining the applicability of the Federal Act. It is possible for the Court to adopt a narrow view and thus limit greatly the field of injuries compensable under the Act. This will result, if it is judicially determined that the whole question of compensation for injuries sounds in tort. It may be that such personal injuries as contemplated by this act will be classed as maritime torts and under the admiralty grant:

> The jurisdiction of the Admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[92]

Should the Supreme Court hold that compensation sounds in tort, then State Acts will apply to injuries on land.

But it is believed by the writer that it is now being generally held that compensation is in the nature of a contractual obligation and that this is the broader attitude which the

[92] The Plymouth, 3 Wall., 20, cited in Atlantic Transport Co. vs. Imbrovek, 234 U. S., 59–60.

Court will adopt. At first, many of the earlier State Courts decided that there was such an element of tort, that it was controlling; but recently the opinions have swung the other way and the Doey Case[98] in New York has for that jurisdiction definitely established the proposition that compensation liability sounds in contract.

In the event of this latter view, it will not be the locus of the injury which is the determining factor but it will be the nature of the employment itself that will set the limits and bounds of the federal legislative power. And indeed this may explain the reason why the Federal Courts have in the past recognized and enforced state death statutes as regards maritime injuries, whereas the state compensation statutes when applied to maritime injuries have been declared unconstitutional. Although the distinction has as yet not been drawn in the cases, it is expected that the answer will be that one is in tort and the other is in contract.

However, this explanation will not bear much weight when viewed in the light of the objections relating to the desired uniformity of maritime law and the freeing of commerce from the restrictions and burdens of state legislation.

As a result of this uncertainty it is proposed to insert a special provision as to stevedores, longshoremen, etc., in the Act, whereby personal injuries received in such employments in a State or on the territorial waters thereof may be compensated under the state statute "provided that the constitutionality of such State enactment is sustained by the courts."

The arrangement and establishment of the necessary machinery of administration of such a comprehensive Act as is proposed has presented its difficulties as well but it is highly probable that the Act will be administered by districts corresponding to the federal judicial districts and that in each there will be created one or more Commissioners for Compensation who will be officers of the District Court. Thus

[98] 120 N. E. Rept., page 53.

it will be linked up closely with the judicial system and subject to the latter's supervision.

Whatever the ultimate form this Act will take it is extremely urgent that Congress act at once, and supply an adequate compensation for the employees in maritime work. An immediate relief will be noticed from the present unsettled labor conditions prevailing in our large seaports. So difficult has the situation been in tiding over the period since the Jensen decision that almost all of the steamship owners have been impelled to carry their own insurance to cover these injuries and to make gratuitous payments thereunder. This system is unwieldy, uncertain, and unsatisfactory, and can only be cleared up by the pending Act.

CHAPTER II

Jurisdictional Immunity of Public Vessels and Goods

The world-wide activity in commercial and shipping enterprises, resulting from the war operations of the belligerent nations in the recent conflict, reached such enormous proportions that no allied or neutral port on the seven seas was free from continual maritime shipments of nationally owned cargoes of war supplies.

The most important harbors of the Allies were filled with foreign ships loading and unloading war munitions and supplies as well as great masses of foodstuffs destined for public uses. Every available vessel was impressed into the service of the governments in order that ultimate victory might be assured. The character of modern warfare demanded unprecedented shipments and the entry of the governments into an international business to an extent never before experienced. Under the power of legislative Acts and executive proclamations ships were rapidly built, private vessels were bought, or chartered, or requisitioned for government service.

The result was that hundreds of former merchant vessels took on a public or quasi-public character as instruments of sovereignty. The methods of operating these vessels were varied and, in instances, unusual. Some were manned by officers and enlisted men of the naval forces of the government, some were armed and others were not, still others were operated by the original owners under a master and crew employed and paid by the government. Sometimes ships of the naval forces were chartered to private companies for the carriage of a private cargo, while on the other hand merchant vessels were chartered by the governments for the transportation of a government-owned cargo while the actual possession and direction of the ship remained in the owners who hired and paid their own master and crew to operate it. The foregoing differences, and the difficulty of determining, in

every case, the effect of national requisition upon the character of a vessel, have led to a wide divergence of opinion as to the extent to which a ship in any particular instance has become clothed with the rights and immunities of sovereignty.

The Admiralty Courts have been faced again and again with suits against these ships arising out of claims for damage in collision, claims for salvage, for loss and damage of cargo, and for breach of charter parties and other maritime contracts unperformed by reason of a national requisition intervening. A denial of jurisdiction is made in these cases, and it then becomes the duty of the District Courts to examine into the principles of the immunity of sovereigns and their property from the jurisdiction of a foreign tribunal and the accepted doctrines of international comity in regard to these immunities.

So complex have been the circumstances in the majority of the cases which have arisen that any a priori reasoning in an attempt to definitely establish principles and rules, governing the immunity from the jurisdiction of the foreign courts, which can be applied to all cases, will prove very unsatisfactory and will not accord with the opinions which have been handed down in a number of instances.

It is, therefore, the writer's purpose to examine first of all the leading English and American decisions which have enunciated some of the principles governing the immunity of foreign public vessels and goods, and then, from the more recent cases deduct, if possible, certain exceptions and variations from the general rule which the courts have been led to make growing out of the necessities for justice and the exigencies of circumstances.

And in the way, a more exact delimitation of the present status of the law applied in these cases may be arrived at. However, it will be admitted that in certain jurisdictions very different tendencies will be observed, which are not apparent, or do not exist in others. These may often be explained, nevertheless, on political and historical grounds.

Principles of Exemption from Local Jurisdiction

Several well-known exemptions from local jurisdiction are accorded under the customs of nations and the practice of international comity.

Chief among these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. So well established is this principle that it is not necessary to review the cases. A single reference to an English case[1] of rather unusual circumstances will show to what extreme this doctrine is carried. The Sultan of Johore while living incognito in England under an assumed name entered into a contract to marry. Action for breach of promise was subsequently brought against him as Albert Baker. A certificate from the British Colonial Office was forwarded to the court, stating that Johore was an independent state and that the defendant was the sovereign ruler of it. The court accepted this as conclusive as to the status of such sovereign. And, although it was argued that the immunity attached only to acts done by a sovereign in his character as sovereign, and that therefore he had waived his immunity and privilege by coming into the country and making contracts as a private individual, the court nevertheless dismissed the case; all the judges concurred in the view that he could not be subjected to the jurisdiction unless he voluntarily submitted to it, and that he was not required to elect whether he would submit until the court sought to subject him to its process.[2]

A second class, to which immunity is granted in all countries, is that of ambassadors and foreign ministers.

Immunity also extends to foreign troops and all military forces which are permitted to pass through the territory under a special license granted by the government. Another large class of exemptions is found in countries not possessing European civilization, chiefly in the East. This exemption from the local law is termed "extraterritoriality" and is gen-

[1] Mighell vs. Sultan of Johore, Q.B.D., vol. i (1894), p. 149.
[2] Cf. Moore, Int. Law Digest, vol. ii, p. 559.

erally secured by treaties. In those countries, due to the diversity of customs, laws and habits, jurisdiction is exercised over foreigners by their respective diplomatic or consular officials.

The above comprise in general the classes of individuals that are exempt from civil process. (It is not here proposed to enter into an examination of the exemptions from local criminal jurisdiction applicable to these classes.)

Immunity extends, however, to certain things as well as to individuals. Among these, there are two main classes, namely, Public Vessels, including ships of war, and Public Property, and it is these with which we are chiefly concerned in solving the particular problems that have recently arisen in Admiralty and maritime jurisprudence.

One of the earliest cases in American jurisprudence involving a consideration of the whole question of immunity and international comity was the famous case of the Exchange,[8] the remarkable opinion in which was written by Chief Justice Marshall in 1812. No better method can be adopted for opening up the underlying principles and the reasons for the granting of immunity than by the use of liberal quotations from that eminent jurist, as follows:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either expressed or implied. . . . The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
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> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly

[8] The Schooner Exchange vs. McFaddon & Others, 7 Cranch, 116.

and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Among these enumerated classes is that of the foreign military forces. Ships of war are indeed within this class by analogy, but it is not to be assumed that they are governed by the same principles of comity as the land forces in determining their immunity.

The Immunity Accorded Ships of War

In 1811, the Balaou, an armed public vessel of France, entered the port of Philadelphia. A libel was filed in the District Court against the vessel by M. Faddon and others who alleged that she was originally the Schooner Exchange, of which they were the sole owners, and that she had the year before been unlawfully captured at sea by persons acting under the orders of the French Government. The point involved, therefore, was whether an American citizen could assert in an American court a title to an armed national vessel of a foreign country, found within the waters of the United States, or was the ship immune from jurisdiction.

The rule in the case of troops and other land forces is that their exemption depends upon an express license granted by the Government. This license cannot be presumed. But this rule is not equally applicable to war-ships, says Marshall,

for if there is no express prohibition of entry, the ports are considered open. Vessels of war, therefore, enter, in the absence of treaty stipulations, under an implied license. The question then arises as to why vessels of war should be exempt and private merchant vessels are not, when both classes enter under an implied license.

In the first place, it is impossible "to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign."

Private merchant vessels, on the other hand, like individual merchants, who spread themselves indiscriminately through a foreign nation, were not exempt, since to permit them to be would prove "inconvenient and dangerous to society and would subject the laws to continual infraction, and the government to degradation."

The foreign government would likewise have no real reason for desiring immunity for its private merchant ships. They are not employed by the government nor are they engaged in national pursuits. While on the contrary a war-ship acts under the immediate and direct command of the sovereign and is employed by him in national objects. Any interference would affect his power and his dignity.

It is to be noticed that in his opinion Marshall makes no reference to the older legal fiction, sometimes termed the territoriality of a vessel, a doctrine that ships are floating portions of the country upon which they depend and are thus a continuation or prolongation of territory, and indeed this fiction is now almost universally put aside as untenable.[4]

Another important point which should be observed in the opinion is, that the Balaou is not described as an "armed ship of war" but as "a certain public vessel belonging to his Imperial Majesty, and actually employed in his service." Thus a larger class was admitted to exemption.

[4] Cf. Hall, Int. Law., p. 212, sec. 77.

In 1879 the English Admiralty Court unhesitatingly accorded immunity to a famous old frigate of the United States.[5] The Constitution, while returning home from the Paris Exposition with a cargo of American exhibits belonging to private parties, was stranded on the south coast of England and received salvage services from an English tug which brought an action against the ship and her cargo for salvage remuneration. The American Minister filed a suggestion, through solicitors, that the Constitution was a national ship of war and that her cargo consisted of property of which the United States Government had for public purposes charged itself with the care and protection. The court then held that no warrant for her arrest could issue, either in respect of ship or cargo.

A similar case had arisen in 1819 in England,[6] where a Dutch ship of war with a valuable cargo of spices and other goods on board was libeled, ship and cargo, for salvage services rendered. It is true that the ship and cargo were held liable under the salvage lien, but this was not until after the Dutch Government had submitted to the jurisdiction by requesting that the amount of recompense due the salvors should be awarded by the Admiralty Court.

It therefore can be announced as a general proposition of international law and comity that armed ships of war and their cargoes are exempt from local process and arrest. However, there is one exception as regards cargo which is well illustrated by the American case of the Santissima Trinidad.[7]

A libel was filed by the Consul of Spain in the District Court of Virginia in 1817 against the cargoes of two armed vessels of the United Provinces of Rio de la Plata.[8] These libeled cargoes were asserted to be part of the cargoes of two

[5] The Constitution, L.R., 4 P. D., 39 (1879).
[6] The Prins Frederik, 2 Dodson, 451.
[7] 7 Wheaton, 283 (1822).
[8] During the existence of the Civil War between Spain and her Colonies and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed belligerent nations and therefore entitled to all the sovereign rights of war against their enemy.

Spanish ships, which had been unlawfully and piratically captured on the high seas by the former armed vessels. Furthermore, it was claimed that the capturing vessels had been originally equipped, fitted out and armed in the United States in violation of the neutrality of this country. The question at issue was then, granting that public ships of war are exempted from local jurisdiction, whether all property captured by such ships is exempt also on the ground that it was captured for and by the sovereign, and that no sovereign is answerable for his acts to the tribunals of any foreign power.

The Supreme Court discussed the principles of immunity, pointing out that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of this property, but that it arose from the presumed consent or license of nations. And, says Story:

> It would indeed be strange if a license implied by law from the general practice of nations, for the purpose of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implications, impose upon those who seek an asylum in our ports. . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry and if a proper case can be made out, for restitution to those whose possession has been divested by a violation of our neutrality, and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

The liability of the cargoes of the war-ships in this case was decided on the well known doctrine of prize that property captured in breach of the laws of neutrality is held by the prize courts of the neutral state not to be lawful prize.[9] These circumstances will warrant a denial of the usual exemption. As a further explanation of the principle announced in the Santissima Trinidad, however, attention must be called to a related doctrine of prize law to the effect that

[9] Wheaton, International Law, pt. 4, c. 2, par. 14; c. 3, par. 11–13; Halleck, International Law, c. 22, par. 22–24; 1 Phillimore, International Law, 371; 3 Phillimore, ibid., 452–456.

the trial of prizes belongs exclusively to the courts of the country of the captors.[10]

Troop-ships and Transports.—In 1842, the brig of a British Shipping Company was run down in the English Channel by Her Majesty's troop-ship Athol. Upon a suit for damage the court refused to exercise jurisdiction.[11] Nor would it issue a monition against the Lords Commissioners of the Admiralty to answer in the suit.[12] These Lords however did later voluntarily appear and jurisdiction was thereupon exercised and damages awarded. And similarly a transport which was arrested under a warrant from the Irish Court of Admiralty in a cause of collision was released by that court upon its being shown that she was the property of the Crown and employed in the public service.[13]

In the Thomas A. Scott,[14] a transport ship owned by the United States, but not commissioned, was exempted and the general doctrine was announced that all public property in the possession of the Government for public purposes is immune from legal process. Conversely civil salvage is allowed in admiralty against a government transport, which has been captured and abandoned by the enemy, and found by salvors in the situation of a derelict not in the *possession* of the Government.[15]

[10] Justice Story in the case of the Invincible, 2 Gallison, 29 (1814), adhered to this doctrine. The Invincible was a French private armed ship duly commissioned as a cruiser, captured by the British and subsequently recaptured by an American privateer, and carried into Portland and proceeded against in the District Court of Maine as prize of war. Two claims were set up against the ship, one by the French Consul and another by American owners of another ship, the Mt. Hope. This latter claim was for damages caused by the Invincible when it had captured and carried off the Mt. Hope on the high seas. The question therefore was as to the legality of the capture of the Mt. Hope by the Invincible. The court refused jurisdiction over the claim on the above principle, even though the Mt. Hope had actually never reached France, having been captured by the British from the French before arrival.

[11] The Athol, 1 W. Robinson, 382 (1842).

[12] For a discussion of the British Practice of the Crown submitting to jurisdiction through the appearance of the Lords of the Admiralty, see below, page 69.

[13] The Resolute, 33 L. T., 80.

[14] 10 L. T. (N. S.), 726.

[15] The Lord Nelson, Edw. Adm., 79.

Transports are universally regarded by the courts as parts of the naval forces of the Government and, although they are not necessarily armed ships of war, the same immunity is to be accorded them as to vessels of war and upon the same reasoning. Two recent cases in the American courts will show to what extent the above ruling is adhered to in the United States.

The Pampa.[16]—A vessel regularly enrolled as a ship of the Argentine Navy as a transport, and flying the naval ensign of that republic, whose officers and crew were officers and enlisted men of such Navy, was libeled in the District Court for the Eastern District of New York for damages for a collision. The court dismissed the libel on the ground that public ships of a sovereign, whether armed or not, when they are in the actual possession, custody and control of the nation itself, are not answerable legally (in the absence of consent) in her own or other courts. This decision was made even though the Pampa, at the time of the collision, was carrying a cargo of general merchandise belonging to private persons. It appeared that the cargo was carried for the benefit of the Argentine Republic, and as an incident to her voyage to this country to obtain coal and munitions for the use of the government.

The Maipo.[17]—A naval transport owned by the government of Chile, and in its possession, through a naval captain and crew was chartered to a private individual to carry a commercial cargo of hides. The hides, which were owned by a New Jersey corporation, were damaged in transit. It was sought to have the ship seized for this damage by an action brought in the District Court for the Southern District of New York. The Chilean Embassy filed a suggestion setting forth the national character of the ship and prayed release of the ship. The court released the ship, stating definitely that a sovereign does not lose his immunity and privileges by laying down his character as a sovereign and entering

[16] 245 Fed. Rep., 137, Aug. 29, 1917.
[17] 252 Fed. Rep., 627; also cf. 259 Fed. Rep., 367 (July 8, 1918).

into trading transactions. The cases which have developed this doctrine are considered in a subsequent section.[18] This is the only recent instance in which purely private commercial cargoes were carried, and business conducted, by a ship belonging to the public naval forces, and although the doctrine here involved is somewhat out of its logical place, the case is here remarked upon to further impress the former principle (subject to the exceptions noted) that a public naval vessel, in the actual possession of, and under the control of the government, is, together with its cargo, exempt from local process.[19]

This excellent statement by Judge Mayer is found in the Maipo Decision, concerning the result and effect of holding such a vessel immune:[20]

> It is said great loss and inconvenience may be visited upon the many kinds of people who deal with a vessel thus immune, and that American citizens will be put to the trouble and expense for claims, large and small, of seeking their relief in far-distant foreign jurisdictions. The answer is that, when one knows with whom he is dealing and the law is applicable, he must arrange accordingly. This may be difficult, but in these days of rapid changes, accommodation to new conditions is accomplished effectively and expeditiously.
>
> While diplomatic questions are beyond the court's province yet practical considerations of comity are not to be lost sight of. The American Government has placed naval officers and men on ships to safeguard them, and these ships are engaged in commercial enterprises which are of benefit to the people at large. And as time is so important a factor, a detention by process of a court might cause incalculable damage. Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign people when dealing with us, is the price which the individual is paying for the ultimate benefit of his country.

The Extension of Immunity to Other Public Vessels

Instruments of Sovereignty. Light-ships.—Three lightboats were built in the State of Massachusetts for the United States. They had been accepted and paid for by the govern-

[18] See below, page 76.

[19] In the second Maipo case, 259 Fed., 367 (1919), the attempt was made to arrest the vessel under a maritime lien arising out of tort. But the same rule was applied and the ship was a second time exempted, on the grounds that the maritime lien was to be treated the same whether it arose out of contract or tort.

[20] 252 Fed. Rep., 630.

ment and title thereto had vested in the United States, by the taking possession of them and fitting them for use with lanterns, etc. Subsequently an action in rem was brought for labor and materials furnished in the construction of the ships by certain subcontractors,[21] but prior to their actual use as light-ships by the government. Immunity from arrest was established by the State Court in this case, not because the ships were instruments of war, but because they were instruments of sovereignty. Nor was the exemption dependent upon the extent or manner of their actual use at any particular time, but on the purpose to which they were devoted.

The importance of this well-considered decision by the Massachusetts Court can not be overlooked, for from this case, as a precedent, both English and American Courts have adopted broader and more liberal doctrines of exemption and the phrase "instrument of sovereignty" is now applied by the Admiralty Courts to cover many classes of vessels engaged in public business. There are, undoubtedly, certain kinds of ships devoted to governmental and public uses which, on grounds of policy, should be exempted from detention and the resulting loss of time, which, prior to this decision, could with difficulty have claimed exemption on a well-recognized legal basis, if at all.

Before tracing the extension of this doctrine of immunity in subsequent cases, a second and most important rule of law, as applied in admiralty, must be here announced, as it is in this same case of Briggs vs. Light-boats that the rule finds one of its most brilliant expositions in American law.

The Nature of the Process in Rem.—A lien may attach but it is not enforceable by a process in rem against the vessels and property in the possession and control of the sovereign power.

As was pointed out in the Briggs Case the question was not as to the validity of the petitioner's title but as to the

[21] Briggs & another vs. Light-boats, 11 Allen (Mass.), 157 (1865). This case offers an exhaustive inquiry into all the previous cases in English and American law bearing upon the point at issue.

mode of asserting it; not of right, but of remedy. The sovereign power had not submitted itself to the jurisdiction of the court by bringing a civil action to enforce its own rights to property in the possession of an individual. The United States had only appeared specially to the jurisdiction. In the absence of permission it could not be sued. Yet the contention was advanced that by bringing the process in rem the suit was solely against the ship itself and that the state was not thereby in any way made party to a suit. The ship alone was affected.

The court denied that a suit in rem against the ship was one which did not affect the government. The effect of the process was to attach and hold under power of sale the whole property, including the title of the United States, and that in this way the United States would in effect be impleaded and summoned in as a defendant. The process in rem "does not wait for final adjucation of the rights of the parties, before it takes the property out of the hands of its owner and possessor; but assumes the custody at the very first stage of the proceedings. And thus, if these petitions can be sustained, any attorney of a state court may cause a public vessel of the United States to be taken out of their possession without any previous judicial investigation of the petitioner's claim, and at a moment when the exigencies of the public service, known only to the executive department, and which may not safely be disclosed, require its immediate dispatch to a distant station." Such would be the effect of upholding the petitioner's claim. There had been, previous to this case, an opinion of Justice Story's in 1838 in the case of United States vs. Wilder,[22] in which apparently an attempt was made in several obita dicta of his to draw a distinction between the prohibition of suits in personam against the government and suits in rem. He says on page 312:

> It is said, that, in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deducted, that there can be no remedy in rem. Now, I confess, that I should reason altogether from the same premises

[22] 3 Sumner, 308 (C. C. of U. S., 1st C.).

to the opposite conclusion. The very circumstance, that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground, why the remedy in rem should be held to exist.

In other words, he holds that the action can be brought and the amount to be paid ascertained by the Court. But beyond that the Court could not go in enforcing the award against the United States. The judgment would be unenforceable, but one which the Government was competent to discharge at its own volition.

Certainly he overlooks the fact that the Court, by ordering the process in rem at the very inception of the action, actually deprives the United States of the use of its property. Altogether the eminent Justice here got on very dangerous ground, but the law was saved from the possible unfortunate result of such an opinion by the fact that in this particular Wilder Case the United States had on its own initiative come into Court, as it itself had brought the suit in trover to recover certain goods.

This obiter of Justice Story's has been attacked in the British Courts, particularly by Lord Justice Brett in the case of the Parlement Belge.[28] In discussing the nature of the process in rem he says:

But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is not necessary, in order to enable the court to proceed further, that the owner should be personally served with any process.

The seizure is accomplished by a public formality and notice. The owner has a right to appear and show cause and this right cannot be denied him. If he is not given the opportunity to protect his property from a final decree by the Court, the judgment in rem would be contrary to natural justice. The owner is thus, at least, indirectly impleaded to answer to, that is to say to be affected by, the judgment of the Court. It cannot be assumed that a Court which seizes and sells a man's property does not subject that person to its jurisdiction.

[28] Law R., P. D., 197 (1880), p. 215.

> To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded.[24]

And in 1868 the Supreme Court in the Siren[25] held, through Justice Field, that a proceeding in rem would not lie against a vessel which was the property of the United States.

> In such a case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

The inability of such claimants in admiralty to obtain speedy payment and justice against public vessels of the United States was, prior to the act of 1920, one of the unfortunate weaknesses of our American system. The method of procedure adopted in England for the enforcement of such claims was far more satisfactory. And it was probably due to this very weakness of our law that inferior courts throughout the country, seeing the necessity of some rapid justice in particular cases, have resorted to many forms of expedients and reasoning to escape the apparent impleading of the United States in invitum.[25a]

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[24] 5 P. D., 219 (1880).

[25] 7 Wall., 152 at 155.

[25a] Even the Supreme Court itself has at times gone far to argue around the prohibition of impleading the United States, as is exampled, for instance by the case of U. S. vs. Lee, 106 U. S., 196. There, the Court arguing from a quotation of Marshall in U. S. vs. Peters, 5 Cranch, 115, that "it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title,"—held that the doctrine of the non-suability of the United States has no application to officers and agents of the United States, who, when as such, holding possession of property for public uses are sued by a person claiming to be the owner thereof or entitled thereto. But the lawfulness of that possession and the right or title of the United States to the property may be the subject matter of inquiry and judged accordingly. The defendants were sued individually as trespassers and they set up an authority as officers of the

The Act of March 9, 1920, has now greatly relieved the situation by permitting suits in personam against the United States in Admiralty in causes arising out of the operation and management of merchant ships by the United States through the Emergency Fleet Corporation.

The English Method of Impleading the Sovereign in Admiralty.—In England, when there exists a claim against a Public Vessel owned by the Crown, the present practice is to file a libel in rem upon which the court directs the registrar to write to the Lords of the Admiralty, requesting an appearance on behalf of the Crown. These Lords represent the Crown, and upon such a request usually appear, and this is equivalent to a waiver by the Crown of its privileges as sovereign and the subsequent proceedings are conducted as in other cases. However, no warrant issues in these cases for the arrest of the vessels of the Crown and for reasons of public policy they are not taken into custody; and furthermore it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.[26]

However, no power resides in an English Admiralty Court to issue a monition to the Lords of the Admiralty to appear in a suit of this sort.[27] The policy of the Government is to submit itself to the jurisdiction of its own courts on application for a redress of grievances. It is believed that this British practice has at times affected the American and has been the origin of the not infrequent contention that public ships can be subjected to maritime liens, without the express consent of the Government.

The Immunity of Vessels Owned and Operated by Quasi-sovereignties. Municipal Corporations.—Immunity from

United States which the court held to be unlawful. But any suit against officers of a state in which the judgment or decree will be conclusive of the rights of the state will be regarded as a suit against the state, as in Stanley vs. Schwalby, 162 U. S., 255; cf. Willoughby on the Constitution, p. 1101.

[26] Cf. Siren, 7 Wall., 152 at 155; also The Fidelity, 16 Blatchford, 569 at 574.

[27] The Athol, 1 W. Robinson, 382.

seizure in a suit in rem was extended by Chief Justice Waite in the Fidelity[28] to a steam-tug, the property of the City of New York. This tug was used exclusively by an executive department of that city, and while actually engaged in public service under the orders of that department caused damage to another vessel for which a libel was instituted.

On the basis of Klein vs. New Orleans,[29] it was held that municipal corporations were the local agents of the Government enacting them and that their powers were such as belonged to sovereignty. And therefore public property of such corporations when devoted to public uses is exempt from seizure and sale under execution.[30] This is apparently the line of argument advanced, but it is certainly very doubtful whether the rule of the courts of common law which exempts from seizure the property of a municipality devoted to its municipal uses should obtain in a Court of Admiralty of the United States. It is admitted that the Admiralty Court would have jurisdiction of a suit in personam against the municipality itself. It is therefore submitted that the statements found in this case, namely, "the exemption of public vessels from suits in Admiralty arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel," and "a public vessel is part of the sovereignty to which she belongs, and her liability is merged in that of the sovereign," are incorrect and are overruled by two Supreme Court decisions. In Workman vs. New York,[31] page 570, it is said that "in maritime law the

[28] 16 Blatchford, 569 (1879).
[29] 99 U. S., 149.
[30] Brinkerhoff vs. The Bd. of Education, 2 Daly, 443.
[31] 179 U. S., 552 (1900). In this case the City of New York was held liable in an action in personam for damages caused by a fire boat of New York City to a British Ship, while fighting a nearby fire. The court refused to say that the city was exempt just because its property causing the damage might be exempt from an action in rem on the ground that it was an instrumentality in the performance of municipal functions. It was not admitted that the corporation should be treated as a sovereign by the maritime law. The immunity of a sovereign was held to be based on the hypothesis of the want of a person or property before the court over whom jurisdiction can be exercised and the inability to give redress. The court did not lack this power over municipal corporations.

public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." And in the John G. Stevens:[82] "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages." A lien therefore attaches, the ship is made liable, and this liability can be enforced when the court has jurisdiction.

There remains therefore the single question as to whether a Federal Admiralty Court has jurisdiction over a vessel owned by a municipal corporation or by one of the United States, which is at the time of the suit devoted to public uses.

A State of the United States.—It is believed by the writer that the better law is to be found in the case of The Oyster Police Steamers of Maryland,[83] where the District Court of Maryland exercised jurisdiction over and ordered the arrest and seizure of three steam vessels owned and operated by the State of Maryland, and used solely as instruments of government in the enforcement of the state fishery laws. True it is that this libel was instituted for a failure to comply with the United States inspection regulations, a "law enacted by a sovereign power having express power granted to it to make the law." But this does not in any way alter the fact that the District Court recognized its power to exercise jurisdiction over instruments of state sovereignty.

It is, therefore, believed that the correct rule of admiralty and maritime law is that immunity from process is only to be extended to public vessels owned by, and in possession of, and destined to a public use, by the sovereign powers, in the international conception, and not quasi-sovereignties.

Political Subdivision of Foreign Governments.—This rule has certainly been followed, as far as foreign quasi-sovereign

[82] 170 U. S., 120 (1897); cf. also The Barnstable, 181 U. S., 464.
[83] 31 Fed. Rep., 763 (1887).

powers are concerned, in the Supreme Court of New Jersey in what is known as the Yucatan Hemp Case.[34] The State of Yucatan in Mexico created a corporation to assist in carrying out its policies with reference to the growth and sale of sisal hemp. This corporation was sued in a New Jersey court and claimed immunity under the theory that it was a branch of the sovereignty of a foreign state and that its work contributed to the prosperity of Mexico. But the court held that the State of Yucatan of the republic of Mexico was not such a sovereign state as to be immune from the jurisdiction of courts of another state, since Yucatan was only a member of the federated state of Mexico, and, in external relations, the United States of Mexico only were sovereign in the view of international law. Furthermore the court said that none of the reasons given for the immunity of sovereigns were applicable to corporations, whether governmental agencies or not.

In this case it was also clearly shown by a communication from the State Department that the policy of the United States Government was that political subdivisions of a foreign government engaged in ordinary commercial transactions must be regarded as subjecting themselves to obligations arising from commercial transactions if they are also to reap the benefits and enjoy the rights of trade.

Government Revenue Cutters

Two steam cutters were constructed in New York for the public service of Mexico under contract with a certain Obregon, claiming to be an agent of the Mexican Government. These vessels were completed and delivered to the agent in New York, by whom they were turned over to two American captains to be taken to Vera Cruz and there delivered to the Mexican authorities. The following day, while still at the wharf, they were salvaged from fire. A libel for salvage services was begun.[35] The defence of no jurisdiction was

[34] Molina vs. Comision Reguladora, Mercado de Henequen, 103 Atl. Rep., 397.

[35] Long vs. The Tampico, 16 Fed., 491 (1883).

set up, but the court held that since the actual authority of Obregon did not appear, nor were his relations to the Mexican Government clear, the libel for salvage would be sustained against the vessels. There was no evidence that the property in the vessels had passed to the Mexican Government, but regardless of this, whether it had passed or not, the ships were still liable because they were not at the time of the libel in the public service of that Government, nor were they in the possession of any officer of that government.

Thus the rule is clearly asserted that,—

Possession by the Government Must be Actual.—When the possession of the vessel has been delivered to the master or captain as bailee, for delivery, then the immunity ceases.[86]

Public Vessels of Sovereign Engaged in Business of Commercial Character. English Cases.—The leading English case involving the immunity of Public Vessels engaged in business of commercial character or, as has been said, in the common business of commerce, is that of the Parlement Belge,[87] decided in 1880.

The Parlement Belge was an unarmed packet belonging to the sovereign of Belgium. It was in the possession and control of officers commissioned by him and employed in carrying mails between Ostend and Dover. On these trips the vessel also carried merchandise and passengers for hire. A suit in rem was instituted in the British Court to recover redress for damages resulting from a collision and the defense of immunity was set up on the one hand and the libellants, among other reasons, denied the exemption on the ground that this immunity was lost by the fact that the ship was engaging in commercial enterprise.

The Belgian Government declared, through the Attorney General, that the packet was in the possession of the sovereign and that it was a public vessel of the state. The correctness of this declaration the Court refused to inquire into since "to submit to such an inquiry before the Court is to submit to its jurisdiction."

[86] See below.
[87] Law R., 5 P. D., 197.

No action in rem against the ship was allowed by the Court.

The public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the courts of such State, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that by international comity, which acknowledges the equality of states, if such immunity, grounded on such reason, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all the other states. The dignity and independence of each state require this reciprocity.[88]

As to the loss of immunity by reason of the ship having been used for trading purposes, although the carrying of passengers and merchandise was subordinate to the duty of carrying the mails, it was held that any doubt as to whether the ship was used for national purposes would be covered by the same rule; that the declaration of the sovereign authority could not be enquired into.

The only previous case which in any way argued that the immunity of sovereignty was lost by the undertaking of commercial enterprise by a public vessel was that of the Charkieh[89] in which Sir Robert Phillimore held that a vessel owned by the Khedive of Egypt, though flying the flag of the Turkish navy, was not free from a process in rem, when she had come with cargo to England and had been entered at the customs like an ordinary merchant vessel. He said:

That if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "strenue mercatorem agens," or in which, as Lord Stowell says, he ought to "traffick on the common principles that other trades traffick" it is the present case, and if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case. It was not denied, and could not be denied, after the evidence that the vessel was employed for the ordinary purpose of trading. She belongs to what may be called a commercial fleet. I do not stop to consider the point of her carrying the mails, for that was practically abandoned by counsel. She enters an English port and is treated in every material respect by the authorities as an ordinary merchantman, with the full consent of her master; and at the time of the collision she is chartered to a British subject, and advertised as an ordinary commercial vessel. No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his

[88] Law R., 5 P. D., 210.
[89] Law Rep., 4 A & E, 59.

benefit; and when he incurs an obligation to a private subject to throw off, if I may speak so, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position.

Notwithstanding this expression of opinion in the Charkieh Case, the decision there undoubtedly turned on the fact that the Khedive was not an independent sovereign, and hence his vessel was not exempted. This is the interpretation placed on the case by all subsequent English decisions, and indeed it is now generally admitted that the above reasoning of the well-known Justice has been overruled by the Parlement Belge.[40]

In Young vs. Scotia[41] the privilege from arrest was held to extend to a ferry boat, as being the property of the crown, although it was used for trading purposes as a part of the plant of a railway company in Canada.

This extension of the doctrine of immunity was applied by the English Courts in 1906 to a ship[42] which was the property of a foreign sovereign state, Roumania, and which was destined to public use, being owned in connection with the state railways of Roumania and engaged in the carriage of mails, passengers and cargo. An action in rem arising out of collision was brought. An application of the foreign government was made to the British foreign office and this office produced in Court a certificate of the public character of the vessel in question. All proceedings were stayed and no waiver of the privilege of immunity was assumed, although during the temporary presence of the vessel in British jurisdiction the agents of the government of Roumania under a misapprehension, and in order to procure her release, had given an undertaking to put in bail and had entered an absolute appearance.[43] The case was declared to be covered entirely by the decision in the Parlement Belge.

[40] Cf. Mighell vs. Sultan of Johore, 1 Q. B. (1894), 154 and 158.
[41] 1903, A. C., 501.
[42] The Jassy, 1906, P. D. 270.
[43] Cf. below, page 93.

American Cases.—It is to be observed that the same rule of immunity has been applied by the American Courts of Admiralty in the two recent cases of the Pampa[44] and the Maipo.[45] Both ships were enrolled as naval transports, the former in the Argentine navy and the latter in the Chilean. They were manned by naval captains and crews but each was carrying a commercial cargo belonging to private persons. It must be admitted, however, that the national character of the vessels themselves as such was the reason for their exemption. They were, in type, certainly not merchant vessels. As far as is known, no such case as the Parlement Belge has arisen in American Courts of Admiralty. It is very possible that should a case arise under corresponding circumstances the English doctrine would be followed by our courts. However, it cannot be denied that some very strong opinions to the contrary have been expressed in America. Almost all of these can be traced to the opinion of Chief Justice Marshall in the Bank of United States vs. Planter's Bank of Georgia.[46] He there said:

> It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. . . . So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

Then Justice Story in discussing exemptions in U. S. vs. Wilder[47] said that a distinction has often been "taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things *extra com-*

[44] 245 Fed. R., 137.
[45] 252 Fed. R., 627.
[46] 9 Wheaton, 904, 6 L. Ed., 244.
[47] 3 Sumner, 308 (1838), at p. 315.

mercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign jure coronae, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce."

Certainly the opinion in the Yucatan Hemp Case[48] is a strong expression of this theory, although the actual decision turned on the fact that Yucatan was not a sovereign state, and in this way the case is very similar to that of the Charkieh. In the second Maipo Case[49] Judge Hough, in the District Court of the Southern District of New York, although feeling bound to grant exemption on the basis of the previous Maipo decision,[50] went on to state that it was his opinion that "when a sovereign republic, empire, or what not, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person." However, the judiciary is powerless to remedy the situation, he says, for it is unable to dictate and define for a foreign government what it (the government) should consider to be a governmental function. If, as in this case, the foreign government officially declares that the commercial business carried on is a governmental function, the court is unable to go behind this declaration and must accept it with the resulting dismissal of the ship from the libel proceedings.

This rule, that the court must accept, as conclusive, an official declaration by the foreign sovereign, or a suggestion by the United States government as to the national character and use of a vessel, has been followed in practically every case with the exception of the recent case of the Attualita,[51] where the court held that a suggestion by the Federal Government could be disregarded when it was not actually in the form of a demand for the release of the vessel.[52]

[48] 103 Atl. R., 397.
[49] 259 Fed. R., 367.
[50] 252 Fed. R., 627.
[51] 238 Fed. R., 909.
[52] For a further discussion of this case, see pages 82, 83.

The former general rule, however, was applied by the Supreme Judicial Court of Massachusetts in 1908,[53] when an action of tort was brought against the Intercolonial Railway of Canada. A member of the Massachusetts bar, as amicus curiae, suggested that the railroad was the property of the King of the United Kingdom of Great Britain and Ireland. On appeal it appeared that the railway was not a corporation, that no private individual or corporation had any interest in it, but that it was owned and operated by the King through his government of Canada for the public purposes of Canada. The court held that the action should be dismissed since the court had no jurisdiction to proceed against the public property of a sovereign of a foreign state.

The Carlo Poma.—The English principle of immunity was adopted and followed in the Carlo Poma[54] in May, 1919, by the Circuit Court of Appeals for the Second Circuit. A libel had been filed against the Italian Steamer by a shipper of a cargo of lemons from Messina to New York. This cargo was delivered in a damaged condition owing to negligence in loading, stowage, etc. The Italian Ambassador filed a suggestion that the vessel was owned by the government of the Kingdom of Italy, being registered in the name of the Italian State Railroads, a branch of the said government, and in the possession of a master employed and paid by the government, and wholly manned and operated by a crew employed and paid by the same government. This suggestion was held conclusive[55] and exemption was thereupon granted, and the Court took pains to restate that the American rule was that,—one of the elements required for immunity was that the ship or property should be in the actual possession of the sovereign at the time the process is served.

[53] Mason vs. Intercolonial Railway of Canada, 197 Mass., 349.

[54] 259 Fed. R., 369.

[55] The Supreme Court on February 28, 1921, held that the suggestion by the Ambassador was not in due form, as it should have come through the official channels of the United States instead of being made directly to the court by the Ambassador. See also the case of the Pesaro, decided the same day.

Requisitioned Ships. The Effect of Requisition on Charter Parties.—During the war a Greek vessel was chartered in a port of the United States by a charter party. This agreement contained the usual exemption from liability for "loss or damage occasioned by . . . arrest and restraint of princes, rulers, or people." Before proceeding to her loading dock to take cargo under the charter, the vessel was requisitioned by the Kingdom of Greece for government service by orders transmitted through its legation in Washington. On a libel suit in admiralty for breach of charter party the vessel was held released from the obligations of her charter by reason of the intervening requisition.[56] Of course the question here was simply as to whether the provision of the contract protected the owner in a case of requisition. It was not necessary to decide whether the court could entertain jurisdiction over a government requisitioned vessel. However, Judge Hough did say that "considering the probability of other cases more or less similar arising during the present world war, attention is called to the fact that this libellant is a Canadian Corporation asserting a right against a res presently used by the government of Greece. In my opinion there is no compulsion upon a court of admiralty to entertain such a suit, and it is advisable to decline jurisdiction for political reasons."

Then in the case of the Adriatic[57] the Circuit Court for the Third Circuit dismissed that ship from libel in rem for damages sustained by breach of a charter party. A suggestion had been filed that the vessel was actually requisitioned by the British Government while on the high seas and before the arrival for her to perform the charter. The Charter contained a provision that, "If vessel be requisitioned by the British Admiralty, this charter is to be null and void."

The court held that, "in accordance with the rule that 'the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory' it is not within the province of a court of this

[56] Athanasios, 228 Fed. R., 558 (1915).
[57] 258 Fed. Rep., 902 (1919).

country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain. It must here be accepted as legal."

The Immunity of Requisitioned Ships from Jurisdiction. English Cases.—The British Admiralty Courts, pursuing their generally liberal policy of granting immunity to public vessels, have extended exemption to ships requisitioned during the war by the British Government and to those requisitioned by foreign governments.

On September 3, 1914, the Crown requisitioned the Broadmayne, a tank steamer engaged in carrying fuel oil for the British Navy. This vessel was stranded in 1915 and was salvaged by the Tug R. and an action in rem for salvage was begun.[58] A motion was served on behalf of the Crown to the effect that the cargo of oil belonged to the Crown and thereupon the claim against the cargo was dropped.

The Effect of Requisition.—A very careful discussion of the effect of requisition upon a merchant ship is made by the Court.

Requisition is declared to be in effect a hiring which the owner must accept. The property in the ship is not taken out of the owner and vested in the Crown and, therefore, a requisitioned ship is not for all purposes in the same position as a vessel owned by the Crown.[59] But the fact that the ownership is not changed does not prevent the ship from being exempt so long as she remains under the requisition and in the service of the Crown.

A ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be and the exemption extends as well to claims of salvage as to claims of collision or other claim.

[58] The Broadmayne, 1916, P. D., 65.

[59] Cf. the Scarpen, 1916, P. D., 303. A requisitioned British tug rendered salvage services to a Norwegian ship and sought to recover salvage remuneration. A shipping Act of 1894 provided that no claim could be made for salvage services rendered by a ship "belonging to His Majesty." Held, that a requisition by the Admiralty did not make the tug a ship belonging to His Majesty, nor did the terms and conditions of the hiring have that effect, and that, therefore, the owners, master and crew were entitled to prosecute a claim for salvage, although the tug could not have rendered the services without the consent of the Crown.

A vessel requisitioned by the Italian Government from private owners and carrying war material for that government was held to have the same privilege from arrest in a collision case as a ship requisitioned by the British Government.[60] In a recent case a requisitioned Portuguese vessel which was engaged on an ordinary trading voyage and was an ordinary merchant ship in every respect performing the functions of a private trader was sued for salvage services. The lower English court held that the ship was subject to jurisdiction even though it was proved that she belonged to the Portuguese Government, because it was not devoted to public national service. The Appeal Court, however, felt that it was bound to accept the declaration of the Portuguese Consul and Chargé d'Affaires that the vessel was at all times a public vessel belonging to the Portuguese Government.

In the days when the early decisions were given no doubt what were called "Government Vessels" were confined almost entirely, if not exclusively to vessels of war. But in modern times Sovereign and Sovereign States have taken to owning ships which may to a greater extent still be employed as ordinary trading vessels engaged in ordinary trading.

Whatever the court felt should be the rule in such cases, it regarded itself bound by the Parlement Belge.

Torfrida vs. Porto Alexandre.[61]—A merchant ship owned by a Greek subject, and which, by arrangement between the Greek and British Governments, had been requisitioned by the British for the use of the British and Italian Governments, and which was carrying coal for the latter, was held free from arrest or detention, "so long as the ship shall remain in the service of either the Italian or the British Government for public or state purposes."[62]

American Cases. Foreign Requisitioned Vessels.—Two important cases in our Admiralty Courts raising the question of the exemption to be accorded vessels requisitioned by foreign governments during the late World War have resulted

[60] The Messicano, 32 T. L. R., 519.
[61] Lloyd's List, L. R., vol. i, p. 191 (1919), before L. J. Bankes, L. J. Warrington and L. J. Scrutton.
[62] The Errisos, Lloyd's List, Oct. 24, 1917, pages 5–8.

in conflicting opinions. The Circuit Court for the Fourth Circuit in the Attualita Case[63] in 1916 held that a merchant vessel requisitioned by the government of Italy, and employed in that government's service at a fixed freight, but which remained under the control and management of the owner, who employed and paid the officers and crew, was not exempt from a suit in rem in a court of the United States for a maritime tort. (The libeled ship, the Attualita, had, in collision, sunk a Greek steamship in the Mediterranean.)[64]

The Court had evidently been watching the development and extension of immunity to vessels of this class with considerable apprehension and felt that with the Attualita Case it was time to register a restraining opinion. The first step taken by the Court, as has been pointed out,[65] was the rule that the suggestion of the Government of the United States as to the national character of the vessel could be disregarded so long as it was not in the form of a demand for the ship's release. Secondly, the Court reached a conclusion that the real and fundamental reason why immunity is granted is by reason of the fact that it can be *safely accorded*. The limited numbers of exempted ships and the ordinarily responsible character of the diplomats or agents in charge of the property in question, and the dignity and honor of the sovereignty in whose service they are, make abuse of such immunity rare.

This attempt to put a narrow interpretation upon the broad principles of equality heretofore laid down in our courts only further illustrates the extent to which the Court was prepared to go to deny immunity to a class of vessels over which it

[63] 238 Fed. R., 909.

[64] That a vessel libelled for a tort committed on the high seas sails under a foreign flag, and that the libellant is a subject of another foreign nation, is not sufficient to require a court of admiralty of the United States to decline jurisdiction. Cf. The Belgenland, 114 U. S., 368.

[65] Cf. above, page 77.

believed that public policy required an exercise of judicial restraint. The Court says:

> There are many reasons which suggest the inexpediency and the impolity of creating a class of vessels for which no one is in any way responsible. For actions of the public armed ships of a sovereign, and those, whether armed or not, which are in the actual possession, custody, and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel, it and its owners are liable. But the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its actions no government is responsible, at law or in morals.

However, two years later, in November, 1918, after the United States had entered the war, the District Court of New Jersey in the Roseric[66] would not follow the lead of the Attualita Case, and in fact criticized the reasoning of that previous case. The Roseric was a vessel requisitioned by the British Government and was in collision in New York harbor. At the time of the tort it was manned by officers and crew in the employment of the owner. No arrest under process was permitted by the court. It is believed that the fact that the United States and Great Britain were then co-belligerents against a common enemy argued very strongly to a reversal of the Attualita opinion. The court denied that the British Government was not morally responsible for the actions of the ship. The effect of the requisition was to place the ship, its owner, officers and crew, under the compulsion of sovereignty. According to the Court:

> Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination. . . . The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In regard to the suggested irresponsibility in the Attualita Case, it is pointed out that in such cases the owner of the ship could still be held liable in personam for the negligence of the officers and crew and furthermore the ship itself would still be liable in rem after the period of requisition was up. The lien on the ship for a maritime tort attached and sur-

[66] 254 Fed. Rep., 155.

vived although the right to enforce it during the period of requisition was in abeyance by reason of immunity from arrest.[66a]

The previous decision is again taken to task on the ground that immunity is not based upon the idea that it may be "safely accorded" but on account of the dignity and independence of the foreign nation, and because it is necessary, for the well-being of the nation that it serves, that it shall not be hampered or interrupted in the use of such instrumentalities.

These two cases bring the real point at issue down to the question whether the American rule that ownership and possession by the government must be actual is to be set aside or not. The Roseric decision can be reconciled with this principle only if it is conceded that, owing to the fact that the ship and its entire equipment is under the absolute dominion of the sovereign, possession in the government can be imputed or implied. This is the only possible reasoning by which the court could have been led, in this case, to announce the doctrine that it is not the ownership or exclusive possession of the instrumentality by the sovereign that exempts it from judicial process, but its appropriation and devotion to such service.

The exigencies of the recent war and the fact that a seizure and detention of such ships would result in seriously hampering the co-belligerents in prosecuting such war against the common enemy in their joint struggle placed the question in a different light in the eyes of the court and argued the expediency of such imputation.

Vessels Requisitioned by the United States Shipping Board.—Section 9 of the Shipping Board Act of September 7, 1916,[67] provided that vessels purchased, chartered or leased by the Board "while employed solely as merchant vessels

[66a] Since the completion of this work in 1920, the Supreme Court has decided in the Western Maid case (Jan., 1922) that the hability does not survive. Not only is the vessel immune from arrest, but it is immune entirely from liability and for all time.

[67] 39 Stat., 730 (comp. St., 1916, sec. 8146 e).

shall be subject to all laws, regulations and liabilities governing merchant vessels whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." This provision was re-enacted by the Act of July 15, 1918.[68]

Under the Act of June 15, 1917,[69] the President was empowered to requisition private shipping for use and operation by the United States. By a Presidential Order of July 11, 1917, the President delegated this power of requisition to the Shipping Board and the Emergency Fleet Corporation.

The Lake Monroe while in course of construction was requisitioned. It was completed by the Corporation and documented in the name of the United States. Later it was chartered to a private company for the carriage of a private cargo of coal. An action in rem against this vessel for collision was begun. The question was therefore raised as to whether vessels requisitioned under the Act of 1917 were deprived of immunity by reason of section 9 of the Act of 1916 re-enacted in 1918. The Supreme Court held[70] that the two Acts were to be construed together and exemption must be denied the Lake Monroe because the provision "purchased, chartered or leased" included a requisition of a vessel. This was nothing more, said the Court, than a contract for the temporary use of a vessel or its services not amounting to a demise, and indeed the word "charter" is defined in the Act itself as "any agreement, contract, lease or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel."[71]

[68] 40 Stat., 900, c. 152.
[69] C. 29, 40 Stat., 182.
[70] The Lake Monroe, 250 U. S., 246; cf. also Ex parte Whitney, 249 U. S., 115.
[71] This doctrine has been extended in a very recent case. The Mavisbrook, 270 Fed. R., 1011, decided March 1, 1921, in the District Court of Maryland. Judge Rose held that the fact that a vessel was under requisition and was operated by the United States at the time of a collision would not exempt her from a suit in rem for the

As early as April, 1918, the District Court, Southern District of New York, had reached the same conclusion in the case of The Florence H.[72] However, the facts were somewhat complicated in this earlier case because the vessel at the time of the collision was on the high seas, manned by a French crew under a charter by the Shipping Board to the French Government to transport a cargo of food. The court felt that the ship was being employed "solely as a merchant vessel" and that the mere ownership of the cargo by the French Government did not make the employment of the vessel other than that of the usual "merchant vessel." Since the stipulations did not show that the voyage was a part of the allied military operations of France and the United States. it would, said the court, under the modern practice of war, "be extremely difficult to undertake any line of limitation between what was a part of the military operations of a government and any ordinary mercantile activities."

Furthermore it was held that the libel would not create any jurisdictional embarrassment because it required a scrutiny into the conduct of the French crew, acting at the time directly under the authority of the French republic, because the tort occurred on the high seas and under the American flag.

Act of March 9, 1920.—The matter of suits against the United States in admiralty has now been provided for by statute. In the 2d session of the 66th Congress an Act was passed which provided that no vessel or cargo owned or possessed by the United States or the Shipping Board shall hereafter be liable to arrest or seizure by judicial process in the United States. In thus asserting the government's immunity from actions in rem in admiralty, the former acts, in so far as they put the ships of the Emergency Fleet Corporation on an equal basis with other private merchant ships in the matter

collision after her return to the owner. If this is sustained, all actions in rem against requisitioned ships will survive until return to their owners. (Over-ruled by the Supreme Court in the Western Maid case, January, 1922.)

[72] 248 Fed. Rep., 1012.

of liability to arrest and seizure, have been repealed and instead Congress has made provision by the recent act for libels to be brought in personam against the United States or the Corporation. These suits are to be brought in the District Courts "in cases where, if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action." Money judgments against the United States are to bear interest at the rate of four per cent per annum until satisfied, or at any higher rate stipulated in the contract upon which the decree is based.

Section 4 provides:

> That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

But perhaps the most important provision of all in the Act is that contained in Section 7. If any Shipping Board vessel or cargo is arrested in a process in a foreign court, or if the foreign court entertains a suit against the master in regard to the possession and operation of the vessel and cargo, the Secretary of State may in his discretion direct the nearest United States Consul to claim immunity, and to execute a bond on behalf of the United States for the release of the ship or cargo, and in the case of a suit against the master the Consul may be authorized to enter the appearance of the United States and to pledge the credit of the government to the payment of any judgment and cost that may be entered in such suit.[78]

[78] The wording of sec. 7 in full is as follows: "That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought

Thus is accomplished one of the main purposes of the Act, which was to provide in all cases for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions. It is indeed to be hoped that other governments may adopt the same policy in regard to their requisitioned and government-owned merchant ships; thus frequent cases of injustice arising from the enforcement of immunity will in a great measure be obviated, as well as any possible international friction that might arise in the future over the large and growing number of claims of immunity on behalf of government operated merchant vessels.

One of the strong criticisms of the principle of immunity from a suit of any nature as applied by the courts was

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therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States Consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: Provided, however, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

that, although the ships of this class regularly claimed and were accorded immunity in cases where they or their crews were at fault, reciprocal immunity was not conceded by the Government to private ships that might wrongfully injure them. And likewise in cases of salvage services rendered, these government ships were permitted to go into court to recover a remuneration, whereas if the conditions had been reversed, the salvors of a government ship would have been unable to recover.

This is well exampled by the instance of a Norwegian sailing vessel, the Dvergso, which was towed some distance across the Atlantic by the Cripple Creek, a steamship belonging to the United States Shipping Board. Without delay bail was demanded from the salvaged vessel, and had it not been forthcoming she would have been arrested.

By this act, suits for salvage services rendered an American Shipping Board vessel can be brought by an action in personam against the United States in a Federal District Court, and on the other hand the United States, and the crew of any merchant vessel owned and operated by it, has the right to collect and sue for salvage services rendered by such vessel and crew, and in the latter case the money recovered by the United States, in contradistinction to that recovered by the crew, goes into the National Treasury to the credit of the Shipping Board or the Emergency Fleet Corporation.

The Immunity of Government-owned Cargoes

The general rule of Admiralty law applied to cargoes, other than government cargoes, is that suits for salvage may be maintained in rem against the property saved or the proceeds thereof. Thus it has frequently occurred that salvors have attempted to bring actions against cargoes owned by the sovereign power for salvage contribution. The Supreme Court has held in the Davis[74] that a libel will be and is enforceable against personal property of the United States when, at the time of the salvage services, the possession of the property by the United States was not actual.

[74] 10 Wall., 15 (1869).

A shipment of cotton was made by the United States from Savannah to New York on a private vessel. The cotton had been delivered to the master, who was not an officer of the United States, for delivery to an agent of the Government in New York. It was salvaged and libel proceedings were begun before it was delivered to the United States. The court decided that the action in rem did not have the effect of taking the property out of the possession of the government, and thus in no way was the possession of the United States invaded.

The earlier case of U. S. vs. Wilder[75] has often been cited to support the contention that a lien against government property can be enforced by an action in rem in all cases. This undoubtedly is the result of the dicta by Justice Story found therein, which have already been referred to.[76] Although goods belonging to the United States shipped on a private schooner were salvaged, it must be pointed out that the dicta in no way affected the case because it was a suit in trover, brought by the United States to recover the goods, and since the government was voluntarily within the jurisdiction of the court, the court held that the United States officers had no right to take the goods which had been salvaged without paying or securing their contribution to the general average.

Set-offs against Governments Submitting to Jurisdiction.— On the same ground as the Wilder decision it is now well established that when a government has voluntarily come within the jurisdiction, claims against the property or vessel of the government may be made by way of set-off.

A naval ship of the United States captured the Siren in Charleston in 1865. The Government instituted prize court proceedings, and the Siren was sold and the money was turned over to the United States. But it seems that while the Siren was being taken to the port of adjudication it ran into and sank a ship in New York harbor. The owners of the lost

[75] 3 Sumner, 308 (1838).
[76] See above, page 77.

ship asked damages from the fund derived from the sale of the Siren. This the court allowed by way of set-off since the United States was already voluntarily within the jurisdiction for the purpose of obtaining a prize decree.[77]

In the St. Jago de Cuba,[78] the United States filed a libel against the ship for violation of slave trade laws, and seamen's wage and material men's claims were allowed and paid by way of set-off. The claims arose even subsequent to the illegal acts, but the parties were ignorant of the illegality of the voyage.

The general rule can therefore be stated that when the United States institute a suit, they waive their exemption, so that the defendant can present claims of set-off, legal and equitable to the extent of the demand made or the property claimed. Then the United States stands, with reference to the right of the defendant or claimant, just as any private suitor, except that they are exempt from costs and affirmative relief against them beyond the demand or property in controversy.[79]

A similar rule is in force in the British Courts, as is evidenced by the case of the Marquis of Huntly,[80] where, when the Admiralty had entered an appearance under the English procedure, a cargo of ordnance and naval stores in charge of a Lieutenant as government agent was made to contribute along with the ship and freight in the contribution for salvage services rendered.

The American Rule Contrasted with the British Rule.— Following the decisions in the Davis[81] and Long vs. Tampico,[82] that immunity is only granted where the possession is actual, the Circuit Court of Appeals for the Third Circuit in the Johnson Lighterage Company, No. 24 case,[83] held that a

[77] The Siren, 7 Wall., 152.
[78] 9 Wheaton, 409.
[79] Cf. U. S. vs. Ringgold, 8 Peters, 150, and U. S. vs. Macdaniel, 7 Peters, 16.
[80] 3 Hagg, 247 (1835).
[81] 10 Wall., 15.
[82] 16 Fed. Rep., 491.
[83] 231 Fed. Rep., 369 (1916).

suit in rem could be maintained against munitions of the Russian government which were salvaged while in the possession of a Lighterage Company which had contracted to transport the munitions from a railroad terminal to a vessel in New York harbor. The Lighterage Company had no other connection with the foreign government and the property was still in its possession when libeled and seized by the marshal. The court made this decision even in the face of affidavits filed on behalf of the Russian Government with the Department of State to the effect that the cargo was the sole and exclusive property of the Russian Government. The court would in no way admit that the Lighterage Company was an agent of the Russian Government but classed it as a common carrier.

Just the opposite conclusion was reached by a British Court in Vavasseur vs. Krupp et al.[84] in 1878. The Mikado of Japan had purchased from Krupps in Germany certain shells said to be infringements of an English patent. These shells were brought to England by a certain Ahrens & Co. in order to be put on board a Japanese ship of war building there. The English patentee obtained an injunction against the Company in whose custody the shells were, restraining it from removing the shells. The foreign sovereign then applied to be made a defendant to the suit. The court overruled the injunction in most striking terms and held that on no grounds could the property of a sovereign be arrested and withheld, no matter in whose possession it was, if the sovereign demanded that it be released. Indeed, Lord Justice James was shocked at what he considered the boldest attempt he had ever heard of to interfere with the right of a foreign sovereign to deal with his public property. Furthermore, he decided that a foreign sovereign who, for the purpose of obtaining his property, had submitted to be made a defendant in an action did not thereby lose his rights.

These two cases well illustrate the difference in attitude between the English and American Courts. So strong, how-

[84] 9 Ch. D., 351 (1878).

ever, is the present American tendency to escape from the extension of immunity to any further classes of subjects, that it is the opinion of the writer that the District Court for the Eastern District of Pennsylvania in the case of the Luigi[85] was led thereby to announce a doctrine which by the weight of previous decisions is not at all warranted.

The Luigi Criticised. The Release of Owners from Bond.—A libel suit was instituted against the Luigi, an Italian requisitioned vessel, and in personam against the owners for breach of charter party. Upon the formal suggestion of the Attorney General that the ship was a requisitioned ship and engaged in business for the government of Italy in carrying a cargo devoted to public uses, the vessel was released. But prior to this suggestion the owners, through the master, had entered bond for the release of the vessel for the benefit of the Italian Government. After the release of the vessel, the court refused to release the bond, holding that the further action of the court could no longer affect the rights of the foreign government, but private rights only. The suit from then on was between private individuals, and the rule of comity was not allowed to have retroactive effect and "be applied where the necessity for its application no longer exists."

In the Jassy[86] the owners were released from their bond which had been entered to procure the ship's release pending the formal suggestion of the Government. A similar procedure was adopted in the Broadmayne.[87] It is true that both the actions were in rem only, and the bonds were released on the principle that the appearance and giving bail by the owner did not change the character of the action from one in rem to one in personam.

[85] 230 Fed. R., 493 (1916).
[86] 1906, P. D., 270.
[87] 1916, P. D., 65.

The Circuit Court for the Third Circuit in the Adriatic[88] released the owners from the bond given for the release of the vessel prior to the formal suggestion by the British Ambassador, even though the libel was brought in personam against the owners as well as in rem against the ship. It is submitted that the ruling on the release of the owner's bond in the Luigi Case is incorrect.

[88] 258 Fed. Rep., 902 (1919).

CHAPTER III

Jurisdiction over Foreign Private Merchant Vessels and Seamen

The jurisdiction which the courts of one country may exercise over the private merchant vessels of another is primarily a question falling within the field of international law and comity, but the establishment of the correct rules for the determination of jurisdiction, in any one case, is peculiarly important for the courts of admiralty, for most frequently are the Federal District Courts called upon to determine whether they have jurisdiction in causes affecting foreign merchant vessels and seamen. Our great shipping centers are daily crowded with foreign merchantmen, manned with foreign crews, and flying a foreign flag. This very fact immediately suggests a conflict of national jurisdiction, for, is it to be supposed that the right to fly a foreign flag carries with it no significance? Does this flag become a mere ornament at the mast head when the ship is within the territorial waters of a foreign nation?

The fundamental principle of sovereignty declares that the jurisdiction of every independent nation is absolute and exclusive and that it extends to all the territorial waters. All vessels and individuals within these limits are prima facie subject to the jurisdiction of the sovereign state. However, in the course of international relationship and commerce each nation has either by implication, custom, treaty, or comity agreed to certain exceptions in favor of the sovereignty of foreign nations.

Each exception must be derived from the actual or implied consent of the former.[1] Not every exception made by a country results in a complete denial of all jurisdiction over the matter or thing, for were this so there would be no conflict. In the large number of cases it is found that the abso-

[1] The Exchange, 7 Cranch, 116.

lute sovereignty has been withheld only in so far as to recognize a concurrent power residing in the foreign nations. Thus there are at times two or more national jurisdictions which may take cognizance of a suit and the actual assertion of this right is frequently a matter of judicial discretion to be determined by the Admiralty judges.

A merchant vessel may find itself in one of three situations. Either it is in a port or territorial waters of its own country, on the high seas, or in foreign territorial waters. No question arises over ships in the first category. It is with the last two that we must deal. But before entering into the problems of jurisdiction and legislation over foreign private vessels it is necessary to inquire into certain opinions which have been advanced as to the inherent character of ships themselves, and especially what is known as the territoriality of ships.

The Territoriality of Ships

When a vessel sails from its home shores and passes beyond the three-mile limit it is then floating upon waters which are subject to the jurisdiction of no nation. It is undoubtedly natural for the country to continue to assert jurisdiction over the ship and matters arising on board while upon the open sea, but upon what theoretical ground this jurisdiction exists is subject to considerable difference of opinion. One of the most commonly asserted doctrines is that the vessels of a nation are to be regarded as floating portions of the country upon which they depend. Since every government is always interested in and dependent upon its foreign commerce to a greater or less extent and usually derives a large portion of its wealth therefrom, it has been customary for all maritime nations to extend in every way the protection of their laws and administration to the vessels flying the national flag. They have repeatedly viewed with disfavor and guarded with jealousy against any loss of jurisdiction over their vessels by reason of the assertion of exclusive jurisdiction by a foreign nation. Whenever controversies have

arisen in such matters, the governments complaining have found it most convenient to assert this doctrine of territoriality, and indeed our own public papers contain numerous statements of it in varying forms.[2]

Mr. Webster has probably gone as far as any American statesman in arguing for a right of exemption from local jurisdiction. In his correspondence with Lord Ashburton he argued that slaves, so long as they remained on board an American vessel in English waters, did not fall under the operation of English law. Thus he asserted the general rule to be in favor of the jurisdiction of the state to which the vessel belongs, deviations from this general principle being exceptions. The burden of asserting and proving them must fall upon the local powers where they seek to enforce the supremacy of local laws.[3]

And again (August 8, 1842), writing to the same person with reference to impressment, he says:

> Every merchant vessel on the seas is rightfully considered as part of the territoriality of the country to which it belongs. The entry therefore into such vessel, being neutral, by a belligerent, is an act of force, and is prima facie a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations.

Hall, in his work on International Law,[4] traces the doctrine of territoriality back to the "Exposition des Motifs" of the Prussian Government in 1752. Courts and statesmen adhering to the theory have pointed to Vattel.[5]

Nevertheless, the modern practice of nations so limits this theory that it will not always stand the test of circumstances. The extension of this doctrine to its logical end would result in a denial of jurisdiction in all cases over foreign merchant vessels. But this is not so, for such ships do become subject to local jurisdiction in foreign ports in a great number of

[2] Mr. Evarts to Mr. Welsh, Minister to England, For. Rel., 1879, 435, No. 328, July 11, 1879.
[3] Mr. Webster, Sec. of State, to Lord Ashburton, Aug. 1, 1842, Webster's Works, VI, 303, 306.
[4] Hall, Int. Law, 1st ed., p. 208.
[5] Book 1, chap. 19, sec. 216.

ways and in fact their territoriality there is denied, as will be seen. The theory breaks down, for if a merchant vessel is part of the territory of her state she must always be a part of it.[6] Hall declares the fiction as untenable:

> The territoriality of a vessel is a metaphorical conception; and before a metaphor can be employed as an operative principle of law, it must be proved to have been so adopted into law as to render its use necessary, or at least reasonable.[7]

The French Courts and French authorities, although recognizing the fact of extra-territorial rights, do not ascribe the privileges which flow from it to the same sources. They hold to the view that the crew of a merchant ship lying in a foreign port is unlike a collection of isolated strangers traveling in the country; that it is an organized body of men, governed internally in conformity with the laws of their state, enrolled under its control, and subordinated to an officer who is recognized by the public authority.[8] In the navigation of the ship, the crew and the ship are inseparable, and the business engaged in by the two affects the commercial interests of a nation as a whole. Thus it is clothed with a certain national atmosphere which still surrounds it when in the waters of another state. One of the results is that the courts have no jurisdiction over civil suits between foreigners, except in certain specified cases.[9]

The rule is stated by Wheaton thus:

> It is the duty as well as the right of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations, as to taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each state, guided by such motives as may influence its judicial policy.[10]

Hershey,[11] commenting upon the attitude of the government of France, says:

> This so-called "French rule" is, however, a very convenient and desirable practice from the standpoint of commercial interests, and deserves the heartiest commendation and support.

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[6] Manning, 276.
[7] Hall, Int. Law, p. 209.
[8] Ortolan, Diplomatie de la Mer, pp. 228–229.
[9] Vattel, Book 2, chap. 8, sec. 103, Ed. of Pradier-Fodéré.
[10] Wheaton, Elements of International Law, Part 2, chap. 2, div. 3, sec. 19.
[11] Essentials of International Public Law, p. 222.

The Supreme Court of the United States has adopted a qualified theory of territoriality. It is usually found in somewhat the following form: "It is undoubtedly true that for some purposes a foreign ship is to be treated as foreign territory."[12] In a very recent case[13] the same Court has said:

> Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be "laboring in the United States" or "performing labor in this country." It is of course true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative . . . and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.

Moore calls the doctrine metaphorical and says that the jurisdiction of the nation to which the merchant vessel belongs is quasi-territorial.[14] It is probably for a lack of a better and more exact theory on which to establish the jurisdictional right of the home nation to take cognizance of causes arising on merchant vessels that our courts for some purposes treat these ships as if they were parts of the territory of foreign nations. As long as there is no possible conflict of jurisdictions the strict theory of territoriality, although false, is harmless. Indeed, for such a matter as births upon the high seas, it very conveniently serves its purpose. But its failure as a universal doctrine is no better exposed than in the law and practice of criminal jurisdiction over foreign vessels.

Criminal Jurisdiction over Foreign Vessels.—One of the three great classes of functions of the District Courts in the exercise of their admiralty jurisdiction is to sit as a Criminal Court, in which are tried and punished those maritime offences over which the acts of Congress have given them jurisdiction. The power of the Federal Government to provide for the punishment of crimes and offences committed on the

[12] Patterson vs. Bark Eudora, 190 U. S., 169, 176.
[13] Scharrenberg vs. Dollar SS. Co., 245 U. S., 122.
[14] Moore, Digest of International Law, vol. i, sec. 174, p. 930.

high seas or in any waters within the admiralty and maritime jurisdiction of the United States is derived from the clause of the Constitution granting jurisdiction to the Federal Courts in Admiralty matters. The District Court has jurisdiction to try all offences thus provided for which are not capital.[15]

On the High Seas.—It is well settled that neither state nor federal criminal laws of the United States will extend to foreign merchant vessels on the high seas. By this is meant that the courts have never construed a criminal law, providing for the punishment of crime committed on the high seas, to apply to any other than American vessels. However, the statement that Congress possesses the power to go further and to authorize the punishment of parties for offences committed on the high seas without reference to their nationality, or that of the vessel on which the same are committed, if they shall thereafter be found or come within the United States has been definitely stated in United States vs. Lewis[16] (1888), by the District Court of Oregon. The Court based its authority for the statement on this opinion of Chief Justice Marshall in United States vs. Palmer:[17]

> The question, whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States, is not without its difficulties. The Constitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?

It must be remembered that this opinion was given in a case involving the power of Congress to punish piracies on the high seas as offences against the law of nations.[18] The

[15] Benedict, Admiralty, 4th ed., p. 262, sec. 599.
[16] 36 Fed. R., 449.
[17] 3 Wheat., 630.
[18] Piracy as an offence is justiciable in the courts of any county; cf. U. S. vs. Holmes, 5 Wheaton, 412.

Supreme Court would not construe the Act in question to be applicable to offences occurring on the high seas in foreign vessels.

Nor would the Circuit Court in the United States vs. Kessler[19] construe the Act of May 15, 1820, so as to give it jurisdiction to try and punish a foreigner for an offence committed at sea in a foreign vessel. The Court said:

> It is easy to see that this might get us into difficulties with other nations, who may not choose that we should hang their subjects by the mode of trial and sentence of our tribunals, for offences on board their own ships under their authority and protection. . . . Questions and difficulties of this sort are avoided by confining our cognizance of offences on the high seas to our own ships, leaving other nations to take care of their own.

Both of these cases do acknowledge the power as one which Congress possesses but which it has not exercised.[20] Whether the right of the Federal Government to punish piracies is the limit of this possible jurisdiction, or whether other crimes inherently against the law of nations and not against any one particular state are included within this power, is a point which does not bear upon the present discussion.

However, on the principle that the legislative and judicial powers of a state extend to the punishment of all offences against its municipal laws by its subjects or citizens wheresoever committed, even within the geographical limits of another nation, it is competent for the United States courts to entertain jurisdiction over a crime committed by an American citizen on a foreign vessel on the high seas.[21] In most

[19] 1 Baldwin, 15 (1829).

[20] The fifth section of the Act of March 3, 1819 (in force for one year), did provide "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders shall, afterwards be brought into or found within the United States, such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

[21] Bishop, Criminal Law, Book 2, chap. vi, sec. 117; Moore, Digest Int. Law, vol. i, p. 933.

instances this jurisdiction will not be insisted upon especially where the law governing the locus of the crime is in conflict. But Mr. Bayard, as Secretary of State, has said that the right to insist upon it "is a matter in which no other nation has the right to interfere."[22]

In an opinion of Mr. Justice Story in United States vs. Davis[23] it is apparently assumed that Congress has power to provide for the punishment of the crime of manslaughter committed by an American on a foreign vessel in the harbor of the country of that vessel although the decision was to the effect that the Act of 1790, Chapter 36, Section 12, did not extend to such an offence.

In Territorial Waters of the United States.—Every state claims to exercise jurisdiction over its own merchant vessels wherever they are, and even when they are in the waters of another state.[24] Thus a crime committed on a foreign merchantman in a port of the United States or in the territorial waters thereof is properly cognizable in the courts of that foreign country. The United States has asserted and exercised this right against the Dominion of Canada in the case of United States vs. Rodgers,[25] in which the District Court was held to have jurisdiction of an assault taking place on an American vessel in the Detroit River within the territorial limits of Canada. The British Admiralty Courts have also assumed jurisdiction in similar cases.[26]

Of primary interest is, however, the jurisdiction which the Federal Courts have over crimes occurring on a foreign vessel and by foreigners while the ship is in a port of the United States. (It must be remembered that the actual jurisdiction of the Federal Courts is entirely dependent on statute. The amount of possible jurisdiction they may be invested with by

[22] To Mr. Connery, Chargé at Mexico, Nov. 1, 1887, For. Rel. (1887), 754.
[23] 2 Sumner, 482 (1837).
[24] Wheaton, Internatl. Law, 4th ed., p. 168.
[25] 150 U. S., 249; cf. also the case of U. S. vs. Bennett, 3 Hughes, 466; same right asserted against France.
[26] Reg. vs. Anderson, 11 Cox, C. C., 198.

Congress in cases involving foreigners and foreign ships is largely governed by principles of international law.) In the absence of any treaty or convention, the United States has absolute jurisdiction over all such crimes. When a foreign vessel enters a port of this country it must obey the laws, and as said in the Exchange, the persons on such foreign ships "owe temporary and local allegiance" and are amenable to the jurisdiction.

On the other hand, by convention and by comity, it has come to be generally understood among civilized nations that all matters of discipline and all things done on board which affect only the vessel or those belonging to her, and do not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belongs.

Thus foreign vessels in port are at the same time subject to two concurrent systems of law, one of which may in part have been temporarily surrendered. But the right to resume jurisdiction nevertheless exists and might be assumed on due notice being given.

The Supreme Court in the Wildenhus Case[27] held that a felonious homicide by a foreigner on a foreign vessel in port, occurring entirely below decks, was by its nature such an offence against the peace and tranquillity of the port that in spite of a convention giving jurisdiction of differences arising on Belgian ships between officers or crew while at sea or in port to the consular agents of that country, the American court was permitted to take jurisdiction and try the offender. Thus the discretion of the court as to whether an offence does or does not disturb the peace and tranquillity of the port will determine the jurisdiction.[28]

[27] 120 U. S., 1 (1887).

[28] In the cases of the Sally and the Newton (1 Phillimore's International Law, third ed., 484), the French courts held in their judgments such crimes did not affect the peace and traquillity of the port. This nevertheless did not affect the principle involved; cf. also the case of the Tempest, 1859, in the Court of Cassation, France.

The exemption of a vessel "can never be construed to justify acts of hostility committed by such vessel, her officers and crew in violation of the law of nations, against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defense as the security of the State may require."[29]

The question as to whether the courts have jurisdiction over crimes committed on foreign vessels by foreigners at the time the ship was passing through the territorial waters of the United States on a voyage to another country is subject to a considerable difference of opinion. The attitude of the International Law Association and the Institute of International Law is that there is a right of innocent passage within the three-mile limit and that crimes committed on foreign ships, so passing, on persons or things on board are without the jurisdiction of the neighboring country unless they violate its rights or laws. And Halleck says that a foreign ship passing through the littoral seas "is bound to respect the military and police regulations adopted by the state for the safety of its territory. . . . The vessel in other respects is as free as if it were on the high seas."[30] Hall, however, takes a different view. He says: "There is no reason for any distinction between the immunities of a ship in the act of using its right of innocent passage and of a ship at rest in the harbors of the state,"[31] and that the local state must be held to preserve its territorial jurisdiction in so far as it chooses to exercise it over the passing ships and those on board as fully as over ships and persons in other parts of its territory.

The leading case on this point is that of the Franconia,[32] in which the majority of the English judges held that the court in the absence of a statute did not have jurisdiction of a manslaughter committed by a German on a German vessel

[29] The Carlo Alberto; cf. also Wheaton, Int. Law, 4th ed., p. 168.
[30] Halleck, International Law, third ed., vol. i, p. 157.
[31] Hall, International Law, pp. 169–170.
[32] Regina vs. Keyn, 2 L. R., Exchequer Div. (1876–1877), p. 63.

passing within three miles of the shore of England. Two of these justices held that Parliament could not, on principles of international law, apply English criminal law to such a case arising in littoral waters. A very strong dissent was entered on the ground that the sea within three miles of the coast of England was part of the territory of England; that the English criminal law extended over those limits; and the admiral formerly had, and the Central Criminal Court then had, jurisdiction to try offences there committed although on board foreign ships.

The only American case which seems to uphold the dissent in the Franconia Case is that of United States vs. Smiley,[33] which seems to recognize the criminal jurisdiction of the neighboring country over the littoral sea.[34]

Although it cannot be said that any established principle in international law has been determined upon in this matter, it is probably true that the great weight of authority is against the independence of private merchantmen in transit through the territorial waters of another state.

Civil Jurisdiction over Foreign Vessels and Seamen.— Without risk of over-emphasis, the general rule can be here again restated. The jurisdiction of admiralty courts over foreign merchant vessels in territorial waters is complete,[35] and for the adjudication of questions, no foreign power can of right institute, or erect any court of judicature of any kind, within the jurisdiction of the United States, except such as may be warranted by and are in pursuance of treaties. This was announced by the Supreme Court in the case of Glass vs. The Betsy,[36] and it was definitely stated that the

[33] 6 Sawyer, 640.

[34] Cf. "Jurisdiction over Foreign Ships," Mich. Law Rev., vol. ii, 347.

[35] The Howard, 18, Howard, 231; The Exchange, 7 Cranch, 116; Benedict, Admiralty, p. 151; Moore, Digest of Int. Law, vol. ii, p. 272.

[36] 3 Dallas, 6 (1794). In Ellis vs. Mitchell (1874) the Supreme Court of Hongkong held that the American Consul could not settle a dispute as to seamen's wages in the absence of express authority under treaty. Scott's Cases, 234.

admiralty jurisdiction which had been exercised in the United States by the Consuls of France in matters affecting the internal order and discipline on French vessels, not being based on a treaty, was unwarranted and not of right.

Although the United States has the power to regulate and decide disputes between the crew and master or officers on a foreign ship while within the jurisdiction of the United States, it will, in the absence of a Federal Statute and treaty stipulations, usually refrain from doing so. It thus adopts the French Rule and declines to exercise jurisdiction over foreign merchant vessels in its harbors to this extent. The general statement can be made that our courts, in the absence of a treaty or act of Congress, are not bound to exercise jurisdiction over a suit, either for wages or for an assault committed, where the parties are both foreigners, and the contract was made in a foreign country, or the tort committed on a foreign ship.

But the courts may, in their discretion, take jurisdiction over internal questions, even where there is no federal law which requires the courts to take jurisdiction, and where there is no treaty covering the case. They will take jurisdiction where it is manifestly necessary to do so to prevent a failure of justice.[87] The Admiralty Courts will have jurisdiction over such suits between foreigners, if the subject matter of the controversy is of a maritime nature.[88] In such cases it is the practice of the District Courts to require first the consent of the Consul or Consular representative of the country of the parties to the suit. But the Consul's consent is not necessary to jurisdiction, for if the court possesses jurisdiction at all, it must have had it originally over the subject matter because the consent of a foreign consul or minister can not confer jurisdiction on an American court.[89]

[87] Henry, Admiralty Jurisdiction and Procedure, pp. 96–97.
[88] Taylor vs. Carryl, 20 Howard, 583.
[89] Cf. The Golubchick, 1 W. Rob., 143.

The rule is well stated by Mr. Justice Grier, in Gonzales vs. Minor,[40] as follows:

A court of admiralty has jurisdiction in suits for wages, promoted by foreign seamen against foreign vessels, as questions of general maritime law. But the exercise of such jurisdiction is discretionary with the court, and to be permitted or withheld according to circumstances. The express consent of the foreign minister or consul is not essentially necessary to found such jurisdiction. Nevertheless, the exercise of it is rather a matter of comity than of duty. Whether it ought ever to be exercised against the remonstrance of the representatives of such foreign nation, we need not inquire; as we cannot foresee all possible cases, and that question, is not before us. But when the court does entertain such cases without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice, or injury, likely to be suffered without such interference, as would raise the presumption of a request, because it is in fact conferring a favor on such foreign state.[41]

An American sailor on a British ship at the termination of the voyage in Boston, and after his discharge, libeled the master in personam for injury from imprisonment in a foreign jail. The master was a British subject, although domiciled in Boston. The British Consul objected to the jurisdiction, but this protest was overruled and the court said: "The voyage was ended at this port. The libellant is a native of the United States and here has his home. To require him to follow this master over the world until he can find him in a British port would practically deprive him of all remedy. I do not think any consideration of public convenience or the comity extended by the Courts of Admiralty of one country to those of another have any applicability to such a case."[42]

So also torts originating within the waters of a foreign power may be the subjects of a suit in a domestic court. A British ship was damaged by the negligence of a New York

[40] 2 Wall., Jr. 348, 353.

[41] In Ex parte Newman, 14 Wall., 152 (1871). The Supreme Court said that the Foreign Consul should be consulted where it is practicable but that "His consent however is not a condition to jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion whether jurisdiction in the case ought or ought not to be exercised."

[42] Patch vs. Marshall, 1 Curtis, C. C. R., 452 (1853).

corporation while in Colon. The corporation was the proprietor of piers at this place and through its negligence in failing to remove a certain sunken obstruction at the pier the vessel was sunk and a large part of the cargo lost. The libel was subsequently filed in the District Court for the Southern District of New York. The question of jurisdiction was taken to the Supreme Court, which held:

> Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case though the better opinion is that, even under those circumstances the court will take cognizance of torts to which both parties are foreigners, at least in the absence of a protest from a foreign consul.[43]

In 1868 a Canadian ship was libeled in the District Court in Baltimore by a Canadian for damages for deviation and breach of contract of affreightment. The place of shipping and place of consignment were foreign ports, and the whole ground of libel was a matter which occurred on the high seas and in Wales. The Supreme Court finally decided that since the English Admiralty Courts by Act of Parliament would have had jurisdiction of the case, the jurisdiction of the American court could be established and it would here administer the foreign law. Their opinion was that where a lien is given by maritime law the question was not one of jurisdiction but of comity:

> In controversies wholly of foreign origin and between citizens and subjects of the same foreign country, the admiralty courts of the United States will not, in general, entertain jurisdiction to enforce the maritime lien or privilege in favor of shipper or shipowner in a case where the libellant would not be entitled to such a remedy in the place where the contract was made or where the cause of action set forth in the libel accrued.[44]

The Effect of Treaty Stipulations on Jurisdiction.—As a general rule aliens are allowed to bring suits in our courts against our citizens or against each other, where the subject matter of the controversy is transitory in its nature. To some extent, however, this power is restricted by treaties with foreign nations by which the Consuls of those states

[43] Panama R. R. vs. Napier Shipping Co., 166 U. S., 280 (1897).
[44] The Maggie Hammond, 9 Wall., 435.

respectively are empowered to have exclusive charge of the internal order of the merchant vessels of their nations, and to alone take cognizance of any differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts.

However, it is usually provided that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort on their return to the judicial authority of their country.

An important principle affecting cases arising under these treaties is that when a seaman, no matter what his nationality may be, duly enrolls himself as a member of the crew and signs the articles of employment on the vessel, he becomes, for the time being, for all purposes of consideration by the tribunals of this country in his relations to the ship, a citizen of the nation to which the vessel belongs. Thus it is the nationality of the vessel and not of the crew which governs in taking cognizance of the cause, and all the crew are treated as of the same nationality as the vessel.[45]

As to whether the treaties divest the Admiralty Courts of jurisdiction over internal matters and leave the case to the exclusive control of the consular authorities has proved a question of considerable delicacy for the courts. As was said by Judge Peters, in an early case, it is a matter of "too serious import to be rested on implication alone."[46] In Ex parte Newman,[47] which was a libel by Prussian sailors against a Prussian vessel for wages, the master of the ship set up the Prussian Treaty, and the Consul of Prussia protested the jurisdiction. The District Court assumed jurisdiction but was reversed by the Circuit Court of Appeals which held that there was no jurisdiction and the Supreme Court adhered to this view.

[45] Ross vs. McIntyre, 140 U. S., 435; The Ester, 190 Fed. Rep., 219; Henry, Admiralty Jurisdiction and Procedure, pp. 98–99; The Leon XIII, 8 Prob. Div., 121.

[46] The St. Oloff, 2 Pet. Adm., 433.

[47] 14 Wall., 152 (1871).

And in the Elwine Kreplin,[48] Judge Woodruff, in a libel in rem brought by seamen against a Prussian vessel for wages, held definitely that the treaty required that the matter be left in the hands and subject to the determination of the Consul. In the Belgenland,[49] the Supreme Court said: "if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the Consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed."

On the basis of the last-named case, the District Court for the Eastern District of South Carolina in 1911 refused jurisdiction, saying: "In the particular case before this court, the failure by the court to take jurisdiction may work great hardship, but the possibility of such consequences is not for the court to consider if it be a matter of treaty."[50]

Jurisdiction in Questions Communis Juris.—Causes of salvage and bottomry and collision are deemed to be questions of the jus gentium and admiralty courts should and do exercise jurisdiction as a matter of comity. A libel for salvage services rendered a French ship by the crew of a British vessel came before the eminent jurist Marshall in 1804. The services had been rendered on the high seas with great peril to the salvors. Whatever doubts there are as to the jurisdiction, said Marshall, "seem rather founded on the idea that upon principles of general policy, the court *ought not* to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of the court that, whatever doubts may

[48] 9 Blatchford, 438 (1872).
[49] 114 U. S., 364 (1884).
[50] The Ester, 190 Fed. Rep., 216, 229.

exist in a case, where the jurisdiction may be objected to, there ought to be none where the parties assent to it." [51]

Thus even in such cases the admiralty courts may decline to exercise jurisdiction, yet where such controversies are communis juris, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it.[52]

Mr. Justice Story has held, in the Jerusalem,[53] that wherever a maritime lien is acquired on a foreign ship, a court of admiralty will be governed by the principle of civil law, that the proper forum in proceedings in rem is the locus rei sitae. He said:

> With reference, therefore, to what may be deemed the public law of Europe, a proceeding in rem may well be maintained in our courts where the property of a foreigner is within our jurisdiction.
>
> Salvage is a question jus gentium, and materially different from the question of a mariner's contract, which is creative of the particular institutions of the country. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum, but this is a general claim upon the general ground of quantum meruit, to be governed by a sound discretion acting on general principles and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question of such a nature, so to be determined.[54]

A suit arising out of collision falls under the same rule, and is prima facie a proper subject of inquiry in any court of admiralty which first obtains jurisdiction.[55]

The leading American case is that of the Belgenland.[56] A Norwegian and a Belgian ship collided on the high seas and on suit for damages the jurisdiction was contested. The Supreme Court carefully reviewed all the circumstances that usually render it inexpedient to take the jurisdiction of con-

[51] The Blaireau, 2 Cranch, 240 (1804).
[52] Parsons, Shipping and Admiralty, vol. ii, p. 226.
[53] 2 Gall., 191.
[54] Sir William Scott in The Two Friends, 1 Ch. Rob., 271, 278.
[55] The Attualita, 238 Fed. R., 909 (1916).
[56] 114 U. S., 355 (1885).

troversies between foreigners in cases not arising in the country of the forum. It then adopted and cited two opinions of Dr. Lushington. The first was from the case of the Johann Friederich:[57]

> All questions of collision are questions *communis juris*. . . . One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be communis juris or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress.

The second quotation is from the Griefswald:[58]

> In cases of collision, it has been the practice of this country, and so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed in rem against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy in personam would be impracticable.

The Supreme Court therefore sustained the jurisdiction in the principal case, pointing out that it would be impossible to remit the parties to a home forum, for since they were subjects of different powers, no such tribunal existed. And as was said in Bernhard vs. Greene,[59] the only forum "which is common to them both by the jus gentium is any court of admiralty within the reach of whose process they may both be found." Therefore the law which the court taking jurisdiction should apply was the general maritime law as understood and administered in the courts of the country where the suit was brought.

The Exercise of Judicial Discretion in Cases between Belligerents in the World War

The whole question of the exercise of judicial discretion in taking jurisdiction of suits in admiralty, where the parties to the suit were belligerents in the recent war, was before the Supreme Court in two important cases. The first was the well-known case of the Appam.[60] Suit was brought by a

[57] 1 W. Rob., 35.
[58] 1 Swabey, 430.
[59] 3 Sawyer, 230, 235.
[60] 243 U. S., 125, 156 (1917).

British Company, the owners of the Appam, to recover possession of the ship and cargo which was at that time in an American port, having been captured on the high seas and brought here by a German raider. The court felt that the neutrality of the United States had been violated by making an American port a depository of captured vessels with a view to keeping them there indefinitely. On the authority of Glass vs. Betsy and the Santissima Trinidad, the court held that the basis of jurisdiction was the violation of neutrality "and the Admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where the offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people."

Prior to the entry of the United States into the war, a British Corporation sued an Austrian Corporation in personam in the District Court for the Eastern District of New York. Since England and Austria were at war against each other at that time the trial court in exercising its discretion refused jurisdiction. In addition to the fact that both parties were aliens, the cause of action arose and was to be performed abroad. The Circuit Court of Appeals affirmed this opinion but by the time that the appeal reached the Supreme Court the United States had declared war. As, in admiralty, cases are tried de novo on appeal, the Supreme Court held that a suit could be brought in our courts against an alien enemy and that jurisdiction should not be declined as an act of discretion. However, owing to the non-intercourse laws, the further prosecution of the cause should be suspended until peace was signed.[61]

Federal Statutes Affecting Foreign Merchant Vessels and Seamen

Along with the growth of maritime commerce there has been a development in the laws of the United States with

[61] Watts vs. Unione Austriaca, 248 U. S., 9 (1918).

the object of improving the conditions of American seamen and of protecting them against a large number of injustices which they had formerly been subjected to. The usual circumstances surrounding the employment and discharge of seamen had been notoriously bad. The regulations respecting the payment of wages were harsh and unjust in many instances, and in some sections the practice of shanghaiing was carried on openly. The seaman's contract was treated as an exceptional one and he was usually forced to carry it out and very stringent laws were enacted for the capture and punishment of deserting seamen. After the passage of the first acts of Congress intended to better these conditions, it was often found that they in fact resulted in a discrimination against American seamen, so that in many instances it was impossible for American seamen to find employment because the masters of vessels preferred to ship foreign seamen for their crews rather than comply with the requirements of the federal statutes regulating the employment and wage contracts of American seamen. To obviate this unfortunate result and to put the foreign seamen on the same basis as American seamen, several of these so-called Seamen's Acts contained clauses making stipulations of the Act applicable as well to foreign vessels and seamen as to American ships and seamen.

Just such an act was the Seamen's Act of December 21, 1898,[62] which among other things provided that any payment of wages to seamen in advance of the time when he had actually earned the same was unlawful, and that the person paying such wages would be deemed guilty of a misdemeanor with punishment. Furthermore, the payment of such advance wages could not absolve the vessel or the master from full payment of wages after the same had been actually earned, and that this advance payment could not be set up as a defense to a libel, suit, or action for the recovery of full wages. This provision was made applicable to foreign vessels and seamen.

[62] 30 Statutes, 755, 763.

A case soon arose to test the power of Congress to make such legislation applicable to foreign vessels and crews. Certain seamen shipped on board a British vessel at an American port and the ship paid twenty dollars, with the consent of the men, on account of each of them to the shipping agent through whom they were employed. This advance payment was not contrary to the laws of Great Britain. But later these men libeled the ship under the Act of 1898 for the full wages earned, contending that no deduction of the advance payment could be made. In establishing the constitutionality of the Act and the power of Congress to extend it to foreign vessels and seamen, the Supreme Court said:

> The implied consent of this government to leave jurisdiction over the internal affairs of foreign vessels in our harbours to the nations to which those vessels belong may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit for it to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbours, and declares that they are applicable to foreign as well as to domestic vessels.[68]

Thus, although the power of the United States to make such legislation applicable to foreign ships and seamen while in a port of the United States is acknowledged, it is interesting to note that such extension of statute law to foreign vessels is usually accompanied by a protest from the foreign government. Especially have the English and American governments exchanged protests on the occasions of the enactment of reciprocal legislation of this nature.

The British Merchant Shipping Act of 1876, called the Plimsoll Act, provided against the overloading and improper loading of foreign ships in the United Kingdom, and Section 24 imposed penalties on foreign ships arriving at any port of the United Kingdom during the winter months carrying a deck cargo in violation of the Act. The protest of the Department of State was to the effect that the right to impose penalties on the master or owner of an American vessel, sail-

[68] Patterson vs. Bark Eudora, 190 U. S., 169 (1903).

ing from a port of the United States, for the manner in which the cargo was laden or stored, was of so doubtful a character that, however wise or beneficient the intent of the act might be, the Government of the United States "cannot but invite the attention of Her Majesty's Government particularly thereto, before further steps are taken in Great Britain to enforce obedience to the law in these particular cases, and before any steps be taken toward the enforcement of fines in these or similar cases." [64] The British Government replied, sustaining the validity of such legislation, and asked this government to yield the matter in the interests of humanity. Apparently no further action was taken by the United States.

In 1900 the Supreme Court held that Section 1 of the Harter Act,[65] which prohibited common carriers by sea from contracting to exempt themselves from responsibility for loss or damage arising from negligence in the proper loading, stowage, custody, care, or delivery of property from or between ports of the United States and foreign ports, would include a British vessel transporting merchandise from Buenos Aires to New York, and such a vessel and its owner were liable for negligence in proper loading or stowage of the cargo, notwithstanding that a stipulation had been made in the bill of lading that the ship and owner would be exempt from liability for such negligence, and that the contract should be governed by the law of the ship's flag.[66]

And, in the Kensington,[67] the same court invalidated a contract embodying exceptional stipulations relieving a steamship company from liability in regard to loss and injury to baggage. This contract was entered into at Antwerp, Belgium, but the court refused to recognize it and declared it void by a rule of public policy.

The Germanic, arriving at New York from Liverpool, rolled over and sank at its pier as a result of negligent un-

[64] Mr. Fish, Secretary of State, to Sir Edward Thornton, British Minister, Feb. 10, 1877; cf. Moore, Digest, vol. ii, p. 282.
[65] February 13, 1893, c. 105 (27 Stat., 445).
[66] Knott vs. Botany Mills, 179 U. S., 69 (1900).
[67] 183 U. S., 263 (1902).

loading. She was libeled for loss of cargo. Justice Holmes held: "It is settled by repeated decisions that the Harter Act will be applied to foreign vessels in suits brought in the United States. The Scotland, 105 U. S., 24. The Chattahooche, 173 U. S., 540. The claimant sets up the act and relies upon it. Under the cases it must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary." [68]

So vigorous was the protest of the American Government against a law of Venezuela providing that the ship's papers of a foreign vessel while in a port of that country should be turned over to the custody of a Venezuelan official the government of that country after some delay deemed it best to repeal the Act. The American Secretary of State, Mr. Frelinghuysen, stated in his protest:

> It cannot be expected that the United States will unreservedly yield to the authorities of a foreign state a measure of control over our vessels in their ports, which is not permitted by our law to be exercised by our own officers in our own ports, over foreign vessels, except as a retaliatory measure in the absence of reciprocity. . . . We do not seek to take from Venezuela a recognized right because we distrust its exercise; we simply wish to retain for our own consuls, a right which we deem pertains to them as the representatives of our national sovereignty, and one which is claimed and recognized as just among maritime nations.[69]

A similar protest was addressed to the British Government in regard to the Canadian Seaman's Act of 1876, which required that the shipment of crews on a foreign vessel in that country should be made before a Canadian shipping-master. A law of the United States provides that all seamen shipped on board of American vessels in foreign ports should sign articles before the United States Consular officers there. Here was a conflict of two national laws and jurisdictions. The contention of the State Department was that it was "an accepted doctrine that the right of a vessel to be governed in

[68] 196 U. S., 589, 598.

[69] Mr. Frelinghuysen, Secretary of State, to Mr. Baker, Minister to Venezuela, No. 190, Nov. 29, 1882; cf. Moore, Digest, vol. ii, pp. 329–330.

respect of her internal discipline by the laws and regulations of her own country is not forfeited by her entrance into a port of a foreign country."[70] The Canadian Government acquiesced in the American request and stopped the enforcement of the Act against American vessels, but in doing so the British Government pointed out that it had no doubt as to the right of the Government of Canada to enforce the provisions of the Act, the object of which was to restrain the evils attendant upon the crimping of seamen and to restrain desertion.

Seaman's Act of 1915.—However, the Sixty-third Congress was not apparently impelled by such motives of reciprocity as were evinced in the action of the Canadian Government. On March 4, 1915, a new Seaman's Act was passed. It was entitled an Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea.[71]

Sections 4, 11, 13 and 14 are made applicable to foreign vessels. Section 4 is as follows:

> Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: *Provided,* such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: *Provided* further, That notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require:

[70] Mr. Bayard, Secretary of State, to Mr. White, Chargé at London, March 1, 1889, For. Rel., 1889, 447.

[71] U. S. Stat., vol. 38, Part 1, chap. 153, p. 1164.

And provided further, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement.

Section 11 provides:

That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.

That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn to his grandparents, parents, wife, sister or children.

That no allotment shall be valid unless in writing and signed by and approved by the shipping commissioner. It shall be the duty of the said commissioner to examine such allotments and the parties to them and enforce compliance with the law. All stipulations for the allotment of any part of the wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement and shall state the amounts and times of the payments to be made and the persons to whom the payments are to be made.

That no allotment except as provided for in this section shall be lawful. Any person who shall falsely claim to be such relation, as above described, of a seaman under this section shall for every such offense be punished by a fine not exceeding $550 or imprisonment not exceeding six months, at the discretion of the court.

That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with.

The leading cases that have so far come before the courts have arisen under the enforcement of these two sections of the Act. Three very important questions have been raised: First, Did the Act apply to advances made to seamen on foreign ships while in foreign waters? Second, Did it apply to advances made by an American ship in foreign waters? Third, Did the Act apply to the wages of foreign seamen on foreign vessels while in a port of the United States so as to invalidate a contract made legally abroad and if so was such an act within the power of Congress and constitutional?

These two sections repeatedly came before the lower Federal Courts, and a review of some of the decisions will show what differences of opinion were current as to what the intention of Congress was in enacting the provisions in question. At the time of the enactment of the law and subsequently it was the understanding of a large number of people generally that this attempt of Congress was a flagrant and intentional piece of "international bad manners." That it involved a breach of principles of comity and that it was a deliberate attempt to force foreign governments to raise their standards and improve the condition of foreign seamen on foreign vessels in accordance with the views of Congress as to what these conditions should be. In fact the original bill was often attacked on these grounds by congressmen prior to its passage, and great apprehension was felt by these members that most serious international complications would arise and even that the United States would be faced with flat refusals on the part of foreign governments to comply with the law; or that, in turn, this government would be subjected to most stringent retaliatory legislation in foreign countries, so that the ultimate result of the Seaman's Act would be a hindrance to American shipping and a hardship upon the seamen themselves for whose particular benefit the Act was expressly drawn.[72]

[72] Cf. Congressional Record, vol. 52, Part 5, Representative Humphrey of Washington, pp. 4644–4655; Senator Root, pp. 4738–4740; Senator Burton, pp. 4741–4743.

The case of the Ixion[73] led the District Court in Washington State to hold, in a libel by a British subject against a British vessel for full payment of wages after a demand for the payment of one-half wages then earned had been refused, that as it was apparently the intention of Congress that no advancement should be made to sailors on foreign vessels for services performed within the ports and waters under the jurisdiction of the United States, a libel showing that a sailor on a foreign vessel had earned wages while in a port of the United States and that demand in accordance with the fourth section was refused, would constitute ground for a cause of action, although the British master of the vessel had already paid the seamen more than one-half of the wages earned during the entire voyage.

In the Imberhorne,[74] the District Court of the S. D., Alabama took a much bolder step. Seamen that had shipped in Scotland on a Russian vessel were there paid one month's pay in advance. And in a suit to recover one-half the wages earned on arrival in a port of the United States, it was held that the court could not deduct from the wages earned the amount of advances made to them when they shipped, although they were aliens, serving on a foreign vessel, and the advances were made in a foreign country, where such advances were lawful and customary. District Judge Ervin here felt that the Seaman's Act of 1915 so amended section 10 of the Dingley Act of 1884[75] that it laid down a rule which was binding on an admiralty court in passing upon how one-half of the wages of a seaman was to be calculated, that even though the penalties declared by the act could not be applied to or enforced against the vessel, still when figuring one-half of the seaman's wages that had been earned the court must exclude any advances whether made in a foreign jurisdiction or not.

[73] 237 Fed. Rep., 142 (1916).
[74] 240 Fed. Rep., 830 (1917).
[75] Act June 26, 1884, ch. 121, 23 Stat., 53.

A similar case had arisen under the Dingley Act. In that case, The State of Maine,[76] however, the judge had held that where advances were made to the seamen in a foreign jurisdiction in order to induce them to sign, such advances were not included under the prohibitory clause of the act, and hence such advances on wages should be deducted from the one-half of the wages earned by the seamen.

It will be remembered that the case of Patterson vs. The Bark Eudora,[77] in which the Supreme Court allowed full recovery under the Act of 1898, without any deduction of advance payments, only applied to advance payments to seamen shipped on a foreign vessel in an American port.

In the Belgier[78] the libellants had signed at Havre, France, as part of the crew of the British ship Belgier, and had received at the time an advance of one-half a month's wages. The District Court, S. D., New York, declared that the advance by the Master of the British vessel to the seamen upon the signing of articles in a foreign port was binding and must be credited to payments, such advance being legal under the British law, for it could not be contemplated that the Seaman's Act was intended to apply to advances made upon foreign vessels outside the United States, but only to advances made while such vessels were in the waters of the United States. This case supported the Ixion Case while it absolutely opposed the ruling in the Imberhorne Case.

One further point in this Belgier decision deserves notice. It was proved that some of the libellants through fear of submarines had not made their demand for wages in good faith and that in fact they had intended to abandon their contract of shipment under a concerted purpose. Judge Hand thought that, although the Seaman's Act had abolished remedies for recapturing deserters and allowed a seaman to recover full wages when his demand for one-half wages is not met, and also permitted under these conditions an entire

[76] 22 Fed. R., 733.
[77] 190 U. S., 169.
[78] 246 Fed. R., 966.

release from his contract, nevertheless it did not entitle deserters to recover wages. And it would seem from this case that it is not necessary that actual desertion shall have taken place; that mere mala fides with an intent to desert is sufficient to bar recovery.[79]

The Circuit Court of Appeals for the Second Circuit had before it in 1918 the cases of the Windrush and the Rhine.[80] Two American vessels in the Port of Buenos Aires needed crews and found it impossible to get them except by agreeing to pay a month's wages in advance because the "crimps" there had such control of seamen that no master could get a crew except by applying to them. These advance payments were made, and upon arrival at New York suit was brought by seamen for a month's pay apiece, as for so much wages wrongfully withheld, the seamen refusing to recognize the charges or deductions. The court below awarded the amount claimed, but these decrees were reversed on appeal and the libels dismissed.

The argument that the act of 1915 was in its entirety so obviously remedial that by it the status of seamen had been so radically changed, and the rigidity of their engagements so greatly relaxed that it must have been intended to make the statute extraterritorially operative and put on the employers of seamen the cost of this rascally way of doing business, over which the country had no direct jurisdiction, was not concurred in by the Court, which held:

> The remedial and penal portions of the part of the statute under consideration cannot be separated; if what these shipmasters did in Buenos Ayres was not lawful, it was unlawful, and a misdemeanor was committed. If it be possible now and in this country to enact a law making a crime of something done by an American citizen in a

[79] If, as has often been stated, one of the purposes of the Act was to encourage the desertion of seamen from foreign vessels in the harbors of the United States and thereby to remove the economic handicap which higher wages have placed on American shipping, then it is doubtful whether the court was justified in overriding the legislative intent by reading "good faith" into the statute, although its action is no doubt salutary. Cf. Harvard Law Review, vol. 31, p. 1169.

[80] 250 Fed. Rep., 180.

foreign land (Rex. vs. Sawyer, 1 C. & K., 101) every and the strongest presumption is against such construction (American, etc., Co. vs. United Fruit Co., 213 U. S., 347, 29 Sup. Ct., 511, 53 L. Ed., 826, 16 Ann. Cas., 1047).

In this particular case it is acknowledged that a law may not punish as a crime an act lawfully done in a foreign jurisdiction and that, as was said in United States vs. Freeman,[81] "Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country."

But it would seem that it was possible to separate the penal clause from the Act and enforce the statute civilly in accordance with the language of the Act which seems plainly to indicate an intention to prohibit advance wage payments by every American vessel no matter where she may be. No limitation whatever is made in the Act itself which says "every seaman on a vessel of the United States" and when speaking of foreign vessels says "while in harbors of the United States." The Supreme Court has certainly extended the Harter Act in the Kensington[82] Case so as to make unlawful in this country a contract entered into abroad and which was lawful there, and a civil suit was maintained in this country upon which recovery was permitted in spite of the express terms of the foreign contract.

It is believed that the act of the Masters in Buenos Aires characterized as "vile" in the opinion was just as much void by public policy as the contract of limitation of liability for negligence that was entered into in Antwerp, Belgium, in the Kensington Case.

That the same attitude is taken in the British courts is evident in the case of Kaufman vs. Gerson,[83] where a contract, made in France, and valid by the laws of France, was refused enforcement in an English Court because of certain duress in contravention of an essential principle of justice or morality. And Westlake says:[84]

[81] 239 U. S., 117.
[82] 183 U. S., 263 (1902).
[83] C. A., 1904, 1 K. B., 591.
[84] Private International Law, third ed., sec. 215, p. 260.

Where a contract conflicts with what are deemed in England to be essential public and moral interests, it cannot be enforced here, notwithstanding it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favor of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received.

However, the opinion of the writer is negatived by the Supreme Court in the recent case of Neilson vs. Rhine Shipping Co.[85] This is the appeal in the Rhine Case commented upon above, where advance payments of wages were made by an American vessel in Buenos Aires. The Court concedes that American vessels might be controlled by congressional legislation as to contracts made in foreign ports but holds that the Seaman's Act did not extend to such cases of American vessels in foreign harbors. The majority opinion (there was a dissent of four Justices) was that the presumption against the possible intent of Congress to extend the act to a case like this was so strong that it could not be set aside by implication but would necessitate a specific requirement made in the statute. Emphasis is laid upon the criminal aspect of the legislation as arguing against any such intent by Congress. But probably the chief argument was that the intent could be imputed to Congress to adopt a policy of declaring illegal foreign contracts legal where made. The opinion of the court is very unsatisfactory in that it merely makes the statement: "the same general considerations as to the interpretation of the statute which controlled in the decision of the case of the *Talus* are applicable here and need not be repeated." It is submitted that the Talus presents an entirely different proposition as will be seen below. That was a case involving advance wages paid in a British port by a British vessel.

In addition to the short statement quoted above, Mr. Justice Day deplores the fact that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. He then says, "we are unable to discover that in passing this

[85] 248 U. S., 205 (1918).

statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage."

A point urged, as showing the intent of Congress to limit the Act to American vessels in American ports, is the wording of the last subsection of Section 11, which denies clearance papers to vessels violating its terms. This undoubtedly bears considerable weight, and the eminent Justice is entitled to draw his inference therefrom, yet it is believed that this provision is entirely reconcilable with an intent of Congress to deal with advances made by American ships in foreign harbors, as showing only a further means offered to enforce the statute here in the United States where direct jurisdiction over such vessels is exercisable.

It is pointed out by the dissenting Justices that the question, where or under what circumstances the advances were made, are not factors in judgment:

> They are the mere accidents of the situation and if they reach the importance and have the embarrassment depicted by counsel, the appeal must be made to Congress, which no doubt will promptly correct the improvidence, if it be such, of its legislation.

However, it is not necessary to continue further; whatever opinion is held as to the original intent of the Act, the fact is, this decision now limits Section 11 so that its provisions will not apply to advances made in a foreign port by an American vessel.

The same day as the Rhine decision, Mr. Justice Day delivered the opinion in the Talus Case.[86] Here was raised the question whether Section 11 applied to advances made by a foreign vessel in a foreign port. Upon a demand for one-half wages by seamen of a British vessel in an American port, the master deducted certain advances made to the men at Liverpool, England, where the seamen were signed. The claimed deductions resulted in a libel. The first question before the Supreme Court was whether Congress intended to

[86] 248 U. S., 185 (1918), Sandberg vs. McDonald.

make invalid the contracts of foreign seamen, so far as advance payment of wages is concerned, when the contract and payment were made in a foreign country. The court was unable to find anything indicating such an intention and held that the extent of the application of the act to foreign vessels was limited by the very words of the statute itself which provided that this section shall apply to such vessels "while in waters of the United States." Emphasis is also put on the criminal provision as strengthening the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

It would seem that the correctness of this decision is clearly borne out by the words of the phrase above quoted, although in the records of the debate in the Senate it was the belief of some senators that the section in question was intended to apply to such a case as the Talus. This is especially seen in the attack on the bill by Senator Root,[87] in which he says:

> Unless we are going back to the old and barbarous days in which the ship of a friendly nation could not enter the port of another nation without being liable to seizure and confiscation, the principle of freedom of intercourse among civilized people denounces any attempt like this to prevent—for that is what it amounts to—the ships of a friendly country from entering our ports unless they will submit to our laws controlling their contracts in their own home.

The Court said it had examined the proceedings in Congress but that there was nothing therein entitled to consideration which required a different interpretation to that which it put upon the act in the opinion. The same four Justices, McKenna, Holmes, Brandeis and Clark, dissented also in this case. Their dissent was an attempt to show that the limitations put on the section by the majority were not warranted in view of the broad wording of Section 4 and the first part of Section 11, which did not only express the particular relations of ship and seamen but expressed the insistent policy of the United States which no private conventions, no matter where their locality of execution, could be adduced to contravene.

[87] Congressional Record, vol. 52, part 5, p. 4739.

Neither opinion doubts the power of Congress to legislate to annul such foreign contracts as a condition upon which foreign vessels might enter the ports of the United States. That Congress has such power is well illustrated by the very recent decision of March 29, 1920, in the case of Strathern Steamship Co. vs. Dillon.[88] In that case, Dillon, a British subject, shipped at Liverpool on a British vessel. The shipping articles provided that his wages should be fixed and were made payable at the end of the voyage, which was not to exceed three years. Before the voyage was completed Dillon, while the ship was in an American port, demanded one-half of the wages earned, as provided under the American Seaman's Act, and upon refusal libeled the ship for the full amount of the wages. His particular contract, entered into in England, had provided that no cash should be advanced abroad on liberty granted other than at the pleasure of the master. This was a valid contract for the payment of wages under the laws of England.

But a unanimous court, by Mr. Justice Day, held that Section 4 of the Act was applicable to such a case, and it rendered void all such contract provisions and gave to foreign seamen the right to recover, notwithstanding the contractual obligations to the contrary.

It is difficult to draw a clear dividing line between these recent cases in the Supreme Court. In this last case a valid contract by the law of the place of the contract and entered into there by subjects of that foreign country was declared void and of no effect in an American court. And yet it is believed that in the Rhine and the Talus cases one of the chief grounds of the refusal to extend the act to foreign waters was that it could not be supposed that Congress intended to invalidate foreign contracts, valid where made. In one case, a contract made in England to pay a month's advance wages was upheld, while in this case a contract, made in the same place, not to pay wages until the end of the voyage was

[88] No. 373, October Term, 1919.

declared void. In each case both parties to the contract were British subjects. And the Court now says:

> But taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the Act. . . . Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

The authority of Congress to enact such legislation is sustained by the weight of the Eudora Case, which has been quoted above.

These cases have involved entirely matters of interpretation of the Act. And the probable reason and ground for the distinction drawn between Section 4 and Section 11 is that the first gives the foreign seamen a right or privilege while the foreign vessel is in a harbor of the United States; the second prohibits the master or owner from doing a certain thing while the vessel is in an American port. A right or privilege given by our law is enforceable here no matter what is done in a foreign jurisdiction because the legislative power has in this case expressly said so. While in the second case the territory in which the act is to be regarded as unlawful is expressly limited to a harbor of the United States, and no extension will be implied in the absence of express provisions. In other words, the creation of a right confers much broader powers of jurisdiction in a court than does the declaration of what shall constitute an unlawful act. The forerunning circumstances affecting a right, no matter in what foreign jurisdiction such circumstances may arise, are under the control of the court if the claimant sets up his right within the jurisdiction of the court, and where the court derives its power from the same source as the legislature which creates the right.

This was the attitude of the British Court of Appeal, Chancery Division, in the case of In re Missouri Steamship

Co.,[89] in which a shipping contract limiting liability was void by the law of Massachusetts, the place where the contract was made, but since it was valid by English law and the contract was to be performed partially in England and the right was set up in that country, was enforced.

The cases in the Admiralty Courts of the United States which have arisen under the Seaman's Act have so far had to do with the enforcement of Sections 4 and 11. However, there is another very important section which applies to foreign vessels. Section 13, although it contains no express provision making it applicable to foreign ships as is the case with the other two sections, states that no vessel of one hundred tons gross and upward shall be permitted to depart from a port of the United States unless it has complied with the requirements therein set forth. It is clear that this section was and is intended to include foreign vessels. The Congressional Record contains numerous references to this and direct statements by those responsible for the drafting of the Act that Section 13 goes beyond American ships and applies to all foreign ships.[90] Furthermore, the Department of Commerce has issued Department Circular No. 268, dated December 14, 1915, directing and informing collectors of customs, supervising and local inspectors, and others that the section does apply to foreign vessels.

Most far reaching are the provisions of the section. Indeed, they constitute, in effect, the boldest attempt ever made by this nation to impose burdens on the ships of foreign nations. In the eye of critics, the United States has stepped far beyond the bounds of propriety and international good faith. Foreign governments are told that their ships shall not leave our ports unless 65 per cent of the deck crew shall be of a rating not less than able seamen. The age and physical requirements and the particular kind of sea service and

[89] (C. A., 1888), 42 Ch. Div., 321.

[90] Congressional Record, vol. 52, Part 5; In the House, Mr. Humphrey of Washington and Mr. Alexander, pp. 4644, 4646, 4651; In the Senate, Senator Lodge, p. 4736, Senator Root, pp. 4739, 4740, Senator Burton, pp. 4742, 4743, 4804, 4806.

maritime experience which are required in order to obtain this rating of able seamen are set forth in detail. Furthermore, no foreign vessel is to be permitted to depart unless she has on board a crew not less than seventy-five per cent of which, in each department, are able to understand any order given by the officers of such vessel. And to cap these difficulties which beset the commercial activities of foreign vessels in our ports, the provision is made that the collector of customs may, upon his own motion, and shall, upon the sworn information of any reputable citizen of the United States setting forth that this section is not being complied with, cause a muster of the crew of the vessel to be made to determine the fact, and no clearance will be given to a vessel failing to comply with the provisions of the Act.

This sworn information can be filed at any time up to within six hours of departure of the vessel.

Such then are the stringent requirements of this section, and which have aroused intense criticism in foreign countries. No cases have as yet arisen under this section. This absence of litigation can be explained by the fact that due to the exigencies of the war and the difficulty of obtaining sufficient crews to man the vessels, Section 13, along with many other provisions, has apparently gone by the board because of the impossibility of enforcing the same under the circumstances. Indeed the Department of Commerce believes that up to the present time no penalty has actually been imposed for the violation of the section.[91]

It may be noted that there is one salutary consideration, in that the collectors of customs are not legally required to cause an actual muster of the crew of any vessel to determine

[91] Special inquiry into the enforcement of the section in the port of Baltimore, Md., has been made. It is learned from the Commissioner of Shipping that no attempt whatever to enforce the Act has been made there, and that foreign vessels are given clearance upon the certificate of their respective Consuls, and the manning and equipment of the vessels is in conformity with the laws of the foreign country to which they belong. He also believes that any enforcement in the future will be impossible, and regards these provisions of the act as of no effect.

whether the crew complies with Section 13, unless affidavit is made by a reputable citizen that the section is being violated. This gives the collectors of customs the opportunity to shut their eyes to non-compliance with the Act.

By Section 14, foreign vessels leaving ports of the United States must comply with all the rules therein prescribed as to life-saving appliances, their equipment, and the manning of the same. The history of this section dates back to the Titanic disaster and the subsequent demand for adequate laws providing standard requirements of life-saving appliances. By reason of the universal belief that vessels everywhere should be governed by strict laws in such matters, this section has not been subjected to the general attacks which have been made against the preceding three sections.

Congress well realized that the Act was a step beyond what had ever before been attempted, and first, that many particular treaty rights would be affected by certain provisions of the Act, and secondly, that questions would arise in regard to foreign vessels which, while not involving legal rights, would involve international comity and the established customs of nations, as, for instance, the general rule of comity under which American courts have refused to take jurisdiction in certain controversies between masters and seamen. It was seen that important international considerations would arise from the nullification of contracts made outside of the jurisdiction of the United States and from the attempt to compel foreign nations to conform to the ideas of the country in matters relating to the equipment of vessels and the treatment and qualifications of seamen. Therefore, Section 16 was written in:

> That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment and

any other treaty provisions in conflict with the provisions of the Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions.[92]

A great many treaties were thus affected by the Act, and as most of them did not contain any provision permitting a partial abrogation, such as was contemplated by Section 16, the State Department was faced with a difficult task in adjusting these treaties to the law as passed by Congress.

As yet, the Act has given rise to no serious international complications, probably due to the fact that it is generally not being enforced, but with the readjustments consequent upon peace it is to be expected that the various foreign governments will possess more opportunity to inquire into the law, which in all likelihood escaped their particular notice during the time of its enactment while these leading powers were at war and otherwise engaged. Should the Federal officials themselves adopt a policy of strict enforcement, especially of Section 13, no one can doubt but that very strong diplomatic pressure will be brought by the foreign governments to the end that Congress may be forced, either through sheer weight of opposition or through corresponding retaliatory measures against American ships, to repeal some of the provisions of this Act or at least leave them unenforced.

[92] As to the time of taking effect, sec. 18 provides that the act will begin to run against foreign vessels twelve months after its passage, except that such parts as were in conflict with treaties or conventions should take effect as regards the vessels of such countries on the expiration of the period fixed in the notice of abrogation provided for in sec. 16.

TABLE OF CASES

VITA

Edgar Tremlett Fell was born in Baltimore, Maryland, February 6, 1895, and received his early education in private schools in Annapolis, Maryland. He entered St. John's College, Annapolis, in 1909, receiving the degree of A.B. from that institution in 1913, and the Master's degree in 1917. During 1913–1914 he taught History and Geography in Chew's Preparatory School for the U. S. Naval Academy, and in 1914 was Attaché at the American Embassy in Madrid, Spain. He entered the Law School of the University of Maryland in 1914, receiving the degree of LL.B. from that university in 1917, and was admitted to the Maryland Bar the same year. He was a graduate student in the Johns Hopkins University, 1914–1917, pursuing graduate courses in Political Science, Law and Political Economy. In 1917 he was commissioned in the United States Army, and served one year in France as Captain of Infantry with service on the General Staff. He was appointed Assistant Professor of History and English at St. John's College, 1919–1920, and also Acting Military Commandant of the Corps of Cadets.