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THE EXCLUSIVE ADMIRALTY JURISDICTION

W. T. BEEKS AND GORDON W. MOSS

In Cline v. Price the owners of a minority interest in a fishing vessel, being dissatisfied with the use to which it was being put, brought suit in Superior Court against the majority owners. The action prayed the appointment of a receiver, an accounting, and a partition of the vessel by sale and distribution of the proceeds. A demurrer was sustained by the lower court and affirmed by the Supreme Court. The ground assigned was that the suit, essentially one for partition, was exclusively within the admiralty jurisdiction of the United States, and the state courts have no jurisdiction to afford such relief.

This pitfall of exclusive admiralty jurisdiction is one which the practitioner in our maritime state of Washington may often have occasion to meet. It shall be the purpose of this article to discuss some of the fundamental aspects of the admiralty jurisdiction in general, with particular emphasis upon those classes of cases where the suitor is limited in his choice of forum to the federal courts sitting in admiralty.

SOURCE OF ADMIRALTY JURISDICTION

The fountainhead of the jurisdiction is, of course, the Constitution of the United States. Article III, § 2, provides: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." In the Judiciary Act of 1789, Congress granted exclusive original jurisdiction in all civil causes of admiralty and maritime jurisdiction to the United States District Courts. That grant was coupled with a reservation to the common law courts, however, for the Act further provided: "... saving suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." By this saving clause, the state courts (and federal courts on the common law side) were left free to enforce in their customary manner such maritime rights and liabilities as they had in the past. The scope of this clause will be discussed in detail later in this article.

What were cases of admiralty and maritime jurisdiction was left to the courts to decide; but by the time of the framing of the Constitution, the maritime law, which is of ancient origin, with considerable

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1 Cline v. Price, 139 Wn. 2d 816, 239 P. 2d 322 (1951).
uniformity was adopted and enforced by the maritime nations of the world including the American colonies. In 1759 Lord Mansfield was able to say: "The maritime law is not the law of a particular country, but the general law of nations." But this does not mean that by the grant of admiralty and maritime jurisdiction to the federal courts there was conveyed to them a system of ready-made rules complete in every respect. As stated by Mr. Justice Bradley in *The Lottawanna*: But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. . . . But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them.

The problem of charting the precise boundaries of the admiralty jurisdiction to meet the requirements peculiar to this country largely occupied the Supreme Court in its opinions on the subject during the last century.

**Contract Jurisdiction in Admiralty**

Before the litigant has a problem of choice of forum, as between a state court and a federal court sitting in admiralty, his case must be within the admiralty and maritime jurisdiction of the United States. As to contracts, the test of that jurisdiction is subject matter. If the nature of the contract is what the courts will label maritime, the contract is within the admiralty jurisdiction, regardless of where the contract was made or to be executed. In this latter respect the American admiralty jurisdiction was expanded from that of England at the time of our Constitution. The English admiralty courts had had their jurisdiction severely limited by the jealousy of Lord Coke and the common law courts, and with but few exceptions a contract had to be

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8 The Colony of Rhode Island had adopted the Laws of Oleron as its code on admiralty matters as early as 1647. The Virginia Colony had enacted that its courts of admiralty should be governed by the "laws of Oleron and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English courts of admiralty and by the laws of nature and of nations." See Canfield, *The Uniformity of the Maritime Law*, 24 Mich. L. Rev. 544, 556 (1926).

4 Luke v. Lyde, 2 Burr. 887 (1759). See also Mr. Justice Bradley's statement in *The Lottawanna*, 88 U.S. 558, 22 L. Ed. 654 at 662 (1875): "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

5 88 U.S. 558, 22 L. Ed. 654, 661 (1875).
made and executed on the seas to be enforceable in an English court of admiralty. The test for this country was laid down in *Insurance Co. v. Dunham* where the court said: "As to contracts . . . the true criterion is the nature and subject matter of the contract, as whether it was a maritime contract having reference to maritime service or maritime transactions." A discussion of the various kinds of contracts which, in a substantive sense, are in their nature maritime, is beyond the scope of this article. Mr. Justice Story, in *DeLovio v. Boit*, stated that the contract jurisdiction "extends over all contracts . . . which relate to the navigation, business or commerce of the sea." Perhaps the best omnibus definition in accord with the decided cases is that found in Benedict's celebrated work on admiralty:

A contract relating to a ship in its use as such or to commerce on navigable waters is subject to the maritime law and the case is one of admiralty and maritime jurisdiction, whether the contract is to be performed on land or water.

To the general rule of subject matter as the determining test is one exception of which the practitioner must beware: a contract to build a ship is "non-maritime" and not within the admiralty jurisdiction. It was so decided by the Supreme Court in 1857; and despite frequent attack (resulting in the drawing of fine lines of distinction between new construction and reconstruction or repair) this anomaly has been firmly imbedded in our law ever since. The builder is thus deprived of that useful weapon, a maritime lien upon the ship, with its concomitant priority over common law and state-created statutory liens.

**TORT JURISDICTION IN ADMIRALTY**

In admiralty tort jurisdiction the key word is not subject matter but locality. Jurisdiction depends on whether the tort occurs on navigable

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7 78 U.S. 1, 20 L. Ed. 90 (1870), upholding the admiralty jurisdiction over a contract of marine insurance, though it was made and to be performed (by payment) on land.
8 Supra, note 6.
9 1 BENEDICT, ADMIRALTY 130 (6th ed. 1940).
10 *People's Ferry Co. v. Beers*, 61 U.S. 393, 15 L. Ed. 961 (1857). The case applied the English test of locality, and found the contract wanting because made and to be performed on land. The case represented a triumph of the states' rights philosophy in narrowing the federal jurisdiction and authority.
waters of the United States or on the high seas; thus admiralty jurisdiction over torts differs in essential principle from its jurisdiction over contracts. The test of tort jurisdiction stems from Mr. Justice Story's statement in *DeLovio v. Boit*\(^{13}\) that cases of admiralty and maritime jurisdiction, within the constitutional delegation, comprehend "all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality." The locality test was solidified and adopted as the *ratio decidendi* by the Supreme Court in *The Plymouth*,\(^{14}\) denying admiralty jurisdiction to the owners of a wharf damaged by fire originating from a ship and caused by the negligence of those in charge of her. The court said: "The whole, or at least the substantial cause of action arising out of the wrong, must be complete within the locality upon which the jurisdiction depends ... on the high seas or navigable waters." This restriction of tort jurisdiction to locality regardless of the maritime flavor of the tort, resulted in the anomalous situation that if a vessel struck a bridge or wharf, the damage to the vessel was within admiralty jurisdiction but the damage to the bridge or wharf was not. It also created difficulties in connection with injuries caused by ships to amphibious objects such as beacons attached to the land by means of piles driven into the harbor bottom. In *The Blackheath*,\(^{15}\) Mr. Justice Holmes, commenting that the scope of admiralty jurisdiction is not a matter of "obvious principle or very accurate history" extended it to an injury by a vessel to a beacon resting on piles. The key distinction was that the beacon was a government aid to navigation. The decision was followed in *The Raithmoor*,\(^{16}\) but not extended, so as to reverse *The Plymouth*, to injuries to docks, bridges, protection piling or similar "land" structures.\(^{17}\)

These fine rules and distinctions became troublesome when in 1942 the United States suddenly became a large shipowner and operator,\(^{18}\) because existing Congressional permission to sue the government on its shipping contracts and torts was limited to suits brought in admiralty

\(^{13}\) *Supra*, note 6.

\(^{14}\) 70 U.S. 20, 18 L. Ed. 125 (1865).

\(^{15}\) 195 U.S. 361, 49 L. Ed. 236 (1904).

\(^{16}\) 241 U.S. 166, 60 L. Ed. 937 (1915). The court said that the beacon's "locality and design gave it a distinctively maritime relation," seemingly superadding a subject-matter criterion to the test of locality. Query how the "maritime relation" of a beacon on piles differs from that of a wharf similarly supported, in a matter so substantive as jurisdiction.

\(^{17}\) Cleveland T. & V. R. Co. v. Cleveland S. S. Co., 208 U.S. 316, 52 L. Ed. 508 (1908).

in the federal courts. Finally, in 1948, eighty-three years after The Plymouth started the trouble, Congress abrogated the specific rule of that case. The new statute provides:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of 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.

By the terms of the Act, suit may be in rem against the vessel or in personam, according to the principles of law and rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable waters of the United States.

An anomaly in the law of admiralty jurisdiction has thus been removed, though it is thought that, with the statutory exception, locality is still the generally exclusive test of tort jurisdiction. Problems of fixing the locus of the tort will still arise.

THE WATERS SUBJECT TO ADJIRALTY JURISDICTION

Reference has already been made herein to the jurisdiction of admiralty over the navigable waters of the United States. But this was not always the judicial definition of “admiralty waters”; this subject was the scene of the Supreme Court’s greatest struggle in freeing the American admiralty jurisdiction from the restraining shackles of the English influence. In England, at the time of our Constitution, the jurisdiction was limited to the waters of the seas and waters washing the shores within the ebb and flow of the tide. In its early decisions the Supreme Court followed the English rule of tide waters jurisdiction,

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21 In personal injury cases, dicta have occasionally crept into Supreme Court opinions, in which the maritime character of the injured person’s presence on navigable waters has been used to bolster the jurisdiction. See Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 58 L. Ed. 1208 (1914); Chelenlis v. Luckenbach S.S. Co., 247 U.S. 372, 62 L. Ed. 1171 (1918). But cf. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 66 L. Ed. 321 (1922). "The general doctrine that... admiralty jurisdiction depends... in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." (McReynolds, J).
22 In The City of Lincoln, 25 Fed. 835 (D.C. N.Y. 1885), followed in Fireman’s Fund Ins. Co. v. City of Monterey, 6 F. 2d 893 (D.C. Cal. 1925), both of which involved injury to goods by submersion resulting from collapse of a wharf, the locus of the tort was held the water and admiralty jurisdiction was sustained. Contra: The Haxby, 95 Fed. 170 (D.C. Pa., 1899) where, a steamer having run into a pier and precipitated goods stored thereon into the water, the court held the locus of the tort to be on land and denied admiralty jurisdiction.
and barred courts of admiralty from cognizance of contracts or torts relating to or occurring upon our inland waters. 23

In 1847 the court affirmed the admiralty jurisdiction in a collision on the Mississippi River, ninety-five miles upriver from New Orleans. 24 The locus delicti was found to be within the ebb and flow of the tide, and thus properly within admiralty jurisdiction, even though also within the territory of a state (the dissenting justices darkly warned of the consequences of federal encroachment upon the sovereignty of the states). And in 1851, in the celebrated case of The Genesee Chief, 25 Chief Justice Taney flatly repudiated the English view, as inconsonant with the peculiar conditions and requirements of this country, with its great network of inland navigable lakes and rivers. The rule in England, he said, was predicated on the fact that the tidal stream was generally the only navigable stream. He announced the new test of jurisdiction: navigability of the waters as a highway of interstate or foreign commerce.

The Genesee Chief extended the admiralty jurisdiction to the Great Lakes; The Hine v. Trevor 26 extended it to the navigable rivers of the country, the court stating that the principles established by The Genesee Chief required this result, the jurisdiction resting upon the original grant of power in the Constitution. Rivers must be not only navigable, but an actual or potential highway for commerce, interstate or foreign. In The Daniel Ball, 27 the court stated that rivers are navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other rivers, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water.

The commerce involved in any particular case may be wholly intrastate, so long as the water is navigable for interstate or foreign commerce. 28 So long as the waterway meets the twin tests of navigability in fact and capability of bearing interstate or foreign commerce, it matters not that it is an artificial waterway and wholly within the geographical jurisdiction of one state. 29

23 The Thomas Jefferson, 23 U.S. 428, 6 L. Ed. 358 (1828); The Orleans v. Phoebus, 36 U.S. 175, 9 L. Ed. 677 (1837).
24 Waring v. Clarke, 46 U.S. 441, 12 L. Ed. 226 (1847).
25 53 U.S. 443, 13 L. Ed. 1058 (1851).
26 71 U.S. 555, 18 L. Ed. 451 (1866).
27 77 U.S. 557, 563, 19 L. Ed. 999 (1870).
29 Ibid.
A perusal of the Supreme Court decisions indicates that it requires but a small craft indeed to successfully navigate a river in order that the river be navigable water within the admiralty jurisdiction of the United States.\textsuperscript{30} The practitioner in the state of Washington will thus have little difficulty with this phase of the admiralty jurisdiction; Puget Sound and most of our rivers will meet the test of waters subject to admiralty jurisdiction.

**Wrongful Death Within the Admiralty**

By the common law an action for wrongful death did not survive, and thus it was "a singular fact that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy."\textsuperscript{31} The maritime law followed the common law in this respect, and it was definitely settled in *The Harrisburg*\textsuperscript{32} that the general maritime law of this country affords no right of action for wrongful death.

This does not foreclose courts of admiralty from enforcing a right of action for wrongful death where created by a general state statute. Such statutes, as applied to wrongful death occurring on navigable waters within the territorial waters of a state, are enforced in admiralty on the ground that they create no new maritime cause of action but only a "new right and liability,"\textsuperscript{33} and because such state modification of the maritime law "will not work prejudice to the characteristics of the general maritime law."\textsuperscript{34}

The litigant has a substantial choice of forum in enforcing his claim under a state statute. He may, by virtue of the saving clause,\textsuperscript{35} have a common law action in the state court,\textsuperscript{36} or federal court on the law side if the other jurisdictional requisites are met.\textsuperscript{37} He may sue *in personam in admiralty,*\textsuperscript{38} and if the state statute specifically provides a maritime lien he may enforce this *in rem* against the offending vessel in ad-

\textsuperscript{30} See, e.g., *The Montello,* 87 U.S. 430, 22 L. Ed 391 (1870), holding the Fox River of Wisconsin navigable even though early traders found portages necessary even for specially constructed boats; *Economy Light & Power Co. v. United States,* 256 U.S. 113, 65 L. Ed. 847 (1926).

\textsuperscript{31} *Goodsell v. Hartford & New Haven R. Co.,* 33 Conn. 51 (1865).

\textsuperscript{32} 119 U.S. 199, 30 L. Ed. 358 (1866).


\textsuperscript{34} *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242, 66 L. Ed. 210 (1921).

\textsuperscript{35} Originally Sec. 9 of the JUDICIARY ACT of 1789, now 28 U.S.C. § 1333 (Supp. 1949).

\textsuperscript{36} *Sherlock v. Alling,* 93 U.S. 99, 23 L. Ed. 819 (1876).

\textsuperscript{37} *Bloom v. Furness-Withy Co.,* 293 Fed. 98 (D.C. Cal., 1923).

\textsuperscript{38} *Western Fuel Co. v. Garcia,* supra note 34.
But if the litigant sues in admiralty, he
is still subject to any defenses to his right of action placed thereon by
the state creating it, including the statute of limitations, and—most
important—contributory negligence as a complete bar.

Where Congress has occupied the field by legislation, the familiar
principle is invoked that such legislation supersedes the state death act
where the Congressional enactment is applicable. This is now true as
to death on the high seas, beyond a marine league from the shore of any
state or territory or dependency of the United States, and not other-
wise within the territorial waters of a state. Prior to 1920 a state
statute could apply to death on such waters, at least where the ship
flew the American flag; but state wrongful death statutes have been
superseded on the high seas, since 1920, by the federal Death On The
High Seas Act. Likewise, the enactment of the Jones Act in the
same year has withdrawn from the purview of the state statutes actions
by the representatives of seamen against their employers for wrongful
death based on negligence, even though the death occurs on territorial
waters of the state.

THE PREFERRED SHIP MORTGAGE

Brief mention should be made of the preferred ship mortgage. In
1854 the Supreme Court held in Bogart v. The John Jay that a court
of admiralty was without jurisdiction to foreclose a common law
mortgage on a vessel. No maritime lien was afforded by the mortgage; it
was inferior to all classes of maritime liens, and thus afforded little
security to the lender.

In 1920 Congress passed the Ship Mortgage Act as part of the
Merchant Marine Act of 1920. As stated by Professor Robinson,"The
ship mortgage section recognized that if the United States was to
have a merchant marine other than at public cost, the money lending
interests had to be attracted by more bait. The net result of the legis-

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39 The Oregon, 81 Fed. 876 (C.C.A. 9, 1897); The Amoy, 27 F. 2d 72, (C.C.A. 4,
1923).
40 The Albert Dumois, 177 U.S. 240, 44 L. Ed. 751 (1900).
41 Western Fuel Co. v. Garcia, supra note 34.
43 The Hamilton, 207 U.S. 318, 52 L. Ed. 264 (1907).
47 58 U.S. 399, 15 L. Ed. 95 (1854).
50 ROBINSON ON ADMIRALTY, p. 442.
lation was to step up the common law mortgage, give it a maritime character and assign it a place of preference even among the maritime securities."

The Act sets out in detail the requirements for obtaining the preferred status for the mortgage and the method of enforcing it; counsel should check the statutes carefully when drafting and perfecting a ship mortgage for a variance may well be fatal. The mortgage is preferred, in general, to all subsequent liens upon the vessel except liens for tort, stevedore and crew wages, general average and salvage.

Jurisdiction to enforce the preferred ship mortgage by libel in rem against the vessel and/or libel in personam against the mortgagor to recover the mortgage indebtedness is vested exclusively in the United States District Courts sitting in admiralty. The mortgagee has no choice of forum in this maritime action if he seeks for his mortgage the preferred status granted by the Act.

LIMITATION OF LIABILITY

Of particular interest to the general practitioner are the jurisdictional problems in connection with the shipowner's statutory right of limitation of liability, for this is one maritime subject he may well meet. To encourage shipbuilding, the investment of money in ships, and the employment of ships in commerce, Congress enacted the Limited Liability Act in 1851. By its provisions, the shipowner is not to be liable for loss or damage occasioned without his "privity or knowledge" beyond the value of his interest in the vessel and her pending freight at the close of the voyage. Pending ascertainment of liability and his right to limit it, the shipowner may transfer his vessel.

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52 In accord with the common law and state-statutory concept but contrary to the general maritime scheme of priorities among maritime liens, where the lien arising latest in time is awarded priority, at least as to liens of the same class. See the discussion in Robinson On Admiralty, pp. 422-434.
55 Norwich etc. Co. v. Wright, 80 U.S. 104, 20 L. Ed. 585 (1872); Butler v. Boston etc. S.S. Co., 130 U.S. 527, 32 L. Ed. 1017 (1889).
57 "Privity or knowledge" is construed to mean personal fault, or personal participation by the shipowner in the fault or negligence causing the loss. Where the shipowner is corporate, the inquiry is into the managerial hierarchy to ascertain whose fault may properly be attributed to the corporation. Coryell v. Phipps, 317 U.S. 406, 87 L. Ed. 363 (1942).
58 By amendments in 1935 and 1936, in the case of certain defined seagoing vessels, liability cannot be limited below $60 per gross ton to pay personal injury and death claimants, even though the vessel be sunk and its value zero. 46 U.S.C. § 183 b (1946).
to a trustee, or file a stipulation for value in lieu thereof to pay all claims up to the value of the vessel and pending freight as finally determined by appraisement under order of the court. Assuming the shipowner to be liable but entitled to limit, the fund is apportioned among the interests suffering loss.

The shipowner may raise the defense of limitation of liability either by way of answer when sued, or by filing a petition in admiralty. Where there are multiple claims, the form of proceeding by petition in admiralty results in a concourse of all claims in that one action. Upon application by the petitioner, the court will issue an order restraining the prosecution of all other suits, in any forum, against him or his vessel in respect to any claim subject to limitation in the proceeding.

Where there are multiple claims the exclusive jurisdiction is in admiralty if the shipowner files a petition, and the admiralty court determines not only his right to limit but the validity of the claims against him. It is to the shipowner's advantage to have the claims against him adjudicated in admiralty for that forum generally provides no trial by jury in civil causes. The claimant, however, may prefer his remedy in personam in a common law court with a jury trial. Where there are multiple claims, the right of limitation can only be effected practicably by a procedure providing a concourse of all claims in a single proceeding, and the balance is thus in favor of exclusive jurisdiction in the admiralty forum.

In the single claim case the balance is not so clear. It is established that merely because the shipowner is sued first in a state court he cannot be thereby deprived of his right to limit liability. The claimant argued that, there being but one claim and hence no need for a concourse of claimants in one proceeding, he ought to be able to litigate his rights in a common law court with a jury trial under the saving clause. Prior to the decision of the Supreme Court in White v. Island Transportation Co., the lower federal courts were in disagreement as

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69 In which case no transfer of the vessel to a trustee or filing of a stipulation for the value of the shipowner's interest is necessary. The Great Western, 118 U.S. 520, 30 L. Ed. 156 (1885).
60 The procedure is set out in Supreme Court Admiralty Rules 51-54.
63 Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 66 L. Ed. 927 (1922), holding that the shipowner could obtain the advantages of limitation of liability by proper pleading in a state court action against him.
64 233 U.S. 346, 58 L. Ed. 993 (1914).
to whether state courts had jurisdiction to grant limitation of liability, and whether admiralty had such jurisdiction to do so and restrain a prior state suit where there was but a single claim. In the White case the court held that an admiralty court had jurisdiction to entertain a petition for limitation of liability and restrain a prior state suit against the vessel owner even though there was but a single claim.

The White case did not settle the matter, however, and it was not till the Aloha cases reached the court from the Western District of Washington that further light was shed on the comparative rights between the shipowner and claimant as to their choice of forum in the single claim case. In Langnes v. Green Green sued Langnes in the Superior Court of Washington for personal injuries received aboard the latter's vessel Aloha. Langnes then petitioned in admiralty for limitation of liability, which court restrained the prosecution of the state court suit and refused to dissolve the injunction on motion of Green, his being the only claim filed. This, said the Supreme Court, was an abuse of discretion; the District Court should have granted respondent’s motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent’s motion was not an idle gesture but was made with full appreciation of the state court’s entire lack of admiralty jurisdiction) unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty.

Undaunted by the Supreme Court’s language, Green, following remission of the case to the state court, “brought into question” the right of Langnes to limitation by challenging the grounds upon which the right was claimed. The District Court thereupon enjoined the state court proceeding and was affirmed in Ex Parte Green. The court reaffirmed the doctrine that the right to limitation of liability is cognizable only in a court of admiralty. The result is thus that the litigant is entitled to have the issues of liability and amount of damages determined by a jury in a common law action, but not the issue of the shipowner’s right to limit. The latest decisions of the Court of Appeals for

65 The cases are discussed in the article by McHose, Admiralty Jurisdiction and Limitation of Liability In Single Claim Cases, 22 CALIF. L. REV. 526 (1934).
66 282 U.S. 531, 75 L. Ed. 520 (1931).
67 Id. at 541, 75 L. Ed.
68 286 U.S. 437, 76 L. Ed. 1212 (1932).
the Second Circuit indicate that the proper procedure is for the claimant to file in the state court proceeding a consent to reserve the issue of the shipowner's right to limitation of liability to the admiralty court, whereupon the state court may proceed to adjudicate the issues of liability and damages.\footnote{Petition of Red Star Barge Line, Inc., 160 F. 2d 436 (C.C.A. 2, 1947); The Lavinia D, 190 F. 2d 684 (C.C.A. 2, 1951).}

**Proceedings in Rem and the Saving Clause**

We now consider a class of action on maritime causes which, by virtue of its nature, is reserved exclusively to courts of admiralty: the proceeding *in rem*. It was because the Washington court thought the proceeding before it in *Cline v. Price*\footnote{Supra, note 1.} was of this kind that it dismissed it for lack of jurisdiction.

With the advent of the steamboat upon the rivers and other inland waters of the United States in the last century, many of the states bordering those waters passed lien laws, providing for liens against vessels for torts, breach of contract of carriage, furnishing of supplies and repairs, and other matters which furnish the basis for the maritime lien in admiralty. Such state statutes provided for enforcement of the liens by direct process against the offending vessel as the defendant, with no personal proceedings against the owner required—in essential respects indistinguishable from the historic admiralty procedure *in rem* to enforce a maritime lien.\footnote{The maritime lien "is a *jus in re*, and 'it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear anything but a claim against all mankind; a suit *in rem*, asserting the claim of the libelant to the thing, as against all the world.' The Young Mechanic, 2 Curt. 404, 412." Fuller, C. J., in Moran v. Sturges, 154 U.S. 256, 282, 38 L. Ed. 981, 990 (1894). The American concept of the lien is that of a proprietary interest in the offending *res*, arising contemporaneously with the cause of action. See Hough, *Admiralty Jurisdiction of Late Years*, 37 Harv. L. Rev. 529, 541 (1924).} So long as the admiralty jurisdiction was excluded from these inland waters, there was no problem; states may create any right and remedy to enforce it where admiralty is without jurisdiction.\footnote{Hence, a state statute affording a lien to a shipbuilder and providing a remedy *in rem* against the ship enforceable in the courts of the state is valid as not in contravention of the admiralty jurisdiction. Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 44 L. Ed. 921 (1909).} When, however, the decision of the Supreme Court in *The Genesee Chief*\footnote{Supra, note 28.} made state and federal jurisdiction under the admiralty clause of the Constitution concurrent over these inland waters, the problem became acute. The rights sought to be enforced in the state courts were maritime in nature. The argument advanced to
uphold the state acts was that they merely provided a concurrent common law remedy which was expressly saved to suitors by the ninth section of the Judiciary Act of 1789, which granted exclusive original cognizance to the federal district courts 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."74

In a series of cases commencing in 1867, the Supreme Court delineated the scope of the saving clause as related to the exclusiveness of admiralty jurisdiction. The net effect of these cases is this: the saving clause gives to the states concurrent jurisdiction with admiralty over actions in personam or quasi in rem; admiralty has exclusive jurisdiction over proceedings in rem against a vessel to foreclose a maritime lien; and state statutes which create a maritime lien on a vessel with proceedings in state courts directly against the vessel to enforce it, essentially akin to the admiralty in rem proceeding, are to the latter extent invalid.

The foundation case is The Moses Taylor,75 denying to the state courts of California jurisdiction to foreclose a lien for breach of a contract of passenger carriage by proceedings in rem against a vessel. Justice Field, speaking for the court, said:

The action against the steamer by name, authorized by the Statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decree, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The court succinctly defined the scope of the saving clause in the following oft-quoted language:76

The case before us is not within the saving clause of the 9th section. That

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74 With the enactment of the new Judicial Code in 1948, this language was changed to read, "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (Supp. 1948).
75 71 U.S. 411, 18 L. Ed. 397 (1867).
76 Defining the proceeding in rem which is within the exclusive jurisdiction of admiralty, Justice Hughes substantially quoted this language in Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303, 59 L. Ed. 966, 968 (1915).
clause only saves to suitors "the right of a common law remedy, where the
common law is competent to give it." 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 court 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.

Following The Moses Taylor, the Supreme Court held that state
courts were without jurisdiction to enforce, by proceedings in rem
against the vessel, liens for collision, breach of contract of affreight-
ment, and furnishing of supplies to a vessel by a materialman. State
laws may create liens which admiralty will enforce, but the states are
limited in their enforcement of such liens to common law remedies by
actions in personam, with or without attachment of the vessel to pro-
vide security for the judgment. "The practice may be somewhat
anomalous, but it has existed from the origin of the government.

Proceedings against a vessel-owner coupled with auxiliary attach-
ment of his vessel to provide security for the plaintiff's claim are within
the competency of the state courts to entertain. So are similar actions
quasi-in-rem against a non-resident defendant, where attachment of his
vessel establishes the jurisdiction of the court as well as furnishes
security to the plaintiff. Such proceedings are well known to the com-
mon law. This was early held in Taylor v. Carryl and the proposition
has been repeated in numerous cases since.

The Supreme Court summarized the holdings of the prior cases in
Knapp, Stout & Co. v. McCaffrey as follows:

The true distinction between such proceedings as are and such as are not
invasions of the exclusive admiralty jurisdiction is this: If the cause of
action be one cognizable in admiralty, and the suit be in rem against the
thing itself, though a monition be also issued to the owner, the proceeding
is essentially one in admiralty. If, upon the other hand, the cause of action
be not one of which a court of admiralty has jurisdiction, or if the suit be
in personam against an individual defendant, with an auxiliary attachment
against a particular thing, or against the property of the defendant in gen-

78 The Belfast, 74 U.S. 624, 19 L. Ed. 266 (1869).
80 Mr. Justice Bradley in The Lottawanna, 88 U.S. 558, 580, 22 L. Ed. 654, 663
(1875).
81 61 U.S. 583, 15 L. Ed. 1028 (1857).
82 See, e.g., Leon v. Galceran, 78 U.S. 185, 20 L. Ed. 74 (1870); Knapp, Stout &
Co. v. McCaffrey, 177 U.S. 638, 44 L. Ed. 921 (1900), holding that a state court of
equity had jurisdiction to foreclose a possessory lien on a raft of logs for towage—"the
suit was clearly one in personam to enforce a common law remedy."
83 Ibid.
law, and within the saving clause of the statute (§ 563) of a common law remedy.

The Washington court in Cline v. Price predicated its holding that the lower court had no jurisdiction of the partition action upon the following syllogism: Admiralty has exclusive jurisdiction over action *in rem*, a suit for partition is essentially a proceeding *in rem*, therefore a state court is without jurisdiction of a suit for partition of a vessel. The validity of the minor premise is open to some doubt, and that of the major premise even more so if it is applied uncritically.

The court relied upon Dennis v. Godfrey for its characterization of an action for partition as one *in rem*, having said in that case, where one of the owners of the land involved was a non-resident who had not been personally served, "The proceeding was one strictly *in rem*. No personal judgment was sought or could have been obtained." But this is the sort of action which, the court's jurisdiction depending on attachment of the non-resident's property within the state, the United States Supreme Court has characterized *quasi-in-rem* as distinguished from the true *in rem* action as used in the admiralty. It was so held in an action involving partition of land in Freeman v. Alderson, where Justice Field said:

Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and...its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi-in-rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted.

Referring to the action of partition in the case before him, he stated:

Such action, though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property.85

It is suggested that the court erred in characterizing the suit for

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84 122 Wash. 207, 210 Pac. 507 (1922).
85 119 U.S. 185, 30 L. Ed. 372, 373 (1886).
partition as a proceeding in rem in Cline v. Price. But it is not enough to deduce the answer by the process of labeling alone. Even if partition be in rem, it does not necessarily follow that admiralty has exclusive jurisdiction. The ultimate question in a given case is whether there was a common law remedy; by way of illustration, a suit strictly in rem against a vessel to enforce a forfeiture for violation of municipal law was a proceeding known to the common law and thus saved to the states by virtue of the saving clause.

It is submitted that when the Supreme Court has said that actions in rem are within the exclusive jurisdiction of admiralty and not within the saving clause, it was talking solely about in rem actions, in the strict sense of the term, against a vessel to foreclose a maritime lien. The court has never denied state court jurisdiction in any other kind of case, and the language of the cases, so far as suits between private litigants are concerned, is restricted in this connection to actions in rem to enforce a maritime lien. That the proceeding in rem which admiralty jealously guards is tied to the maritime lien, seems apparent from the language of Justice Field in The Rock Island Bridge, where, referring to the maritime lien, he said:

The only object of the proceeding in rem, is to make this right, where it exists, available . . . to carry it into effect. It subserves no other purpose. The lien and the proceeding in rem are, therefore, correlative . . . where one exists, the other can be taken, and not otherwise.

The court quoted with approval from the English decision of The Bold Buccleugh: "in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim

80 Id. at 30 L. Ed. 384. In Pennoyer v. Neff, 95 U.S. 185, 24 L. Ed. 565, 573 (1878), Justice Field classified actions to partition real estate, foreclose a mortgage or enforce a lien as actions in rem in the larger sense of the word as distinguished from such actions in the strict sense of the term, meaning proceedings taken directly against the property.

87 In Fisher v. Carey, 173 Cal. 185, 159 Pac. 577, LRA 1917A 1100, it was suggested that an action to partition personal property was a remedy known solely to equity and thus not saved to the suitor by the saving clause. If true, this objection should be obviated by the change in the language of the saving clause when it was reenacted as 28 U.S.C. § 1333 in the 1948 revision of the Judicial Code. The purpose of the change, according to the revisers' notes, was to reflect the abolition of the distinction between law and equity (Rule 2, F.R.C.P.) and be more expressive of the original intent of Congress.

88 Cf. C. J. Hendry Co. v. Moore, 318 U.S. 133, 87 L. Ed. 663 (1943), upholding forfeiture proceedings in the California state courts against a purse net used in fishing in violation of the State Fish and Game Code.

89 See, in addition to the cases previously cited herein, American Steamboat Co. v. Chace, 83 U.S. 522, 21 L. Ed. 369 (1873); Moran v. Sturges, 154 U.S. 256, 38 L. Ed. 981 (1894).

90 73 U.S. 213, 18 L. Ed. 753, 754 (1867).

91 7 Moore, P. C., 284.
upon the thing to be carried into effect by legal process.\textsuperscript{92}

The suit for partition was not one in which the vessel was "itself seized and impleaded as the defendant, [to be] judged and sentenced accordingly."\textsuperscript{93} In \textit{Knapp, Stout \& Co. v. McCaffrey},\textsuperscript{94} a state court equity suit to foreclose a possessory lien on a raft of logs for towage, the Supreme Court held it incumbent on the defendant, who pleaded jurisdiction exclusively in admiralty, to show that the proceeding taken was a suit \textit{in rem} as construed in \textit{The Moses Taylor},\textsuperscript{95} \textit{The Hine v. Trevor},\textsuperscript{96} \textit{The Belfast},\textsuperscript{97} and \textit{The Glide}\textsuperscript{98}—all cases involving a suit directly against the vessel to appropriate her, as the offending \textit{res}, for the indemnification of the plaintiff. The action before it, said the court, was "no more a suit \textit{in rem} than the ordinary foreclosure of a mortgage." Since the same court in \textit{Pennoyer v. Neff}\textsuperscript{99} and \textit{Freeman v. Alderson}\textsuperscript{100} linked actions to foreclose a mortgage and actions for partition as actions \textit{in rem} only in the broad (or \textit{quasi}) sense of the term, as distinguished from the true action \textit{in rem} as defined in the admiralty cases, it should seem that the action for partition of a vessel in a state court is a remedy to which the suitor "is otherwise entitled,"\textsuperscript{101} as not infringing upon the exclusive jurisdiction of admiralty.

The Washington court in \textit{Cline v. Price} could—and it is submitted, should—have taken jurisdiction over plaintiff's lawsuit. The ultimate result of denying plaintiffs the relief sought may well be correct. As pointed out in the \textit{Cline} case, as a matter of substantive law admiralty will not decree a partition of a vessel at the behest of minority owners who object to the employment to which the vessel is put by the majority.\textsuperscript{102} As a matter of uniformity in the maritime law, binding upon both state and federal forums,\textsuperscript{103} a state court should doubtless apply this rule.\textsuperscript{104} But this is a matter of substantive law, not jurisdiction. \textit{Cline v. Price} has not clarified the scope of jurisdiction in the admiralty.

\textsuperscript{92} At 18 L. Ed. p. 755.
\textsuperscript{93} Justice Field in \textit{The Moses Taylor}, \textit{supra}, note 75.
\textsuperscript{94} \textit{Supra}, note 82.
\textsuperscript{95} \textit{Supra}, note 75.
\textsuperscript{96} \textit{Supra}, note 77.
\textsuperscript{97} \textit{Supra}, note 78.
\textsuperscript{98} \textit{Supra}, note 79.
\textsuperscript{99} \textit{Supra}, note 86.
\textsuperscript{100} \textit{Supra}, note 85.
\textsuperscript{101} The present language of the saving clause, 28 U.S.C. § 1333 (Supp. 1948).
\textsuperscript{102} 1 Benedict, \textit{op. cit.}, 158 § 74.
\textsuperscript{104} It might avoid this by holding the matter to be "local" in nature and within the "maritime but local" exception to the doctrine of uniformity. See Robinson, \textit{op. cit.}, p. 101 \textit{et seq}. 