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CHARACTERISTICS OF UNITED STATES MARITIME LAW†

ARNOLD WHITMAN KNAUTH*

The maritime law of the United States is different in several interesting aspects from that of the other leading maritime nations. The history and nature of these differences have been frequently examined but many important changes have occurred as the law grows and changes under the impetus of our great new American maritime activity. It is therefore opportune to re-examine some of the more important points, and especially those which have developed and changed during the past twenty or thirty years. The following topics will be considered:

1. Basis and nature of the federal admiralty jurisdiction and its relation to the common law or code jurisdiction of the States.

2. Nature of the maritime lien.

3. Practice in rem, including steps which can be taken to release the res.

† This essay was originally contributed to the Revista del Diritto della Navigazione, 1951 No. 1-2, Parte Prima, page 1, in a translation prepared by Professor Torquato Carlo Giannini of the University of Rome. As thus published, it was designed to contrast the United States admiralty law with the system familiar to readers of that journal. It is republished here with some modifications with the thought that it may be of some interest to American lawyers whose practice lies outside the admiralty field and with the realization that to the admiralty practitioner it will be elementary in the extreme.

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4. Practice in personam with admiralty attachment of property, including steps which can be taken to release attached property.

5. Divided damages.

6. Some seamen’s rights, including those of alien seamen in foreign flag ships.

7. Sovereign immunity.

8. Death claims, as distinguished from claims for bodily injury.

9. General Average and the negligence clause.

10. Limitation of shipowner’s liability.

11. Finally, some reasons why litigants prefer to utilize the methods and remedies of the maritime law and the admiralty practice, in preference to the land-wise methods of our common-law and code-law courts.

The strong revival of shipping, both under the American flag and under forty or fifty foreign flags, may give this survey a practical value.²

The development of Admiralty jurisdiction and maritime law has been the subject of many studies by noted American legal authors, and its history has been traced by learned judges in their opinions. Earliest was Judge Bee, who presided over the federal court in Charleston, South Carolina in the years 1790-1812; his opinions carefully state the European sources from which he derived the principles

²The sources of the statements here made may be consulted in several volumes which have appeared since 1939, namely: Robinson’s HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES (1940), which describes the substantive law, hereinafter cited “Robinson”; Benedict’s LAW OF AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE, (6th ed. 1940) by Knauth, hereinafter cited “Benedict”; SPRAUGE AND HEALEY’S CASES ON ADMIRALTY (1950), a collection of leading statutes and judicial decisions intended primarily for classroom instruction, hereinafter cited “Sprague & Healey”; KNAUTH’S AMERICAN LAW OF OCEAN BILLS OF LADING (3rd ed. 1947), describing the present situation of the Hague Rules, the Harter Act of 1893 and the American Carriage of Goods by Sea Act of 1936; Griffin ON COLLISION (1949), hereinafter cited “Griffin”; and Norris ON THE LAW OF SEAMEN (1951, Vol. 1; 1952, Vol. 2). The sixth volume of Benedict contains a collection of the texts of 95 international treaties, conventions and agreements, both multilateral and bilateral, which affect shipping in international trade, with references to many more touching the work of consuls, the fisheries, imports and exports, taxation and related matters. The literature has been prolific, and examination of the sources might require a library of several hundred volumes.
for his decisions. In New England and on the Supreme Court, Justice Story, in the years 1811-1845, expounded the historical sources of the American maritime law. Of him, Professor Parsons wrote in 1859:

"Story could not find all the true or original principles of admiralty or of the law of shipping in English law; he followed the lead of Mansfield and went where they could be found — went to continental Europe. . . . He went with a freer step than Mansfield."

His opinion in De Lovo v. Boit delivered in 1815, remains a classic.

The first edition of Abbott on Shipping, printed in London in 1802, was well known to the early American judges; and the preface of that great work (which passed through 12 editions in 80 years) directs the student to the sources of maritime law in these words:

"... the absence of a general and established code of maritime law (in England), which almost every other European nation possesses, seems to render a collection of the principal points of that law peculiarly necessary."

and he points to the Mediterranean codes, to the laws of Oleron and Wisbuy, the works of Cleirac and others. In 1821, Hall's American Law Journal presented a complete translation of the French Ordinance de la Marine of Louis XIV — the Colbert Code of 1681. Dunlap's volume on admiralty practice appeared in 1836, with a second edition in 1850. Judge Betts' more authoritative book appeared in 1838, and Oliver's forms in 1842. The work of formulating the General Admiralty Rules of Practice was commenced in 1842, and, under the inspiration of Judge Betts, went into effect in 1844. Conkling's book appeared in 1848, and Benedict's first edition in 1850. Judge Marvin's unsurpassed work on Wreck and Salvage came in 1858. Parsons, the Dane Professor of Harvard Law School and teacher of the youthful Holmes, published his trio of masterly works...

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5 Parsons, Law of Maritime Property and Contracts (1859) p. 17.
4 Abbott on Shipping (12th ed. 1880) preface to 1st ed.
in 1859, 1868 and 1869. The second edition of Benedict followed in 1870; and all the federal shipping statutes were re-examined and re-stated in the Revised Statutes of 1872-78. Lowell's Decisions (1871-77) and Benedict's Reports (1877-78) were soon followed by the century collection of the Federal Cases (1780-1880) which included many maritime reports previously available only in manuscript.

This stream of publication subsided in 1880, and in the next 40 years there were only the rather simple Handbook of Admiralty by Hughes, and two further editions of Benedict, and a handful of essays in the law reviews. This period coincided with the low ebb of United States flag shipping. But there was no dearth of sound learning in the judicial opinions of the period. Judge Addison Brown in New York (1881-1900), Judge Hughes in Virginia (1874-1900), Justices Blatchford (1867-1893), and Henry Billings Brown (1875-1910), on the Supreme Court were presently re-enforced by Justice Holmes (1902-1932) whose opinion in The Blackheath in 1904 displayed ample knowledge of the history and the principles of the maritime law. Curiously, he used a phrase in that opinion which has often been misquoted out of its context; he said that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." These words have often been repeated to indicate that the maritime law as a whole is not founded on broad and sound principles, which is quite the opposite of the truth. Many years later, he uttered another much-quoted phrase in The Western Maid:

"In deciding this question (whether a maritime lien, although dormant while the Government is in possession of a vessel, becomes enforceable as soon as the vessel comes into hands that could be sued) we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and

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2 195 U. S. 861 (1904).
3 237 U. S. 419, 432 (1922); parenthetical material added.
adopted by the United States. There is no mystic over-
law to which even the United States must bow."

This of course is the legal fact in every sovereign state. The customs of merchants and the law of the sea, however, are not a mystery, and all trading nations do pay careful heed to them. Another phrase which he coined has been much disputed, namely that "the maritime law is not a corpus juris — it is a very limited body of customs and ordinances of the sea." Those words were written in dissent, and they seem quite inaccurate; for the maritime law deals with every sort of tort, of contract, and of crime, relating to ships and shipping; and it has broad powers of an equitable nature as well, while its limitation procedure is akin to a composition in bankruptcy.

Other judges of the recent half century have displayed a strong interest in the maritime law: Justice McReynolds in the Supreme Court proclaimed the necessity for a unified law for shipping in a series of powerful opinions; in the lower appellate courts, Judges Rogers, Hough, Ward, Learned Hand, Augustus N. Hand, Rose, Hutcherson, Soper, Denman, Magruder, and many more have delivered notable opinions concerning the history and principles of maritime law. In the courts of first instance, many judges in the seaports have been learned in the law maritime: Judges Coxe, Campbell, Woolsey, among others in New York, Chesnut and Coleman in Baltimore, Way in Norfolk, Fee in Oregon. Since 1920 the stream of literature has been renewed; the American Maritime Cases were commenced in 1923; new editions of Benedict, extensively revised, appeared in 1925 and 1940; Professors Lord and Sprague published a collection of selected cases in 1925, with two subsequent editions; Professor Robinson’s excellent work on Admiralty Law came in 1940, and Knauth’s Ocean Bills

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11 Southern Pacific Co. v. Jensen, 244 U. S. 205, 218, at 220 (1917) (dis. op.).
14 Hough, Admiralty Jurisdiction — Of Late Years, 37 Harv. L. Rev. 529 (1924).
of Lading (1937, 1940 and 1947) and Griffin's American Law of Collision (1950) and Poor's work on Charter-parties (1920, 1930 and 1949) and Congdon's General Average (1923) have become well known. There has been no lack of scholarly research into the sources, history and principles of the maritime law and the admiralty jurisdiction in America throughout the period since the Republic was founded in 1789.

1. BASIS AND NATURE OF THE FEDERAL MARITIME JURISDICTION

An operative system of justice must consider three aspects: first, jurisdiction of the persons sought to be controlled and of the subject-matter of their lawsuit; next, a set of rules of substantive law, stating rights and duties; and third a system of practice — adjective or procedural law — stating the methods, sanctions and penalties by which they may work out their respective rights and duties in court.

This becomes quite a complicated matter when two or more sovereign states may have conflicting or over-lapping jurisdictions, statements of substantive law, and systems of practice. In a federal Union of States, such as ours, these difficulties are capable of adjustment by means of the common Constitution with its federal legal structure. In many ways the federal legal power is limited. One of its unlimited aspects is its power in admiralty and maritime matters.

The maritime law is an exclusively federal law and when that federal maritime law is applied and administered in the admiralty court it is an exclusively federal practice. The influence of the States and of State Law and practice is very small. The reason is simple. The maritime commerce is predominantly international and interstate, and requires a single rule of law for the whole nation. The federal District courts find the maritime law and the limits of "admiralty jurisdiction" in history and custom. They

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18 The Lottawanna, 21 Wall. 558 (U. S., 1874); Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917).
make such rules of practice as they find needful. A United States judge sitting in Admiralty presents a position rarely found in the modern world — a court with constitutional power to find the law where it pleases largely unaided by any code or statute, and to regulate its practice as it pleases.

The customary and historical sources of maritime law are a blend of all the European traditions: — Amalfi, Barcelona, Oleron, and Hanseatic cities, Wisbuy, the Colbert Code of 1681, the English admiralty prior to 1789. This is

"The independence of admiralty judges is shown by the fact that they operated the court from 1789 to 1844 — for 55 years — without any General Rules. The Magnolia, 20 How. 296 (U. S., 1858); Dowling v. Isthmian S.S. Corp., 1850 A. M. C. 1876, 184 F. 2d 758 (3rd Cir., 1950); Hough, Admiralty Jurisdiction — Of Late Years, supra, n. 14.

"Woolsey, D. J., said: "Admiralty jurisdiction is plastic. It is largely judge-made, and consequently is not technical." The Supreme Court has rule-making power: 28 U. S. C. 2073.

The rules are collected in Benedict, 6th ed., vol. 5.

Statutes extending the federal admiralty jurisdiction:

February 25, 1845, 5 Stat. 726 (extending jurisdiction to the Great Lakes). See The Eagle, 8 Wall. 15 (U. S., 1868), declaring the statute superfluous.

March 3, 1851, R. S. 4222, 46 U. S. C. 182-189 (establishing the system of limitation of shipowners' liability). This is described in detail in Benedict, vol. 3, ch. XLIX.


Statutes restricting admiralty jurisdiction:

October 6, 1917, 40 Stat. 396, 28 U. S. C. 41 (3) (permitting workmen's compensation statutes of the 48 states to apply to persons injured on board vessels while working on territorial waters of the states). Declared invalid in Knickerbocker Ice Co. v. Stewart,
referred to as "the general maritime law of nations" and it is the broad basis of the maritime and commercial law of the present times in all the trading nations. In the United States, this "general maritime law" means the laws and customs which prevailed before the independence of the United States in 1775-1789. The reader will notice that the U. S. judges do not consider the Code Napoleon as a historical source of our law. Nor have they regarded any of the more modern Codes as authentic sources of our maritime law. The 19th Century codes of France, Italy, Spain, the Netherlands, the 19th Century reforms in England, the German Code of 1900, or the work of the Comité Maritime International since 1897, despite their now venerable age, are not yet "history" and do not yet express "custom".

As the year 1789 has gradually receded into the nearer past, the peculiar American blend of all traditions of 1789 has been developed through judicial decisions.

Here we trace the growth of a series of self-proclaimed extensions and self-imposed limitations on admiralty jurisdiction, law and practice which represent a genius differing in many details from the codes and decisions of other maritime jurists of the same century and a half in other nations. The following enumeration will quickly indicate the nature of these differences as they affect the daily work of the courts and the methods of conducting maritime business.

As to torts, admiralty jurisdiction is limited to those which occur in ships which are afloat and which are maritime in the geographical sense, namely occurring on the

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253 U. S. 149 (1920). A re-phrased statute of similar purport was declared invalid in 1924, whereafter Congress complied with the Supreme Court's view by enacting the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. 901. This incident illustrates the power of the Judiciary, under the admiralty power, to force its views upon the Legislature. See Goodrich: Yielding Place to the New: — Rest v. Motion in the Conflict of Laws, 60 Col. L. Rev. 881 (1950).

18 KENT, COMMENTARIES (1826), vol. 1, p. 380, lecture 42. The Magnolia, supra, n. 16; The Lottawanna, supra, n. 15; The Osceola, 189 U. S. 158 (1903); Southern Pac. Co. v. Jensen, supra, n. 15; Chelentis v. Luckenbach S.S. Co., 247 U. S. 372 (1918); Dowling v. Isthmian S.S. Co., supra, n. 16; Doucette v. Vincent, 1952 A. M. C. 455, 465, 194 F. 2d 834, 839 (1st Cir., 1952), (opinion of Magruder, C. J.); See Bomar, sec. 2.
Yet there are some curious fictions, such as the rule that a drydock from which the water has been withdrawn remains a place in the water. Until quite recently, tort claims growing out of injury done by a ship to objects on land were not regarded as maritime and many hair-splitting decisions resulted. This was changed by statute in 1948. The new test is "damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land".

As to contracts, the test of jurisdiction is the maritime character of the contract, and not the place where it is made or performed. Here again we find some curious fictions, such as the holding that a mortgage of a ship is not a maritime transaction but only a banker's business on land. This troublesome rule, which the Comité Maritime reformed by its Liens and Mortgages Convention of 1926, was partly reformed in 1920, by the Preferred Ship Mortgage Act, as to United States flag vessels. Shipbuilding contracts are held not maritime but terrene, and a ship launched but not yet completed is not yet a vessel within the admiralty jurisdiction. Against this rule there has...
been a good deal of protest. A newly launched hull, being shifted across a harbor, can be in a collision. One may wonder whether a ship that splits in two is one ship, two ships, or not a ship at all.

We do not distinguish between the oceans, the coasts, the great sounds and bays, the Great Lakes and the numerous rivers; all are alike waters to which our admiralty jurisdiction and our maritime law apply; there is in the United States no "droit fluvial", such as is familiar in Europe. And indeed this responds to a practical fact, for ocean steamers ascend our rivers to very great distances in every-day navigation, whereas none of Europe's rivers are navigated by ocean vessels for more than a few miles from the sea, as to Rouen on the Seine, Antwerp and Rotterdam on the branches of the Rhine and Meuse delta, Bremerhaven and Hamburg on the Weser and Elbe deltas. Consequently Europe has a "river law" very different from its maritime law; but in the United States there is one single maritime law and jurisdiction wherever there is navigable water.

An admiralty court may divide damages and fault equally, but not in proportion to fault as is generally done in the maritime law of other countries. This rustic rule has often been debated, and opinion concerning it seems to be equally divided — like the rule itself.

The ancient rule that "death is the composer of strife" in the sense that damages are not given for negligent harm resulting in death, has been entirely abrogated by a series of statutes, but after 100 years the ancient rule is still perversely regarded as fundamental.

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27 Hough, Admiralty Jurisdiction — Of Late Years, supra, n. 14.
28 Grifflm, §§245-249; Robinson, sec. 115; Huger, The Proportional Damage Rule In Collisions At Sea, 13 Cornell L. Q. 531 (1928); Sprague, Divided Damages, 6 N. Y. Univ. L. Q. Rev. 15 (1928); Louis Franck: A New Law for the Seas, 42 L. Q. Rev. (London) 25 (1926); Mole & Wilson, A Study of Comparative Negligence, 17 Cornell L. Q. 533, 604 (1932); The Margaret — The Manchester Merchant, 1929 A. M. C. 1 and 307, 60 F. 2d 923 (3rd Cir., 1929).
A. "maritime lien" — the jus in rem — secret, inchoate, and unrecorded, may be enforced at any time against the ship in rem unless there is such delay and change in the circumstances as to permit the equitable defense of laches; this flexible rule has been found to be adaptable to many different situations.

The United States rule as to the liability of carriers by sea to shippers, as found in statutory form in the Harter and Carriage of Goods by Sea Acts, is essentially the same as the Hague rules or Brussels Convention on Ocean Bills of Lading. On the other hand the United States law as to limitation of a shipowner's liability does not resemble that of any other maritime nation; some of its characteristics are discussed at another point in this article.

This rapid review will warn the reader that it is unsafe to suppose that the maritime law of the United States is just like that of Europe, or South America, or even closely like that of Britain and Canada, although the historic and customary foundations of modern European and American law are, in a broad sense, the same.

2. THE NATURE OF THE MARITIME LIEN

In United States admiralty practice, the maritime lien and the right in rem — jus in rem — are closely identified and exist together. The right in rem is only available to enforce a maritime lien, and only against the identical ship, cargo or freight money concerned. The details of this practice are quite different from those now prevailing in England or in the British Commonwealths. In the United States, a right in rem may be asserted against a ship without any regard for the presence or absence of the owner or agent; the ship will be arrested in rem by the Marshal of the federal court even if the shipowner is standing at the spot and offering to give an appearance in the lawsuit. An arrest of this character can only be released by paying the

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81 See Knauth on Ocean Bills of Lading, (3rd ed 1947), pp. 120, 129.
sum demanded or by furnishing adequate security as a pledge to pay whatever the court shall decree to be payable. The security may not exceed twice the amount fairly claimed to be payable; the excess sum is available for legal costs and for legal interest (at 6 per cent in most courts, and at 7 per cent on the Pacific Coast) from the date when the lawsuit is commenced or, in some cases, from the date when the debt arose. The right in rem is necessarily limited to the value of the res; if a person with a good claim for $10,000 brings a suit in rem against a ship which has a value of only $8,000, the security and the decree cannot exceed $8,000. A right in personam (described in the next section) is not so limited in amount, and may be enforced against the debtor's future property as well as against his present property. Ordinarily there is no time limit for asserting any secret maritime lien, except laches. A few time limits have been imposed by treaty or by statutes: 2 years for salvage,\(^4\) and for death on the high seas,\(^5\) 1 year for Bills of Lading.\(^6\) In deciding what is reasonable time, the courts will look at the time-limitation statutes of the States in which they sit for analogies.\(^7\)

The ranking of liens when questions of priorities between competing lien claimants arise is in a somewhat confused state. As a general rule, the last lien in point of time outranks prior liens — the exact reverse of the common law rule — on the theory either that the most recent service to the ship has preserved it as an asset for the benefit of prior lien claimants or that one in whose favor a lien has attached to a ship has thereby acquired an interest in the ship subject to liens subsequently arising.\(^8\) However, certain classes of liens (such as seamen's wages and salvage) are accorded priority over others regarded as of lesser dignity, so that the ranking depends somewhat upon custom. Also, the statutory preferred ship mortgage is given priority over liens arising subsequent in time to its recording and en-

- See note 30.
Endorsement, except as to liens for wages, salvage, general average, and tort claims, thus bringing in the common law rule of priority to the one first in time to this extent. Liens for necessaries and supplies furnished in the home port were formerly not recognized, 38 but this rule was changed by statute in 1910. 39 For seagoing ships, liens are usually grouped by the voyage; 40 in the larger harbors, they are ranked by forty day periods; 41 and in various inland waters they are grouped by the season or by the year. 42

The United States admiralty courts may increase or decrease the kinds of claims which are regarded as giving rise to a maritime lien enforceable in rem. A recent example of the extension of the maritime secret lien by jurisprudence, unaided by statute or historical precedent, is as follows: the court gave a cargo owner a lien on the ship for refund of freight money several months after the freight had been paid and the cargo delivered, because the contract provided that the shipowner would refund part of the freight if it should be proved that similar cargo was carried by a rival ship for a lesser freight. 43

A recent example of the denial of a lien arose out of the question whether an old ship, retired from service, should be held liable in rem for the daily hire of the wharf where she was moored and for the service of painters who painted her; it was successfully argued that she had been withdrawn from commerce and had, as it was said, become a "dead ship", so that the liens were denied. 44 The border line between lien and no-lien cases is always open for argument, and the judges may be persuaded to extend or reduce the classes of torts or of contracts which give rise to the maritime lien.

As the maritime lien is secret and unrecorded, the purchaser of a ship should always be careful to obtain an assur-

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38 The General Smith, 4 Wheat. 438 (U. S., 1819).
41 The Interstate No. 1, 1923 A. M. C. 1118, 290 Fed. 926 (2nd Cir., 1923).
42 The Portchester, 1932 A. M. C. 414, 55 F. 2d 579 (2nd Cir., 1932).
ance that the ship is free of secret liens, as well as recorded liens, and that the seller will defend and pay for any liens asserted against the ship and arising prior to the sale.

3. Practice in Rem

One who claims a maritime lien, secret or recorded, files a libel in the federal court in the district where the ship is or where it is expected to arrive. The libel names and describes the ship, the cargo or the freight money in question and must be verified by the libellant. He furnishes the clerk with a deposit or guarantee (known as the stipulation or stip), usually $250, for court costs; this amount may later be enlarged if the costs exceed that sum. No other bond or security is given at that time by the libellant. After the clerk issues the process and monition, the Marshal goes on board the ship, or to the place where the cargo lies or where the freight money is deposited; he takes possession, and leaves a caretaker or watchman to enforce his authority. He posts on the ship the copy of the monition (popularly known as the "sticker"); this is usually affixed at the gangway, on the door of the Master's office or cabin, at the mainmast, or at some other conspicuous place where public notices about the ship's affairs are displayed. He forbids any movement of the ship. Sometimes he takes away the ship's anchor, or a portion of the machinery, to make sure that there will be no attempt to escape.

Release of an arrest in rem may be quickly accomplished. The shipmaster or agent informs the shipowner, who notifies his underwriter and causes a bond or stipulation for security to be furnished. The security may not exceed twice the amount of the damages claimed, and it may not exceed the value of the res. The libellant and his proctor usually agree to a bond or stipulation for about 110% or 125% of the damages claimed; the Clerk will act according to such an agreement. Quite often the libellant agrees to release the ship upon a proctor's promise that a bond is being arranged and will be given at an early date. It is also common to file a claim for a ship and give an appearance and a bond or stipulation in lieu of the ship before the
ship arrives; and in such a case the court will proceed with
the case, even though it may turn out that the ship never
arrived in the jurisdiction at all. This practice saves much
time and inconvenience when busy ships are in port for
only a few hours, perhaps on a holiday, when the arranging
of security is difficult.

As soon as security is arranged, the Marshal takes away
his notices, and the vessel may proceed freely about her
business, while the lawsuit continues against the security
in lieu of the ship.

Sometimes the shipowner prefers to leave the ship in
the custody of the Marshal until the case is tried and de-
cided. Some well-known instances of this practice are *The
Navemar*, a Spanish steamer for whose possession the Bar-
celona government and the Franco government contested
during the Spanish civil war;*5* *The Poznan*, a chartered
Polish vessel which was alleged to be liable for losses
suffered by a cargo arranged by the charterer;*6* *The Arauca*,
a German steamer against which cargo claims were asserted
as she lay in a port of refuge in the first year of the recent
war, 1939-1941;*7* and *The Caribe*, ex-Alacran, a Colombian
vessel arrested during a passage of the Panama Canal be-
cause of cargo claims against her sister-ship, *The Cali*.*8*
These and other examples show the necessity of an agree-
ment with the Marshal for watching and anchorage or
wharfage fees at the lowest possible rate; for while these
charges are paid in the first instance by the arresting party,
they will be paid in the end by the party losing the lawsuit,
who may be the shipowner.

4. **Practice in Personam with**
   **Admiralty Attachment**

   If the respondent in an admiralty suit is absent and
cannot be found at his usual place of business, the U. S. A.
admiralty practice permits the maritime creditor to file an

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*5* 1927 A. M. C. 723, 724 U. S. 117 (1927).
*6* 1940 A. M. C. 860 (S. D. Fla., 1940).
*7* Swift & Co. v. Compania Colombiana del Caribe, 1950 A. M. C. 1069, 339
admiralty libel in personam with a prayer for a writ of admiralty attachment (referred to as a writ of "foreign" attachment, but quite different from the common-law writ of assistance usually called a "foreign" attachment). With this writ the Marshal may arrest any property of the respondent — the ship herself, or any sister-ship, or any bank account or credit, or any chattel or other thing, on land or afloat. But if the vessel-owner is present so that personal service can be made on him, then this right of attachment instantly disappears. Thus in practice it is useful chiefly against the owners of tramp-ships who do not maintain permanent agents in United States ports; it is not useful against liner companies whose agencies have offices always open for business and ready to receive service of a libel in personam. This is a sharp remedy, and when it functions it is operated in general like the process in rem described above.

The libellant may combine a libel in rem with a libel in personam and pray in the alternative for both forms of relief. This is very commonly done. In the end, of course, the libellant may receive only one payment, whether in rem or in personam.

To accomplish an admiralty attachment, the libellant must avoid notifying the shipowner in advance of his purpose, for if the shipowner causes a personal appearance to be filed with the Clerk after the libel is filed but before the Marshal can find the property to be attached, the attachment will fail altogether.

The release of an attachment is accomplished by the same steps already described for the release of an arrest on process in rem.

5. DIVIDED DAMAGES AND CARGO'S RIGHTS

Where there is mutual fault United States admiralty courts will divide both fault and damages, but only on one basis — namely half and half if there are two parties, or

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*The Melmay, 1932 A. M. C. 1396 (C. Z., 1932); 1934 A. M. C. 1483 (S. D. N. Y., 1934); The Carlbe, supra, n. 48; The Chief Capillano, 1931 A. M. C. 1089 (W. D. Wash., 1931); Benediet, vol. 2, pp. 103, 350.*
in thirds if there are three parties. Several efforts have been made to introduce the British and Brussels rule of liability proportioned to the fault, but without success. The President sent the Brussels Collision Convention of 1910 to the Senate for its advice and consent as to ratification, but the Senate failed to act for many years, and in 1949 the President recalled it. No action is now contemplated. Thus we perpetuate the long-existing situation whereby the plaintiff often has a free choice between the two systems of law as to divided damages, and may by suing in Europe or in America seek whichever rule of law he prefers by a suitable choice of the forum. It would seem that this option is desired by a large sector of the business and insurance community.

If the parties agree to settle a case on an apportionment basis, the courts are willing to enter the appropriate decrees and to divide the damages in the same proportions.

In the United States it is also settled law that the cargo is "innocent" of the navigational faults of the ship in which it is carried, and therefore may recover its full loss against a colliding ship which is only partly at fault. This is of course the opposite of the rule of the Brussels Convention and the English admiralty, which allow cargo to recover only the same percentage as the fault of the colliding ship. Until very recently it was possible, however, to attain the same result by inserting a "both to blame" clause in the bill of lading, but such clauses have now been held invalid by the Supreme Court.

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6. SEAMEN'S RIGHTS

Seamen are frequently referred to as "wards of the admiralty court". In a long delayed effort to give seamen ample protection from abuse by harsh employers and officers, a most complicated system of seamen's rights and remedies has been created since 1915. One commentator has spoken of this situation as "the tangled skein", and the phrase is apt. More than one-third of the maritime litigation of recent years arises out of the effort to adjust the rights of sick, injured and socially unadjusted seamen through the machinery of the courts. While most of this effort relates to seamen in United States flag vessels, a substantial part also concerns ships of foreign flags.

In general, every seaman is always entitled to "maintenance, cure and wages" to the end of the voyage, and sometimes much longer; and he may also receive money indemnity for negligent injury. After leaving the ship, a sick or injured seaman receives "maintenance" as long as he is incapacitated and hopeful of cure or betterment in his situation; this is true even though the sickness or injury was occasioned while the seaman was on shore leave and not performing any duty for his ship, so long as he can be still regarded as in the ship's service at the time. Maintenance is often received by remaining on board the ship or by entering a free federal "marine hospital". "Care and cure", means medical care, surgery and nursing and this is usually given at the free "marine hospital". The sick or injured seaman receives wages until he is discharged or until the end of the voyage, whichever happens first. These are ancient rights, now restated in International Labor Office Convention No. 55, which the United States has ratified and made effective, October 29, 1939. Until the present, there has been no implementing legislation of the Convention.

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55 Yale L. J. 564 (1946).
58 International Labor Office Convention No. 55; Benedict, vol. 6, p. 294; 1938 A. M. C. 1297; 1939 A. M. C. 1591.
A seaman of any nationality in an American flag vessel—whom we may call a "domestic" seaman—may be entitled to sue his employer for injuries on either of two theories, which were originally quite distinct but are now tending to merge together: (a) if the injury was due to the vessel being unseaworthy—a right given under the general maritime law and (b) if one of his fellow-seamen was negligent—a right not recognized by the general maritime law but given by the so-called Jones Act of 1920. The two ideas tend to merge when the unseaworthy condition is caused by negligence, as when a piece of unseaworthy rope is selected for use by a fellow seaman. Again, from 1920 to about 1940 it was the general view that an injured seaman, entitled to claim both the Jones Act "negligence" remedy and the "unseaworthiness" remedy of the general maritime law, must choose or "elect" whether to claim unseaworthiness or negligence; but recently it has been said that he may proceed to the trial of his case on both grounds at the same time, and recover a verdict if he proves one or the other. Under either system, there may be very large awards of damages. The merchant seamen in United States merchant ships are not limited or governed by any system of social insurance for sickness, injury or death.

A seaman in a ship of foreign flag is, as a general proposition, not touched by the American law, but to this there are many exceptions. It has been decided that a seaman in a ship of Panamanian or Honduran flag, owned by American citizens and operated in a service at American ports, may have the same rights against his employers as though he were serving in a domestic ship of United States registry. And when a Greek ship (during the German occupation of Greece) was sailing on the American coast and obtained some of the crew at American ports, it was decided that such men, when injured in American coastal waters, should

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61 The NACCA Journal (semi-annual, since 1948) published by the National Association of Compensation Claimants' Attorneys.
63 The Castilla, 1933 A. M. C. 81, 60 F. 2d 927 (2nd Cir., 1932).
have the rights of domestic seamen.\(^6\) In war times, it was sometimes unjust to say that a foreign seaman must go home to his native country to receive compensation for his injuries.

Since 1915, it has been lawful for foreign seamen to break their contracts of employment while in United States harbors and leave their ships, without penalty for mutiny or for breach of contract.\(^6\) Few seamen actually do this, because of fear of punishment when they return to their own countries; and since 1935 the United States immigration-quota laws have also prevented many men from leaving their ships.\(^6\)

The United States laws as to seamen's wages are of serious importance to seamen (of whatever personal nationality) serving in foreign flag ships, and to foreign shipowners. The United States laws do not allow a payment of wages in advance; and any advances must be paid a second time at the end of the period of work. They require one-half the earned wages to be paid on demand in each port. They forbid the payment of wages to any persons except the seaman himself, or his wife, children and parents under a strict allotment system.\(^6\) The penalty for failing to pay wages promptly when due is the payment of double wages for every day of delay — a heavy burden.\(^6\) Under these laws, some Greek shipowners have had to pay double wages in United States ports because they obeyed a decree of the Greek Government (in exile in London) requiring them to place a certain part of a Greek seaman's wages in a special fund for the benefit of the families of Greek seamen after the liberation of Greece from German occupation.\(^6\)


\(^{\text{6}}\) Knauth: Alien Seamen's Rights and the War, 37 Am. J. Int. Law 74 (1943).


7. SOVEREIGN IMMUNITY

The United States and each of the States separately assert the doctrine of sovereign immunity; they all refuse to allow anyone to bring a lawsuit as a matter of right against the State for damages done by public servants.

In 1915 for the first time the United States consented to be sued in the ordinary courts as a shipowner; this law was not satisfactory and a new law was enacted in 1920. Suit is now permitted, but only in the federal courts, and without the right of arrest or of security. The time for suit is 2 years, and this is strictly enforced. In 1925 the same system was extended to "public" vessels, which in the main means the ships of the Navy, Coast Guard and the Military Transport fleet. These laws do not meet the commercial demand for a right to sue a government in a foreign court; but in this respect the attitude of the United States government is not different from that of most governments. In foreign ports, the American government stands upon its claim of sovereign immunity, and consents to being sued only ex gratia. Foreign citizens may not sue the United States Government in the United States courts unless they can demonstrate that an American citizen is allowed, vice versa, to bring a suit against the foreigner's government in the courts of his country.

8. DEATH CLAIMS

The situation concerning lawsuits for damages for a negligent or civilly wrongful death has become absurdly complicated. The federal admiralty judges unfortunately long ago adopted the English view — derived from the old English common law — that "death is the composer of strife". This means that if one person negligently kills another, the death of the victim is the end of all lawsuits. There is no such doctrine in civil-law countries of Europe,

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\[n The Brazos-Eglantine, 1943 A. M. C. 23, 317 U. S. 395 (1943).\
\[n 43 Stat. 112 ; 46 U. S. C. 781 ; 1946 A. M. C. 1292.\
\[n The Petar (Yugoslav-flag) 1948 A. M. C. 340, 165 F. 2d 738 (2nd Cir., 1948).\
\[n ROBINSON, sec. 16 ; BENEDICT, vol. 1, pp. 372-3.\]
where lawsuits for negligent wounding and negligent killing are receivable without distinction. The English rule was most unjust, and was corrected in 1846 by Lord Campbell's Act, which created a cause of action in the personal representative of the deceased person for the benefit of certain classes of his dependents. The various States have all enacted similar laws, but with curious variations. Thus the time limits for commencing suit vary from 1 to 2 years in most States, to 6 years in one state — Michigan. And 19 States fix a maximum limit upon the amount that a jury may give for a negligent death; these money limits vary from $5,000 in Colorado to $20,000 in Connecticut. These "death acts" apply to deaths in State territorial waters. The reform was completed in 1920 by a federal statute creating a right to sue for a wrongful death occurring on the high seas, beyond the jurisdiction of any one of the States; the federal time limit is 2 years, and there is no money limit. For the death of a seaman, Congress created a special "death act" with a 3-year time limit which applies both in State waters and on the high seas.

As a result of public feeling about the course of the litigation which followed upon the loss of the Titanic in 1912, a law was enacted which states that a shipowner may not limit his liability in a United States court against claims arising under the "death act" of a foreign country. This rule has an important effect upon the liabilities of foreign shipowners whose vessels suffer a disaster on or near the American coasts, or on the Great Lakes. A recent example of the complicated working of this statute as to deaths at

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[9] Lord Campbell's Act, 9 and 10 Victoria, c. 93 (1846).
sea is the Noronic case, discussed under the topic of limitation of liability.

9. GENERAL AVERAGE

It may be supposed that at least half of the general average cases of modern days are caused by negligent errors of navigation and management by the ship's personnel. In the last half of the 19th century the cargo interests contended strongly that such negligence destroys the ship's right to a general average. To meet that contention and preserve the institution of General Average, the Antwerp Rule 1903 was devised. This simply declares that:

"Rights to contribution shall not be affected though the event which gave rise to the sacrifice may have been due to the fault of one of the parties to the adventure..."

This is now Rule D of the 1950 York-Antwerp Rules.

In the United States, however, the rule has long been otherwise, and this remained unchanged even after the Harter Act relieved the ship from liability for damage to the cargo resulting from negligent navigation when due care had been taken to make her seaworthy. However it was held in the Jason that consistently with public policy the parties to the shipping contract could by contract agree that the ship should retain a right of general average in spite of her negligence. Now the Ocean Bills of Lading Convention and the Carriage of Goods by Sea Act permit such a bargain if the shipowner has used due diligence to make the ship seaworthy, at and before the beginning of the voyage. Therefore the result of Rule D may be obtained by inserting a properly worded agreement in the bill of

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lading — the so-called Jason Clause.\textsuperscript{52} It \textit{must} be inserted in every bill of lading in every trade which runs to or from the United States or passes near those shores; and this is carefully required by the rules of all the P & I underwriters.\textsuperscript{53}

It would of course be convenient if the Jason Clause could be written into the York-Antwerp Rules as a part of Rule D. Unfortunately the draftsmen of the 1950 Rules were of the opinion that this should not be done; they persuaded themselves that the American policy of the Jason litigation, settled now for over 60 years, is just an aberration in the views of a single country which should be cured by local clauses in the trade of that country, and is not proper for inclusion in a many-country text. The trading of foreign-flag ships to the United States and of American-flag ships to other countries would hardly seem to justify such a colonial treatment of the Jason clause. Nor would the great importance of the New York and San Francisco and New Orleans insurance markets and their connected activity in the business of stating general averages. However, every shipowner must continue to remember for himself to use this important clause in all his bills of lading.

10. \textbf{LIMITATION OF SHIPOWNER'S LIABILITY}

The United States system is probably more complicated than that of any other country, and an adequate description of it is beyond the purpose of this article. In general, the shipowner surrenders the value of the ship plus the freight for the voyage (if any), the ship being valued \textit{after} the disaster as she reaches the final port of the voyage. When the ship sinks at sea, the liability is limited to zero, or at most to the pending freight. All classes of claims rank

\textsuperscript{52} The new Jason clause is found in the 3rd ed. of Knauth on Ocean Bills of Lading, p. 96 (1947). The old Jason clause is in \textit{Knauth, op. cit.}, pp. 96, 136, 137, 254.

\textsuperscript{53} P & I stands for Protection & Indemnity, a type of marine liability insurance usually covering risks of liability for cargo damage, personal injury, bridge and dock damage, the quarter-collision risk (if not elsewhere insured), routine fines and penalties, all within the limits of shipowner's limitation laws and agreements and within an over-all money limit. See \textit{Barber: Lectures on P & I Insurance} (Kings Point Merchant Marine Academy).
together; but if there is not enough to pay out the life claims, the shipowner (if his other resources are large enough) must pay the life claims until his contribution reaches $60 per ton of the ship's tonnage. The insurance money for the hull and disbursements does not have to be surrendered to the creditors. Under this system, more than 27 possible results can be arrived at, depending on the facts and relative values of the competing interests.

Shipowners are especially interested in the possibility of combining limitation proceedings when they are sued in different countries. There is at present no official method of bringing a United States limitation proceeding into legal relation with a lawsuit in a different country. Two recent cases are of interest. The Canadian steamer Noronic burned in the harbor of Toronto, Canada, and there was loss of life. The owner was subject to suit in the port of Cleveland, and many suits were brought there. Under the Canadian limitation law, the owner claimed the right to limit to $448,409. Under the United States statute, he could claim the right to limit to $370,000. In his limitation petition filed in the federal admiralty court in Cleveland, he cautiously furnished security for the larger Canadian amount, and sought a ruling as to whether the law would permit him to limit his liability to the somewhat lesser United States amount. In the upshot, that question was not answered, because a group settlement offer of $2,150,000 was worked out and accepted by 95 per cent of the damage-claimants. The Noronic flew the flag of Canada; the Canadian law limits the liability of a shipowner to $72.97 Canadian (the former equivalent of £15 British Sterling) per ton for death and injury liabilities. Canada allows a carrier to contract out of all liability. By suing the Canadian shipowner in the United States court, the death claimants evaded the Canadian law and statute.

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9 Proceedings for limitation of liability in U. S. courts is described in detail in BERTRAND, vol. 3, pp. 508-647. The statutes are in 46 U. S. C. 182-189. See also KNAUTH: OCEAN BILLS OF LADING.

9* The Noronic, 1950 A. M. C. 1499, 32 F. S. 549, 1950 A. M. C. 1840 (N. D., Ohio, 1950). Final solution of the Noronic case reported at 1952 A. M. C. (Sept.). The defendant shipowner offered a fund of $2,150,000 which was
In the other case, the American steamer *Norwalk Victory* collided in the Scheldt with the British steamer *Merganser*, which sank with a valuable cargo; the *Merganser* owner sued the *Norwalk Victory* in New York while the cargo sued in England, and the Belgian port authorities brought their wreck-removal claims in Belgium. Under Belgian law the *Norwalk Victory* was entitled to limit all these liabilities to 14,000,000 Belgian francs. But the owner was compelled to pay all three claims in the three countries where he was sued, without any consideration of the limitation law of the place where the collision occurred. In effect, the law said he must pay his single limitation amount three times over, once in Belgium, once in London, once in New York.

These examples illustrate the unreasoned interaction of present-day isolationist national methods of dealing with the liabilities of shipowners.

11. SOME COMPARISONS WITH THE COMMON LAW

It remains to enumerate several reasons why lawyers and litigants prefer to seek legal relief in the United States admiralty courts, instead of in the State courts or in a civil suit in the federal courts, whose doors are also open to them in most cases.

1. The admiralty courts can apportion fault and damages; the State courts and the federal courts in a civil proceeding cannot do this — if they find that both parties are at fault, they must refuse to give any relief. Their rule is that any "contributory negligence" of a plaintiff is a complete defense to any action against him. If the plaintiff is adjudged to be 50% at fault, the defendant must pay only 50% of the damages, regardless of whether he is 0% at fault. The State courts and the federal courts do not have this rule. In the admiralty courts, the damages are divided according to the fault of each party, unless the party is 100% at fault, in which case he is not liable at all. In the State courts and the federal courts, the damages are divided according to the fault of each party, but if the party is 100% at fault, he is liable for all the damages, regardless of the fault of the other party.

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plete defense for the defendant. This rule is especially unsatisfactory in cases of maritime collision.9

2. A State court does not have the power to give a decree in rem in respect of a ship or cargo in a private litigation,90 this power in rem is reserved exclusively for the federal admiralty court.

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

4. A common law court can ordinarily make an order of sale transferring only such a title as the defendant happens to have, and such a sale may be questioned in many other jurisdictions. *Per contra*, the admiralty court may by decree order a sale or possession of the ship which will be respected everywhere as good title to the ship. An instructive recent example is the case of the *Varuna*, where an admiralty decree as to the true title to the vessel cut

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The Second Circuit Court of Appeals declared that it would follow the *Intagliata* decision and repudiated Belden v. Chase in *Hedges v. United Fruit Co.*, 1952 A. M. C. 1465 (2nd Cir., 1952).

The Moses Taylor, 4 Wall. 411, 431 (U. S., 1867); *GORTON*, sec. 250; *ROBINSON*, sec. 59; *Brewster*, sec. 17. State power to confiscate in specie in the enforcement of State criminal and regulatory laws is demonstrated in *Hendry v. Moore*, 1943 A. M. C. 156, 318 U. S. 133 (1943). Many commentators have confused the right to condemn the deodand in favor of the State with the admiralty power to act upon a ship in rem in favor of one private litigant as against another private litigant; the distinction however seems quite clear.
right through a state court and sheriff's attachment of the vessel on the allegation that she was the property of another person. 5

5. The admiralty method of taking testimony of seagoing witnesses, de bene esse, on very short notice and without arrangements for the expenses of opposing parties, is well adapted to minimize delays in the movements of ships. The State court and common law methods of taking depositions are much too slow and cumbersome for maritime purposes. The same comment applies to the current federal rules of civil procedure, which lay down times for notice and action that are much too slow for maritime needs.

6. There is no uniformity of substantive law or of practice among the several States. While the general forms are similar — even in Louisiana where the modern law derives from the Code Napoleon — the variations of detail are as numerous as those, for example, between the laws of Italy, Switzerland, France, Spain and the Netherlands. The maritime law and practice has an immense attraction here, for it is uniform throughout the United States.

This simple fact persuades litigants to seek legal relief, if they can, in the less complicated system of admiralty courts which administer a single body of law and pursue a single scheme of practice.

7. In the admiralty courts in the United States, the European litigant finds a system of law and of practice which is derived from familiar Mediterranean sources. While the modern variations are different in details, the underlying theories are well known. But in the common law courts of the States, he finds a law and practice derived 150 years ago from English common law, greatly changed and modified by a vigorous independent growth, and strikingly different from the legal systems of Europe and of South America and of modern England.

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5 The Varuna is a striking illustration, with simultaneous proceedings in New York State Courts in New York County (site of the debt), Kings County (site of the vessel asset), 1st and 2nd Appellate Divisions, Eastern District federal court and U. S. Court of Appeals for the 2nd Circuit. Combined report at 1951 A. M. C. 1918.
All of these reasons in combination impel litigants, particularly foreign litigants who have matters in the United States, to seek relief in the admiralty court to the full extent of that court's jurisdiction.

CONCLUSION

These paragraphs will indicate some of the more important characteristics of maritime law in the United States today. In 1919 the United States emerged from the first World War with a new fleet of about 2,000 ocean going vessels, and at one bound had the second largest merchant fleet of the globe. In 1945, at the end of the second World War, it was in a position to give and sell hundreds of ships to members of the United Nations whose merchant marines had been reduced during the war, and nevertheless still possessed more than 5,000 vessels, by far the greatest merchant and military transport fleet of the world. This vigorous maritime activity has stimulated many modifications and changes in the maritime statutes and in the decisional law of the American admiralty courts. The process of growth and change continues now from year to year. There is a constant and marked process of development in progress, which both merits and necessitates a continuing attention.92