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ADMIRALTY JURISDICTION: CRITIQUE AND SUGGESTIONS

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I. INTRODUCTION

When a new city plan is put into effect, ancient land-marks are likely to come in for rough treatment. This is sometimes a matter of necessary clearance of right of way, and sometimes merely one of conforming an antiquated style of architecture more nearly to a newer type. In the 1948 revision of the Judicial Code,¹ the latter is the motive most likely to have been at work in bringing about the rewording of the phrase "saving . . . [the] common law remedy" to maritime suitors.² To that time-honored language (coeval with the federal judiciary itself), the doctrines and practices allocating jurisdiction, as between state and federal courts, in matters maritime, have been in effect a gloss. Whether the revised phraseology, ("saving . . . any other remedy . . .") really means or can be taken to mean the same as the older formula is a matter of some question.

In any case, the change itself evidences a reconsideration, however limited in purpose, of the maritime jurisdictional structure; moreover, that change took place as a part of a revision of the entire Judicial Code, an undertaking certain to whet the appetite for further consideration of the practicalities and proprieties of federal-state allocation of judicial power. These factors make the moment a propitious one for considering whether some deliberate changes in the substance may not be overdue.³ Such an endeavor raises a number of questions. What has been the underlying pattern of admiralty and maritime jurisdiction, as determined and bounded by the applicable constitutional language and by the formula of 1789? To what extent, if any, has this pattern been changed by the revision of 1948? What, finally, in the event further change should be possible, ought to be the place of the admiralty and maritime jurisdiction in a thoroughly revised and reorganized federal jurisdictional system?

1. 28 U.S.C. §§ 1 *et seq.* (1948). The present question relates to Section 1333 of that Code.

2. REV. STAT. § 711 (1875).

3. Cf. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216-243 (1948), where the author, under the same stimulus, does for the federal jurisdiction in general what is here proposed to be done with regard to the admiralty. It will be obvious that this Article owes much to Professor Wechsler's general approach.

Such a study cannot be expected to derive anxious interest from widespread restiveness with the 1789 formulation. That formulation, with the jurisdictional pattern in which it resulted, has in fact slipped almost into the category of things inevitable and immutable—the sort of quasi-constitutional statutory law, change in which (despite theoretical susceptibility to the usual processes of amendment and repeal) one feels it almost impious to contemplate.⁴ From private conversations, indeed, I have gleaned the definite impression that the realization has not actually quite soaked in amongst admiralty specialists that this antique language has now the proper juristic force of the Code of Hammurabi, and that the long lines of cases construing it and settling the foundations of admiralty jurisdictional structure have become mere aids to the interpretation of the modernized version. Such an attitude favors what would surely be in any event a strong tendency to take the new formula as a mere redeclaration of the purport of the old, and then to regard the whole matter as resettled for another near-perpetuity.

It is true that dissatisfaction has often been expressed with certain exclusions from and inclusions within the basic category, “cases of admiralty and maritime jurisdiction,”⁵ as well as with deficiencies in the remedial machinery placed at the disposal of the federal courts of admiralty.⁶ But with respect to the fundamental structure of jurisdictional allocation to which the saving clauses old and new are the key, the task seems to have been conceived as properly one of clarification rather than of critique.

Nevertheless, although the subject is not one charged with basic emotions and tensions, it is worth another long look. The pattern of admiralty jurisdiction is a matter of interest and concern for at least two main reasons. First in general appeal, though probably not in practical importance, the institution of the maritime court must in itself be an experiment of interest; it constitutes the only major attempt in our law to set up a separate judicial tribunal, even in the attenuated form of the “side of court,” for the policing of a single industry. It is the only thing like a root-and-branch repudiation of the fundamental idea (a strength and weakness of our legal system, bypassed in part by the Commercial Courts and special courts of other countries) that judicial proceedings and rules of law ought to be as nearly as possible the same regardless of the nature of the concerns to which they are applied. True, this repudiation is in greatest part a matter of substance, and hence the maritime law rather than the court of admiralty constitutes the

4. *E.g.*, the Sherman Act or the Rules of Decision Act.

5. *E.g.*, Farnum, *Admiralty Jurisdiction and Amphibious Torts*, 43 *YALE L. J.* 34 (1933).

6. Morrison, *The Remedial Powers of the Admiralty*, 43 *YALE L. J.* 1-33 (1933). This Article also suggests doubt as to the wisdom of the saving clause formula, a doubt expanded in the present paper. *Id.* at 7.

most significant differentiating factor. But it is certain that the administrative segregation of the admiralty side has through the decades greatly aided in keeping clear and undiluted the specific characteristics of the maritime law. If this experiment, certainly one of great sociological interest, is to be carried on at all, this ought to be done in such a way as to make it most probable that the results will be meaningful.

Secondly, as a matter of more particular and immediate interest, the relevant constitutional provision⁷ recognizes with the clarity of necessary implication that the United States has a deep national concern in the business of navigation and shipping upon the high seas and upon the lakes and rivers of the country, and declares that that concern is to be expressed and made articulate primarily through the judicial branch of the federal government. This national interest is not in the mere maintenance of a set of technical *curiosa* pored over in black-letter and chuckled at for their quaintness, but in the control and regulation of a complex of affairs. The jurisdiction which is the means of articulation of this interest ought to be so shaped and its parts so distributed as best to serve the practical interest itself.

Finally, as a particular aspect of the last point, it should be said that the problem of admiralty and maritime jurisdiction is a sub-problem of federal organization. It is at the same time a problem no longer colored with the strong effects which still inhibit calm solution of certain others of the sub-problems of federalism. Approximation to a practical solution may here be sought through the processes of consideration and re-consideration, with unemotional attention to the working hypotheses and results. Such a solution, or better yet, a technique of solution, may yet make some tiny contribution in an unforeseen way to the solving of others of the constantly recurring and more inflammatory issues having to do with the relations of the federal government and the several states.

In such a field, then, one should aim not merely at a solution which avoids provoking major irritation, but rather at the optimum settlement. The general contention here will be that that optimum has not been attained, largely because it has not been sought with conscious, rational foresight. It may justifiably be postulated that the leading reason for the establishment and maintenance of admiralty jurisdiction is the national interest in a uniform judicial supervision of the maritime industry. This Article will examine the existing pattern of the jurisdiction with a view to ascertaining how far its structure follows the contours of this interest, and will suggest alterations to make the conformity more complete. Since the implementation of such a

7. U. S. Const., Art. III, § 2: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

policy inevitably entails the carrying out of an experiment as to its efficacy, this evaluation of the present jurisdictional allocation will necessarily constitute a critique of the implied experiment in the separate-industry tribunal.

II. PATTERNS OF ADMIRALTY JURISDICTION: 1789-1948

No apology probably is necessary for the recapitulation of matter familiar to the admiralty specialist; if any is needed, let it be the fond hope that this Article may come to the attention of some outside the caballic circle.

The Constitution, of course, started the whole thing: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;"⁸

The aids in projecting an "intent" behind this passage are perhaps sparser than usual.⁹ The word "maritime" was added late,¹⁰ and we are told on high authority,¹¹ and not implausibly, that this was done *ex-industria* to remove any fear of there later being inferred an equivalence of the granted power to the then ridiculously truncated jurisdiction of the British High Court of the Admiralty.¹² The main point now is that this language expressly evidences a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry. In this connection it should be noted that the subject matter is the only one specifically singled out for attention in the jurisdiction section—that this clause embodies the only express constitutional attribution of federal judicial power to a named subject matter, except for the general language of the first clause of the section.

The picture is not complete without mentioning in passing the principal inferences as to substantive law and as to legislative competence that have been drawn from this grant of judicial jurisdiction, for they evidence the completeness with which the subject has been held to be committed to the federal government. The passage has been taken to mean that there is a substantive maritime law in force and implicitly adopted by the United States. This is a "general" law moulded and modified to meet the needs of the New World,¹³ and it is in some way and to some extent (not yet en-

8. *Ibid.*

9. The whole story seems to be told in Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 *CORN. L. Q.* 460 (1925). Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROB.* 3-28 (1948), suggests that the adoption of the admiralty clause was prompted by concern for the international relations involved in shipping.

10. Putnam, *supra* note 9, at 469.

11. See Mr. Justice Story, in *De Lovio v. Boit*, 2 *Gall.* 398, *Fed. Cas. No. 3776* (C. C. Mass. 1815).

12. Or of the Vice-Admiralty courts in the colonies.

13. ROBINSON, *ADMIRALTY* 7-13 (1939); *The Lottawana*, 21 *Wall.* 558, 574 (U.S. 1874).

tirely clear) outside the power of the states to change or impair.¹⁴ Congress may, however, alter it, within limits once again unclear.¹⁵ The power to alter and the rough limits thereto are both obviously and equally necessary. For the sake of simplicity, however, in this Article the constitutional language will be considered in its literal and primary aspect, as a grant of judicial power.

On familiar principles, such a grant in such a place was merely a reservoir. Congress had yet to lay the mains. This was done in 1789 in language virtually unchanged (so far as our purpose goes)¹⁶ until 1948:

Sec. 9. And be it further enacted, That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the rights of a common law remedy, where the common law is competent to give it. . . .¹⁷

Now this is a very strange way of defining an "exclusive" jurisdiction. Exclusiveness seems to be given with one hand, and taken away, in some yet to be defined part, with the other. The very strangeness of the locution may have done something to camouflage the contours, which we are now to explore, of the even stranger effect.

The first interpretative task imposed by the quoted language is that of giving content or expanded reference to the term "cases of admiralty and maritime jurisdiction." Out of all possible cases, which are and which are not to be taken as covered by this term? The establishment of this frontier entailed several major battles and a number of minor skirmishes. A clear and defensible formula was at long last found for designating those waters material to the establishment of jurisdiction.¹⁸ "In principle" (here, as so often, a euphemism for "as a matter of very imperfectly implemented lip service") it was established that the term meant something wider than "Cases formerly subject to the jurisdiction of the High Court of Admiralty."¹⁹

14. *Southern Pacific R.R. v. Jensen*, 244 U. S. 205 (1917) (the landmark case, though somewhat eroded as to its specific holding); see *Davis v. Dept. of Labor and Industries*, 317 U. S. 249 (1942). For a general treatment, see 1 BENEDICT, ADMIRALTY 75-83 (6th ed. 1940).

15. 1 BENEDICT, *op. cit. supra* note 14, at 71-74. *Panama R. R. v. Johnson*, 264 U. S. 375 (1924).

16. The changes resulted from the attempt to include Workmen's Compensation legislation within the "saving clause." For a listing, see LORD AND SPRAGUE, *CASES ON ADMIRALTY* 6, n. 1 (1939). The development is discussed by ROBINSON, *op. cit. supra* note 13, at 93 *et seq.*

17. 1 STAT. 76 (1789), REV. STAT. § 711 (1875).

18. The development was from the English limitation (to tidewater not *infra corpus comitatus*) to the inclusion of all waters actually forming part of a connected water route of interstate or foreign commerce. *The Hine*, 4 Wall. 555 (U. S. 1866); *The Robert W. Parsons*, 191 U. S. 17 (1903).

19. *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3776 (C. C. Mass. 1815).

Finally, a fairly detailed line has been pricked out between the admiralty and the non-admiralty cases.

Roughly, the included territory may be defined somewhat as follows, with many zigzags and without obedience to either "obvious principle or . . . very accurate history":²⁰ First, a case in contract is "maritime" if the contract "concerns" the "navigation, business or commerce of the sea."²¹ A contract to repair a ship does;²² to build one, not.²³ A charter party, yes;²⁴ a broker's agreement to procure one, no.²⁵ Maritime insurance, yes;²⁶ a contract to procure it, no.²⁷ It is in this field that the zigzagging is most manifest. The attempt to project some "principle" is best left alone. There is about as much "principle" as there is in a list of irregular verbs.²⁸ Fortunately, the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided. The highly distinctive cases of general average and salvage are usually assigned somewhat arbitrarily to the contract side.²⁹

Secondly, a tort is "maritime" if it can be referred to a "locality" on navigable waters.³⁰ Since a "tort," a mental construction, doesn't "take place" anywhere, the application of this "test" gives rise to an open series of "and-now-what-if's," reminiscent intellectually of those discussions of fine points in the law of keeping bees which once rang in the Halls of Tara, and pictorially of the Marx Brothers running up and down gang planks one jump ahead of the cops.³¹ But the "test" is subject to the much more fundamental objection that it refers, however imperfectly, to arbitrary locality rather than to real and practical relation with the business and commerce of the sea.

20. See Mr. Justice Holmes, in *The Blackheath*, 195 U. S. 361, 365 (1904).

21. *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3776 (C. C. Mass. 1815); ROBINSON, *op. cit. supra* note 13, at 162-63.

22. *New Bedford Dry Dock Co. v. Purdy*, 258 U. S. 96 (1922).

23. *People's Ferry Co. v. Beers*, 20 How. 693 (U.S. 1857).

24. *Armour and Co. v. Ft. Morgan S. S. Co.*, 270 U.S. 253 (1926).

25. *The Thames*, 10 Fed. 848 (S.D.N.Y. 1881).

26. *Insurance Co. v. Dunham*, 11 Wall. 1 (U.S. 1870).

27. *Marquardt v. French*, 53 Fed. 603 (S.D.N.Y. 1893).

28. The reader who doubts this should try it out on the listing in 1 BENEDICT, *op. cit. supra* note 14, §§ 66-67.

29. ROBINSON, *op. cit. supra* note 13, at 183-84.

30. *The Plymouth*, 3 Wall. 20 (U. S. 1865). The "locality" rule has recently been abrogated by Congress, 62 STAT. 496 (1948), 46 U.S.C.A. § 740 (1949 Supp.), by the drawing into the tort jurisdiction cases of injury to person or property "caused by a vessel," whether or not "done or consummated on land." This corrects the rather shocking tactical advantage formerly enjoyed by the ship-owner whose vessel had been involved in an accident with a shore structure. ROBINSON, *op. cit. supra* note 13, at 64-69. This sort of piecemeal solution, however, falls far short of an attack on the whole question: "Which torts, in the whole range from the most literally physical to the purely commercial, are so related to the conduct of the maritime industry that the federal interest in that industry may best be implemented by drawing them into the admiralty jurisdiction?"

31. *The Admiral Peoples*, 295 U. S. 649 (1933).

Thirdly, no case is "maritime" if what is wanted is "equitable" relief or any relief other than the payment of money or the enforcement of a maritime lien.³² The historical reasons for this are perfectly sound, if one has a taste for them.³³ Their refutation, as reasons, is equally sound.³⁴ What is more to the point, if it is always rather irrelevant to delimit jurisdiction by reference to relief sought, it is ridiculous to do so in the case of a jurisdiction of great dignity set up to police an important industry. But that is how it has stood. The admiralty may enter a personal judgment for money or enforce a maritime lien. If anything else is wanted, one must go elsewhere. The exceptions, statutory in origin, are few, though the fact that they have been allowed is significant from the constitutional point of view.³⁵

The criticisms above have been tentative in character and might perhaps have been omitted at this time, for it is not even fun to carp at mere terminological convention as such. The real issues can hardly come clear until it is seen just what is to happen to the cases included within the reference of the basic term "admiralty and maritime."

For convenience we will momentarily defer consideration of the libel *in rem*, and look on the term "cases of admiralty and maritime jurisdiction" as denoting *in personam* suits based on any of the meritorious grounds suggested in the above listing. Over these the district courts are to have "exclusive" jurisdiction. Now the quoted word is meaningful only insofar as the saving clause fails to nibble away its meaning. Obeying the urge to brevity, one hastens to state that to all intents and purposes *every* claim which can be enforced in admiralty by an *in personam* libel can be enforced in state courts (or in federal courts, on the civil docket, on diversity grounds) by action *in personam*.³⁶ Thus, so far as such claims go, the exclusivity is *totally illusory*.

On the other hand, it is *only in state courts* that "equitable" relief can be had even with respect to maritime transactions and occurrences. This is the consequence of the remedial deficiency described above.

Now to revert to the libel *in rem*: this is in fact the only real item in the "exclusive" jurisdiction granted in the judiciary act to the federal district

32. *Sound Marine and Machine Corp. v. Westchester Co.*, 100 F. 2d 360 (2d Cir. 1938); 1 BENEICT, *op. cit. supra* note 14, at 148 *et seq.*

33. In brief, the High Court of the Admiralty was thought to have had no "equitable" powers.

34. Morrison, *supra* note 6, does the job. The reader with any doubts as to the feasibility or desirability of bestowing full remedial powers on the admiralty should read this classic article.

35. In limitation and in ship mortgage foreclosure proceedings, "equitable" powers have been conferred. See notes 64, 65 *infra*.

36. ROBINSON, *op. cit. supra* note 13, at 23; 1 BENEICT, *op. cit. supra* note 14, at 35. Salvage may be a partial exception; a declaration stating a salvage claim would often have been demurrable at common law. See 1 BENEICT, at 36.

courts sitting in admiralty.³⁷ The libel *in rem* must always state a case of "admiralty and maritime jurisdiction," and it must always state a case which, but for the suit's being against a personified *res* rather than a person, would have formed an appropriate foundation for the libel *in personam*. Equally definitely, it does not look toward a "common law remedy." At this point it must be emphasized and thoroughly grasped that the specific reason for the exclusion from state jurisdiction of the libel *in rem* lies in the wording of the phrase "common law remedy." The libel *in rem* has been forbidden to state courts because it is not a "common law remedy." The exclusivity here is thus tied to the precise phraseology of the saving clause; the cases make the point clear beyond cavil.³⁸

Now let's look over the picture. The coverage of the term "cases of admiralty and maritime jurisdiction" has been delimited, not on the basis of clear practical relation of the included or excluded cases to the business of navigation and transport, but on the basis of considerations of historical accident, "location" of concepts, metaphysical rather than practical conclusions as to what "concerns" what, *etc.* On such a foundation, of course, nothing perfect can be built. Even so, the next step is rather less defensible on grounds of policy. Taking the category "Cases of admiralty and maritime jurisdiction" for as much or as little as it is worth, a litigant who has a claim arising out of one of the included occurrences or transactions is told: "If you have a maritime lien great or small, federal-created or state-created, you must enforce it in the federal district court on the admiralty side. But if your maritime claim is of any other sort, you may sue either in federal court or in state court. Suit yourself. Of course if your defendant happens to be a citizen of another state, you bring him, or he can bring you, into the *civil* side of the district court, but that is a matter obviously irrelevant to the purposes of the admiralty jurisdiction. Just one thing—if you want any sort of relief other than the payment of money, state court only."

The 1789 statute, rolled resonantly off the tongue, sounds rather well, but we are now in a position to translate it into more intelligible language. The translation states the real essentials of the federal-state distribution of jurisdiction in maritime matters, and should go rather like this:³⁹ (1) The district courts shall have jurisdiction concurrent with the courts of the states

37. ROBINSON, *op. cit. supra* note 13, at 23.

38. *The Hine*, 4 Wall. 555 (U. S. 1866).

39. Eliminated from this translation is the possibility, when concurrent jurisdiction exists, of removal from a state to a federal court. Such removability is based upon diversity of citizenship and amount in controversy, an accidental factor which surely can have no connection with the policy of granting or withholding jurisdiction under the admiralty clause, particularly since the diversity jurisdiction operates only in the civil side of district courts.

(at the election of the plaintiff) in personal actions arising out of maritime occurrences and transactions, where money only is sought. (2) The courts of the states shall have exclusive jurisdiction of all personal actions arising out of maritime occurrences and transactions when any relief other than a money judgment is sought. (3) The district courts shall have exclusive jurisdiction of libels *in rem* enforcing maritime liens.

No one has ever tried to defend the above pattern. The only way to do so would be to aver that in a very large class of cases (*in personam* maritime suits), the federal interest is so large that a separate side of court, separate rules, a separate calendar are all required for the adjudication of such cases, while at the same time the federal interest is so small, so lackadaisical, so much a matter of utter indifference, that any holder of such a claim may at his own election force a defendant into a state court. Moreover, once a state court is elected, the case cannot be removed, except through the accidents of diversity and amount and *then* not into admiralty. Indeed, if any relief besides the payment of money is sought, only a state court can give it. A federal interest with such characteristics is hard to project imaginatively; certainly it could not be an interest in the orderly and uniform policing of the concerns of the maritime industry, for that can scarcely be a matter of plaintiff's choice and can scarcely choke off when someone wants reformation of an instrument or specific relief against a maritime tort.

This pattern is virtually unique in the larger scheme of federal jurisdiction. The only rationalization which could possibly support it would be an overriding interest in the convenience of the plaintiff. It is perfectly true that such an interest is discernible in certain other fields. In suits under the Federal Employers' Liability Act,⁴⁰ it has been the policy to favor the convenience of plaintiffs as a class by authorizing, as an alternative to suit in federal court, suit in the courts of the states with the incident of irremovability. Such a policy is intelligible and doubtless in some cases wise; but its existence, *a priori* unlikely in ordinary maritime commercial cases, is decisively repudiated in the present cases by the fact that removal of the state court action brought under the "saving clause" is permitted to the *civil* side of the district courts, given the requisite diversity and amount in controversy.

Under the provisions of the Emergency Price Control Act, free election between federal and state court was permitted, regardless of amount.⁴¹ Removal was usually not in the picture, because of the smallness of the claim. But in this case the policy was perfectly clear—the favoring of the conveni-

40. 35 STAT. 65 (1908), as amended, 45 U.S.C. § 56 (1946).

41. 56 STAT. 32 (1942), as amended, 58 STAT. 632, 640 (1944), 50 U.S.C. APP. § 925(c) (1942).

ence of a plaintiff who acted in part as an enforcement officer. This has nothing to do, obviously, with the maritime litigant in general.

What is left, as the actually implemented policy of the saving clause, is a rather fantastic interest in allowing free choice to a plaintiff, as between federal and state forums, where the accident of diversity is not combined with an amount in controversy of at least three thousand dollars; and even where the diversity factors are present, in allowing the plaintiff free choice as between the admiralty suit and the *civil* action, whether in state or federal court.

Now it is true that this scheme forces a certain amount of small business into the state courts, and superficially appears to operate like the amount-in-controversy requirement, though in a very rough way. But, quite aside from the unsuitability of the application of a rough-and-ready form of the amount-in-controversy yardstick to a field in which a proclaimed federal interest inheres in the judicial control of the whole subject-matter, the saving clause differs radically from the amount-in-controversy provision. The whole thing is strictly a matter of plaintiff's choice; if the plaintiff chooses to bring suit, for whatever amount, on the admiralty side of the district court, he may do so. Litigation in the cheap and accessible forum is just as important to the defendant as it is to the plaintiff. Contrary to the Employers Liability and treble damage cases referred to above, no reason appears, in maritime cases in general, for conferring this advantage, for whatever it may be worth, on the plaintiff alone.

The jury trial entailed by the selection of the action at law is necessarily left at the choice of the plaintiff. If, in certain classes of cases, there is a sound policy in permitting the plaintiff alone to elect whether his case will be tried to a jury, that is certainly not true of the ordinary cases of commercial and property adjustment which form a large part of the business of the court of admiralty and of the maritime jurisdiction. In such cases, the mode of trial, the procedural forms, and even the choice of law that unfortunately sometimes inheres in the choice of court,⁴² are a matter of just as legitimate concern to the defendant as to the plaintiff, and there seems to be no reason at all for placing the plaintiff in a position to make the choice. Indeed, the whole business of dividing maritime cases between federal admiralty and state courts, or, in the diversity situation, between admiralty and common law, on the basis of the wish of the plaintiff, seems not only irrelevant to any imaginable policy, but also actually antagonistic to the root idea behind the admiralty jurisdiction.

The federal courts sitting in admiralty ought to have exclusive jurisdiction over those cases which, as a matter of sound policy, need to be adjudi-

42. *Belden v. Chase*, 150 U. S. 674 (1893); *Calderola v. Eckert*, 332 U. S. 155 (1947).

cated there in order to uphold the federal interest in the subject-matter. If there are no such cases, then the jurisdiction should be abolished and the federal substantive interest upheld through review of state court action. Cases other than these should go to the state courts. This, indeed, is the whole essence of a sound distribution of controversies as between federal and state courts. Personal choice is normally irrelevant. In narrow classes of cases, and for good reasons specifically applicable to such cases, the plaintiff may be given a choice in the matter. No such reasons appear to cover the general case provided for by the saving clause, and it would indeed be idle to look for a reason of the requisite degree of specificity that would cover all the congeries of controversies disposed of by that clause.

The main plan, applicable in general to maritime causes, has now been sketched and discussed. Two important side-roads must be explored. Under the Jones Act,⁴³ as construed by a *tour de force*,⁴⁴ the negligence action provided in the Act may be prosecuted either in admiralty or at law. If brought at law in a state court, it cannot be removed even in diversity cases.⁴⁵ This total irremovability then distinguishes the Jones Act cases. What is more, these cases sharpen the contrast between the chaotic policylessness, on the one hand, of the treatment of admiralty causes in general, and the implementation, on the other, of a conscious policy in a specific sort of case to bestow upon an impecunious class the tactical advantage of free choice of forum.

Side by side with the Jones Act remedy, the seaman enjoys his right to indemnity for injuries suffered in consequence of the unseaworthiness of the vessel on which he serves.⁴⁶ Since this is a right arising under the "general" maritime law and since no special jurisdictional provisions have been made for it, it has fallen under the catch-all provision of the Judicial Code: suit may be brought either in admiralty or at law,⁴⁷ with the usual incidents of jury trial and diversity jurisdiction and removability. Since negligence and the failure to furnish a seaworthy ship are often little more than variant epithets hurled at the same sort of wrongful conduct, the different jurisdictional treatment accorded these two sorts of actions brings out very clearly the haphazard construction of the maritime jurisdiction edifice.

The second side-road which needs some exploration is the shipowner's substantive right to limit his liability. As a matter of statute, this right is

43. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1946).

44. *Panama R. R. v. Johnson*, 264 U. S. 375 (1924).

45. *Goetz v. Interlake Steamship Co.*, 47 F. 2d 753 (S.D.N.Y. 1931). This is the consequence of the incorporation by reference, in the Jones Act, of the Federal Employers Liability Act.

46. *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255 (1922).

47. *Proctor v. Dillon*, 235 Mass. 538, 129 N.E. 265 (1920).

enforceable only in admiralty through a petition for limitation,⁴⁸ though it may be asserted as a partial defense in a state court.⁴⁹

Now the above pattern is not rational, and fails as a whole to exhibit any coherent plan, because it really was never intended to. It was not consciously planned (one resists the usual allusion to Topsy). This Article aims at pointing out that fact and at suggesting that now might be as good a time as any to reconsider the whole subject. It may be that this allocation of judicial function in matters maritime is the best that can be devised. If that is so, it is evidence not of rational foresight, but of a providential guidance which one always ceases to deserve by depending on it too exclusively for the solution of problems.

III. THE EFFECT OF THE 1948 VERBAL CHANGES

Section 1333 of the new Judicial Code reads as follows:

Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled.⁵⁰

There is little question that the main intention behind the general change from "common law remedy" to "any other remedy" *etc.* was to codify the result and the talk of the *Red Cross*⁵¹ and similar cases.⁵² It is to make clear that any *in personam* remedy, and not merely any remedy satisfying the more or less strict understanding of the term "common law," may now be invoked on the "civil" side by the possessor of the maritime cause of action.⁵³ As long as the change goes only this far, it probably does not extend, but merely clarifies, the scope of the "saved" remedy.

Untouched, therefore (and this is quite clear), is the present plaintiff's-choice-no-removal position, so far as *in personam* libels and actions are concerned.

48. REV. STAT. § 4235 (1875), as amended, 49 STAT. 1480 (1936), 46 U.S.C. § 185 (1946).

49. *The Lotta*, 150 Fed. 219 (D.S.C. 1907); *Delaware River Ferry Co. v. Amos*, 179 Fed. 756 (E. D. Pa. 1910).

50. 28 U.S.C. § 1333 (1948).

51. *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924) (holding a state court might compel arbitration of a maritime contract). The court thought the old "saving clause" included such a remedy. Perhaps a more satisfying view would be that an action to compel arbitration was not "maritime," and hence not exclusively within the federal jurisdiction.

52. *E.g.*, *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

53. This seems to be the purport of the cryptic saying, by the Reviser, that the change brings the provision into "conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." Reviser's Notes, printed in U. S. Code Congressional Service, 80th Congress, 2nd Session, *New Title 28*, p. 1837.

This passage does nothing, and nothing is done elsewhere in the revision, to broaden the equitable or remedial powers of the admiralty side.

Thus, of the three main features of the distribution of state and federal judicial power in maritime matters, two are clearly unchanged.

Does this revision leave intact the ivy-clad rule that remits all libels *in rem* to the admiralty side of federal district courts? Long nurture, grown to second nature, cries out a scandalized affirmative, and surely everything surrounding the history of this revision would repel the inference that the main salient of the admiralty jurisdiction, the only position guarded really with any zeal, had been stormed and taken without a shot's being fired. Nevertheless it is too obvious that the reason which has previously been the sole support of this position now ceases to exist.

The reader should keep in the front of his mind the fact that retention by the federal courts of exclusive jurisdiction over the libel *in rem* has depended absolutely upon the non-inclusion of such a libel in the reference of the term "common law remedy." It was not the mere fact that the libel *in rem* was supported by a maritime cause of action that brought about this result, for that, of course, was equally true of every libel *in personam* of which admiralty took jurisdiction. The point was that the libel *in rem* was *not* a "common law remedy."

Can it equally be said that it is *not* "any other remedy to which [the libellant] is otherwise entitled?" Suppose a state should now attempt to do what many of the western states tried to do under the old "saving clause"—set up a statutory machinery for enforcing state-created liens, by *in rem* process.⁵⁴ Under the new Act, how would one phrase the objection to such a proceeding?

It is certainly within the "conflicts" competence of a state to provide for the arrest and judicial sale of chattels within the jurisdiction and under the process of its courts. This is one of the things we mean when we say "sovereignty." Naturally, due process and other constitutional requirements would have to be satisfied in devising a state *in rem* process which could by a judicial sale pass title good against the world. If that hurdle can be passed (and it seems a pretty low one),⁵⁵ then it takes a little thought to discern a further objection. A valid state statute, providing for such a procedure, seems to be just another remedy to which one is "otherwise entitled."

True, the word "otherwise" in the passage under examination makes one unhappy with any construction. Otherwise than what? If "otherwise than

54. Cf. *The Hine v. Trevor*, 4 Wall. 555 (U. S. 1866).

55. This very thing is now done in admiralty, and what is done in federal courts can hardly violate "due process," which seems the only relevant norm.

by invoking his admiralty remedy," which seems on the whole most probable, then the word is pleonastic to the point of decided irritation. If the meaning is "as if the exclusive admiralty remedy did not exist" (a meaning which, to make the chain of inference clear, may be clumsily put: "otherwise than is the present and just stated case, namely, that the federal district courts have exclusive jurisdiction"), then it would go too far. It would, in fact, negative the obvious purpose of the phrase in which it stands; a remedy which would, so far as one can tell, be available only if the admiralty jurisdiction were "otherwise" than exclusive can hardly be saved from the non-availability inferable from the exclusiveness. In point of clarity, the 1789 draftsmen were in a different league from those of 1948. But if the first of the above meanings for "otherwise" is taken, then to conclude that a litigant cannot avail himself of a state's *in rem* process in its own courts would require taking the position that such process is not a remedy to which a litigant is "entitled," notwithstanding the positive provision of state law. And certainly the reason he would not be entitled to it would have to be something other than its being "admiralty and maritime," for that is true of all the cases mentioned in Section 1333.

Nevertheless, it seems fairly safe to assume that the new language will be taken to mean just about what the old did. The announced scope of the revision in which it appears supports that view.⁵⁶ The reviser's note on the passage discloses no intent to effect any major change.⁵⁷ And as a matter of close construction, it is certainly possible to maintain that the libel *in rem* is indelibly "maritime," and that the word "other," qualifying the saved remedy, must mean "other than maritime," which a libel *in rem* cannot be. The issue in passing upon the acceptability of any new state-enforced procedure more or less like the libel *in rem* would thus be transformed into an inquiry whether the resemblance was close enough to justify the inference of a maritime character persistent in the novel remedy, rather than whether the device constituted a "common law remedy." But it nevertheless seems unlikely, and certainly cannot be assumed, that any change at all has been made in the fundamental structure of the maritime jurisdiction, as it has been allocated between the state and federal courts. Regardless of minor changes which may come about through close reading of the new provision, the main characteristics are the same as before. Whatever needed to be done still remains to be done.

56. Senator Wiley, reporting out the bill, announced, as its objectives (1) the elimination of ambiguities, inconsistencies, obsolescence and archaism; (2) the obviating of the necessity for further reference to the Statutes at Large; (3) the enactment of small, non-controversial improvements. SEN. REP. No. 1559, 80th Cong., 2d Sess. 1-2 (1948).

57. See note 53 *supra*.

IV. A RATIONALIZED ADMIRALTY JURISDICTION

It is the first thesis of this Article that the "saving" clause (new as well as old) establishes a general pattern of case allocation not sustainable on the grounds of any intelligibly formulable federal interest in treatment of the covered subject matter. That clause, therefore, ought to be done away with in its entirety.

With narrow specific exceptions, there either is or is not a federal interest in each class of cases sufficient to sustain the granting of jurisdiction to the federal courts, at least where either of the parties desires it. To leave the matter generally up to the plaintiff is a solution which cannot be placed in any sound relation of implementation to the fundamental justification postulated for the existence of the separate federal admiralty jurisdiction: the national interest in federal judicial supervision of the concerns of maritime and fluvial shipping. The experiment of dealing with the concerns of a single industry through an administratively segregated system of courts at the same time loses in clarity. What is wanted is a new basic plan of distribution of jurisdiction. It should be so laid out as to serve to the maximum possible degree the above objectives, and at the same time it should conserve as far as possible the personnel and other resources of the federal judiciary by referring to the jurisdiction of the states, with the usual provision of supervisory federal review where appropriate, those controversies which can be handled as well or better by the state court.

The following proposals (which are intended to stimulate discussion of the issues) aim at the projection of a federal-state maritime jurisdictional pattern that would consciously seek to serve these ends:

A. *Total Area of Federal "Admiralty and Maritime Jurisdiction"*

First in a thorough rethinking of the problem comes the redrawing of the lines of the whole jurisdiction, the area within which the judicial power of the United States, as applicable to maritime matters, actually subsists. Before a wise distribution of cases can be effectuated, the area to be distributed must be delimited.

The task here is one of constitutional construction, and bears a double aspect: (a) What is the utmost fairly sustainable extension of the term "admiralty and maritime jurisdiction" as used in the Constitution? (b) What other cases in the same functional or industrial context are assignable by Congressional action to the federal courts sitting in admiralty (or to other courts) under some other power, such as the commerce power?

Frankly, the present intention is, at the risk of the appearance of dogmatism, to skip full argument of every one of the subordinate issues which

might be raised in connection with the task of answering these questions. The general thesis is offered, however, that Congress would have the power to assign either to the admiralty side or to the state courts every case or controversy having a real and substantial relation to the conduct of the business of navigation and commerce on the high seas or other navigable waters; that there is, in other words, no constitutional objection to a thoroughly rational reworking, on policy lines, of this aspect of the problem. The main course of argument would go somewhat as follows:

As against the lurking theoretical objection that the cases have, in construing the 1789 statute, set up certain rather technical limitations on the meaning of the phrase there used, and therefore on the constitutional language (identical in phrasing), there is the negative reply that "it ain't necessarily so." It is merely an assumption that the same verbal form means the same thing wherever it is used, an assumption false to everyday life, as it is false to the underlying spirit of constitutional law. It is entirely reasonable, on the contrary, to assume that language setting permanent bounds to federal power over a given subject-matter may bear a wider meaning than language, verbally identical, used in the context of an easily amendable statute.⁵⁸

As a matter of positive precedent, Congress has several times enlarged the bounds of the jurisdiction as set up in the 1789 statute. These enlargements have always been sustained.⁵⁹

Finally, and without laboring the point, it seems pretty clear that any gaps between the "admiralty and maritime" formula and the criterion of real and substantial relation to shipping may be filled by reference to other powers.⁶⁰

What then, is the field in which the allocation of maritime jurisdiction may operate? Again at the risk of dogmatism, the following would seem to be a fair formulation: (1) In contract, all those cases involving the enforcement, policing, or adjustment of business arrangements as a practical matter primarily concerned with sea, lake, and river transport. (2) In tort, all those cases seeking relief for tortious conduct with respect to the subject-matter of (1), or for injuries by or to vessels or other maritime objects, or injuries to persons taking place in connection with the conduct of the business of shipping.⁶¹ (3) Miscellaneous cases referable only arbitrarily to

58. Cf. Wechsler, *supra* note 3, where an analogous point is made with respect to the first clause of Article 3, Section 2 of the Federal constitution.

59. One clear example not elsewhere mentioned herein is the Death on the High Seas Act, 41 STAT. 537 (1920), 46 U.S.C. §§ 761-68 (1946). An equally clear case is that of the Ship Mortgage Act, upheld in *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934).

60. Obviously, the commerce power as now construed almost entirely overlaps the implied congressional power under the admiralty grant.

61. A first step in this direction has recently been taken. See note 30 *supra*.

one of the above categories. This heading may be filled in after further study, but would comprise at least the cause of limitation of liability, and general average and salvage, if one hesitates to refer these to "contract."

B. *Nature and Power of the Federal Admiralty Court*

The order of presentation of the remaining proposals is somewhat arbitrary, and necessarily so, since they really form a coherent unit. It may be handier first to dispose of the question: "Assuming, for the moment, that some at least of the above cases are proper for allocation to federal court, what should be the nature of the federal court?"

The institution of the separate side of the district courts, sitting in admiralty, ought by all means to be retained. In the first place, there are strong traditional feelings to this effect. Feelings of that sort need be wounded, after all, only where there is some slight advantage to be gained. Here none appears. As long as the federal courts are to adjudicate some of the cases up to now assigned to the admiralty, there is no reason to shelve the silver oars or the name that goes with them.

But beyond this the administrative separateness of the admiralty side has clearly promoted and may presumably continue to promote the clarity of line segregating the maritime law from other branches of law. It follows thus the contours of the national interest in the separateness of the judicial institutions and the substantive rules governing this industry, and makes for clearness of result in the experiment inherent in such separateness.

The point need not be labored, since the dismantling of the admiralty court as such is likely to be favored only by those (usually not much concerned with this subject) to whom the demolition of ancient monuments is a good in itself.

One thoroughgoing change clearly nevertheless needs to be made. The least defensible feature of the present structure of the maritime jurisdiction—one that crumbles at the touch of reasonable evaluation—is the denial to the admiralty of the remedial tools necessary to do justice in whatever cases may be allotted to it. This has never been defended on any but "historical" grounds.⁶² The remedy seems to lie in the British formula:⁶³ The district court, sitting in admiralty, should simply be granted all the remedial powers enjoyed by the district court in its other branches. Constitutionality is here hardly in issue, since Congress has already been sustained in granting, in limited cases, the powers of foreclosure⁶⁴ and injunction.⁶⁵ To these should

62. See notes 6 and 34 *supra*.

63. The Judicature Act of 1873, 36 and 37 Vicr., c. 66 (1873).

64. *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934).

65. *Ex parte Green*, 286 U.S. 437 (1932) (limitation case).

be added all the other "equitable" powers as well as the power to grant declaratory relief.

C. Suggested Allocation of Admiralty Jurisdiction

Assuming the existence then, of such a court, with such powers, and assuming the power of Congress to allocate to it such of the cases listed above, as may seem wise and proper, we come to the crucial question: "Which shall these be?" It seems clearest to state the proposed solution before proceeding to its defense:

The federal district court sitting in admiralty should have exclusive jurisdiction of all those cases involving contractual, commercial, and property adjustment, necessity for which grows out of the conduct of the maritime industry. The state courts, with removal impossible either on diversity or other grounds, should have exclusive jurisdiction of all cases of personal injury, to seamen or others.

The category for federal jurisdiction is intended, as a matter of first impression, to cover all cases, other than those designated for state courts, arising primarily out of the conduct of the business of shipping. It might be narrowed upon further detailed study, but the criteria of exclusion or inclusion ought refer to the nature and degree of the real and practical relation of the type-occurrence to the industry. At a minimum, the whole present category of maritime contracts would be included within the Federal jurisdiction, augmented by other contracts (such as the charter-party brokerage contract) clearly more intimately a part of the functional pattern of the shipping industry than of any other pattern. Other subjects (*e.g.*, the shipbuilding and ship-sale contracts) should be made the subject of expert study with a view to determining whether their principal bearings and orientations are such as to make them (entirely without regard to metaphysics) primarily a part of the shipping industry, so as to fall properly within the jurisdiction of the federal court policing that industry. Property damage to or by vessels or maritime property should be included,⁶⁶ along with salvage, and general average, and limitation. Study should be given to the inclusion of "commercial" torts: interference with contractual relations, "unfair competition" in its various senses, *etc.*

The above allocation would establish, in the admiralty, a court actually charged with the responsibility and armed with the jurisdiction and remedial power needed to keep watch over the concerns of the shipping industry in their commercial and property aspects. It would be a sort of one-industry Tribunal of Commerce. As such it would be in a position to give vigorous

66. See note 30 *supra*.

articulation to the federal interest in shipping, and at the same time would implement a valuable experiment in the use of the industrial court.

The exclusivity feature, as against assimilation to the concurrent-plus-removal pattern of cases within the ambit of Article III, Section 2, clause 1, is debatable as to particular classes of cases. It can be defended in general on the ground that the thing desired is an orderly judicial administration of the industry as a whole, rather than the possible federal adjudication, where desired by the parties, of the vast miscellany of issues possible under the catch-all clause, and that the consent of the parties is not enough to defeat this industry-tied federal interest. It may well be that a more detailed breakdown of the possible cases might result in the discerning of the desirability of setting up two classes: exclusive jurisdiction and concurrent jurisdiction with the right of removal.

It might even turn out, after exhaustive analysis and canvassing of informed opinion, that in certain narrow classes of cases the "saving clause" formula could be given a specific justification which it cannot have in general. In some cases, in other words, there may be a sound and intelligible reason for leaving the choice of forum up to the plaintiff. (Maintenance and cure comes to mind.) As a start toward such a breakdown, it would be my view that the subject-matters most clearly proper to be assigned to the exclusive jurisdiction of the admiralty are two kinds. The first of these would be all controversies having to do with the adjustment of contractual claims and business arrangements in connection with shipping. Contracts of carriage, general average, salvage, charter brokers' contracts, wharfage, insurance—these and similar transactions form a coherent and integrated whole, and the judicial policing of this central part of the business of shipping is *par excellence* the concern of the admiralty tribunal. A second class would consist of collision and marine disaster, where the expertness of a special court is badly needed. The "amphibious" tort—injury by a maritime to a non-maritime object—might furnish some difficulty, not because of any metaphysical constructions as to tort "locality" but because there is a legitimate state interest in the safety of property ashore.⁶⁷ These cases should be analyzed and classified, and assignment effected on the basis of the needfulness or not of the special expertness and procedures of the admiralty court.

But in its all-important details such a study would have to be undertaken through organized effort by legal and other professional groups concerned

67. The recent broadening of the tort jurisdiction, referred to in note 30 *supra*, merely brings certain "amphibious" torts within the scope of the present "saving clause" pattern. The proposed reworking of that pattern would necessitate the decision, with respect to such amphibious torts or the several classes of them, whether they belong in admiralty or in the state courts, or both.

with maritime affairs. It seems at present that the closer analogies usually lie in the fields of patents and copyrights, where the whole subject is of such concern that not even the consent of both parties is sufficient to defeat the exclusivity of the federal jurisdiction.

What is clear is that any breakdown of cases into the two or more classes mentioned should be performed on some other basis than that of jurisdictional amount. Not only is this an unsuitable criterion in itself for establishing the degree and sort of federal interest necessary to justify the taking of jurisdiction⁶⁸ or the designation of such jurisdiction as exclusive, but also the experience in the admiralty itself has established that the criterion is an unnecessary one in that field.

It is probable that some small cases which now go into state court for costs reasons would have to come into the admiralty. The answer, and perhaps an obvious corollary to the above proposals, would be the establishment of a simplified and inexpensive procedure for dealing with such cases.

The assignment of personal injury claims to the exclusive jurisdiction of the state courts may be justified on several grounds. In these cases, the expertise of the separate court of admiralty is not nearly so much needed as in the cases involving complicated business and property adjustment. The admiralty procedure and mode of trial is quite unsuitable to them. Although the jury is often a fifth wheel in a complicated commercial case, in personal injury cases, it is a vital part of the picture, since the estimation of the intangible but real elements of damage entering into such cases is very much a matter of lay feeling. The common law courts are thoroughly used to such cases, and handling them may be looked on as part of the expertise of the common law bench and bar, as it could not be expected to be of the admiralty. Under the saving clause and the Jones Act, the common law courts have experienced no difficulty in handling maritime injury cases, and there is no reason to anticipate that the trouble would increase if all of them went into state courts.

Removal of such cases because of the accident of diversity is simply an anomaly which might as well be wiped out now. Such removal is impossible in cases brought under the Jones Act, and there is no reason why the principle should not be widened to include all personal injury cases. Experience under that Act demonstrates that federal supervision, through the normal processes of review, may be made adequate to insure the requisite uniformity.

On the general issue of uniformity, it may be pointed out that the above distribution, so long as the respective exclusivities are adhered to, at least eliminates the indefensible tactical advantages enjoyed by the plaintiff who, in choosing his forum, may often choose his law. Naturally, nothing would

68. Cf. Wechsler, *supra* note 3.

happen to the underlying choice of law problem itself; cases like *Calderola v. Eckert*,⁶⁹ seeming to hold that the bringing of suit in the state forum subjects the maritime claim to state substantive law, would be unaffected. But such cases cannot be touched by mere redistribution of jurisdiction; one can only await reconsideration of the question whether such a result is really acceptable from the point of view of a sound federal system.

There remains the problem of the libel *in rem* and the maritime lien. If there is any anomaly in the scheme which allows state courts jurisdiction over personal maritime claims, while withholding jurisdiction to enforce maritime liens based on exactly the same sort of claims, that anomaly will evaporate under these proposals as to liens arising out of transactions of the sort given over to the exclusive jurisdiction of the admiralty. Obviously, that exclusive jurisdiction would carry with it the sole power to enforce maritime liens based on the included causes of action.

There remains the lien arising out of personal injury. In general, maritime torts (other than beatings, which for some reason are excluded by rule) give rise to such liens on the offending vessel. The statutes have somewhat changed the pattern. Jones Act cases are *in personam* only.⁷⁰ Personal injuries under the "general" maritime law carry a lien.⁷¹ The Federal Death on the High Seas Act carries a lien.⁷² For death in territorial waters, the question depends on state law.⁷³ Maintenance and cure, of course, entails a lien.⁷⁴ What court should have jurisdiction to enforce these liens?

It is very possible that the whole question ought to be simplified by abolishing the maritime lien entirely in cases of personal injury. This would not preclude attachment of the vessel, or of any vessel or anything else belonging to the responsible party. It would simply take away from the holder of the claim for personal injuries the extra security of the *in rem* procedure, a security not granted to seamen suing under the Jones Act. It is hard to see why a passenger killed on the high seas (or another seaman who happens to bring his case under the "seaworthiness" formulation that has often come to be little more than an isotope of the Jones Act cause) should have a security denied to the seaman injured by the negligence of his employer. Here is just another illustration of the patternlessness of fortuitous growth in this as in so many other branches of the subject. But, on the assumption that some liens (at least those for maintenance and cure) will still subsist in personal

69. 332 U. S. 155 (1947).

70. *Plamals v. S.S. Pinar del Rio*, 277 U.S. 151 (1928).

71. *The A. Heaton*, 43 Fed. 592 (C.C. Mass. 1890).

72. 41 STAT. 537 (1920), 46 U.S.C. § 761 (1946) (providing for suit against the "vessel").

73. *Rice v. Vancouver S. S. Co.*, 60 F.2d 793 (9th Cir. 1932), *aff'd*, 288 U. S. 445 (1933).

74. *The Montezuma*, 19 F.2d 355 (2d Cir. 1927).

injury cases, nevertheless it seems necessary to allocate the enforcement of such liens, through the libel *in rem*, to the federal court sitting in admiralty. This is not because the state courts are incapable organically of administering this form of process, nor yet because the confiding of this power to them would choke the harbors with idle shipping (state claims, too, can presumably be bonded). But the *in rem* case is always likely to result in interventions, and thus to bring about a concourse of miscellaneous claimants. Such a state of affairs is clearly one which must be dealt with by whatever court has the general job, with respect to the concerns of shipping, which would be assigned to admiralty under the proposals herein. Then, too, the title decreed in its final process by the court enforcing the maritime lien (where, as rarely happens, it comes to that) may be a good deal more likely to impress "all the world" if it is issued from the courts of the United States of America.

V. CONCLUSION

Anticipation of criticism has not been attempted, for it is the purpose of this Article to provoke discussion of the present basic scheme for the allocation of judicial jurisdiction in maritime cases, rather than to present a new plan thought to be defensible from all angles. But one thing may now be said. As against the objection of vagueness in the designation of the category of cases assigned to the admiralty, it should be remarked, first, that the generalized criterion suggested (real and practical relation to or inclusion within the maritime industry and its concerns) is no more than an invitation to further definition at lower levels of generality. Moreover, even if that process were complete, I hope we have all lived too long to think that any verbal description of jurisdictional limits is going to result in anything better than a fairly discernible line. The point is that, in drawing the line on the basis of practical relations with an actually operative industrial complex, we are at least trying to draw it right, which is more than can be said of the present position.

The main thing is that if the court of admiralty is to exist at all, it should exist because the business of river, lake, and ocean shipping calls for supervision by a tribunal enjoying a particular expertness in regard to the more complicated concerns of that business. If the federal government maintains such a court, it must be because the providing of such a tribunal, and the seeing it function, is a federal concern. The proposals in the present Article suggest that a re-invigorated court of admiralty be given a jurisdiction coterminous with the industry and its need for expertise, and that the experiment then be tried whether such a court may improve the administration of justice within its field of influence.