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## THE REMEDIAL POWERS OF THE ADMIRALTY

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IN the framing of the federal Constitution scant attention was paid to that provision in Section 2 of Article III which declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." Its future scope and importance could not then be realized, and during the early years little use was made by litigants in maritime cases of the new and unfamiliar jurisdiction of the federal courts. It was only after a considerable period of development that the broad issues arising out of the simply worded constitutional grant became sufficiently pressing to require authoritative settlement. Yet there were fundamental questions that had to be answered. It was natural that the first of these to be worked out in a substantial way should be that of the scope and limits of the admiralty jurisdiction granted to the federal government. A second problem, seemingly of similar importance, but which was more slowly developed, was that of the nature and sources of the substantive law to be applied in the courts of admiralty. It was necessary, thirdly, to determine what legislative power existed over the body of maritime law and what constitutional limitations there might be to restrict its exercise. Fourthly, the concurrent jurisdiction of the common-law courts in maritime cases, which had survived the adoption of the Constitution, called for some consideration.<sup>1</sup>

In their broad outlines all these issues have now been fairly well defined. A somewhat different field of inquiry remains which has largely escaped critical attention—the scope of the remedial powers of the admiralty. Interest has recently been drawn to one aspect of this subject

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1. The Judiciary Act of 1789 provided that the federal district courts should have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 STAT. 77 (1789), 28 U. S. C. §§ 41, 371 (1926).

by the passage of the Ship Mortgage Act of 1920,<sup>2</sup> the constitutionality of which has not yet been reviewed by the Supreme Court. While the latter topic calls for ultimate consideration, it is the purpose of the present article to examine the broader subject of the types of relief generally available in our courts of admiralty. No attention, however, will be given to the most characteristic procedural feature of the maritime law—the action in rem brought to enforce a maritime lien. The power of the admiralty to entertain such a suit has always been unquestioned, and since it is the form of remedy that will be under examination here, the law of the maritime lien is not involved. So with respect to actions in personam for money damages arising out of maritime transactions, there is little to be said. Such suits have always been maintainable in admiralty in this country. It is relief other than a money judgment, whether the latter be obtained in an action in rem or in an action in personam, and particularly equitable relief, that has caused difficulty and that will be the subject of this discussion.

## I

Before entering upon that subject, it will be desirable by way of background to review briefly the way in which the courts have dealt with the other major problems referred to above. At the outset the district courts, sitting in admiralty, were faced with the necessity of determining the extent of their jurisdiction. By the Judiciary Act of 1789<sup>3</sup> this was made coextensive, so far as civil causes are concerned, with the constitutional grant; but the Constitution itself furnished no key to the interpretation of the phrase "all cases of admiralty and maritime jurisdiction." Several standards were possible. The words might have referred to the jurisdiction generally exercised by the maritime courts on the continent of Europe, where the separate admiralty jurisdiction arose and became established. These tribunals had long exercised a broad and comprehensive control over transactions of a maritime nature. Or resort might have been made to the colonial vice-admiralty jurisdiction, as it had been exercised in America prior to the Revolution. Or, finally, it might have been the intention of the framers of the Constitution to embody the standards of the admiralty of England, to which country the legal profession was accustomed to look for precedents in other fields of law. This again would involve an inquiry as to whether ancient precedent or the contemporary powers of the High Court of Admiralty were to be followed. Broadly speaking, however, these alternatives were reduced to two. For it has been commonly assumed that the jurisdiction exercised by the vice-admiralty courts

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2. Act of June 5, 1920, § 30, 41 STAT. 1000 (1920), 46 U. S. C. §§ 911-984 (1926).

3. Note 1, *supra*.

in the colonies was substantially as broad as that of the European maritime courts.<sup>4</sup> And the early powers of the English admiralty appear to have been equally extensive. In the course of time, however, much of its field had been taken away as a result of its familiar struggle with the courts of common law. The latter, jealous and distrustful of a tribunal which they regarded as alien, succeeded in reducing it to a position of comparative impotence. Their general point of view was that nothing should be left to the admiralty of which the common-law courts could conveniently take cognizance. Particularly in contract cases, by resorting to a locality test and restricting the admiralty to contracts both made and to be performed upon the sea, the jurisdiction of the latter was, with a few arbitrary exceptions, reduced nearly to the vanishing point.<sup>5</sup>

The real issue, then, in the courts of the United States was between this narrow English jurisdiction, artificially limited and proved by experience even at home to have been undesirable,<sup>6</sup> and the broader standards regarded elsewhere throughout the commercial world as fixing the normal limits of the maritime jurisdiction. In the early decisions it frequently was assumed without much consideration that the English limitations were to be followed. Opposed to this view, however, was the authority of Mr. Justice Story. In his bold and far-sighted opinion in *De Lovio v. Boit*<sup>7</sup> he contended that it was to the maritime jurisdiction known over all Europe that the language of the Constitution had reference. It was not until 1847 that this great controversy was conclusively settled by the Supreme Court. In *Waring v. Clark*<sup>8</sup> in that year, a majority, conscious of the needs of maritime commerce and of national development, decided in favor of the broader jurisdiction. With this and other decisions it became definitely established that

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4. It has, however, been vigorously contended that in spite of the broad terms of the commissions of the colonial vice-admiralty courts, the jurisdiction actually exercised by them was no greater than that of the High Court of Admiralty in England at the same period. See Woodbury, J., dissenting in *Waring v. Clarke*, 5 How. 441, 467-481 (U. S. 1847); Daniel, J., dissenting in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 395-408 (U. S. 1848), and in *Jackson v. The Steamboat Magnolia*, 20 How. 296, 307-311 (U. S. 1857); and Campbell, J., dissenting in the latter case at 322-331. But see argument of counsel in *Insurance Co. v. Dunham*, 11 Wall. 1, 4-13 (U. S. 1870); *The Underwriter*, 119 Fed. 713, 733-736 (D. Mass. 1902); HOUGH, *CASES IN VICE-ADMIRALTY AND ADMIRALTY* (1925) xviii-xx.

5. For historical reviews of the English admiralty jurisdiction, see ROSCOE, *ADMIRALTY PRACTICE* (5th ed. 1931) 1-36; 1 BENEICT, *ADMIRALTY* (5th ed. 1925) c. 46-48; MORRIS, *The Jurisdiction and Practice of the High Court of Admiralty of England* (1859) 4 SOL. J. 115, 137; Story, J., in *De Lovio v. Boit*, Fed. Cas. No. 3,776 (C. C. D. Mass. 1815).

6. The limitations imposed upon the High Court of Admiralty were eventually removed by statute and its jurisdiction reestablished upon a normal basis. 3 & 4 Vict. c. 65 (1840), and 24 & 25 Vict. c. 10 (1861).

7. *Supra* note 5.

8. *Supra* note 4.

“. . . the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England.”<sup>9</sup>

Along with this problem of the jurisdiction it was necessary also to decide what was the substantive law according to which maritime cases were to be decided. Here again the Constitution was silent, although the grant of judicial power necessarily presupposed the existence of some body of law. This much was too clear for question, that the admiralty courts must have been intended to apply the familiar, and in fact the only known, system of sea law—the so-called “general maritime law,” which with local variations was in force throughout Europe, and the principal sources of which at the time of the adoption of the Constitution were to be found in the series of sea codes from the Laws of Oleron to the Marine Ordinance of Louis XIV. But the adoption of the general maritime law only partially solved the problem.<sup>10</sup> For one thing, that law was not incorporated in toto into the law of the United States. Many provisions of the codes were obsolete, while others were rejected as being unsuitable to conditions in this country. Furthermore the old law was far from being a complete system and many questions came before the admiralty courts which could not be decided by any reference to the sea codes. In such cases the federal judges generally drew upon the source to which they were most accustomed to look for their rules—the common-law system. Sometimes they applied principles of common law and sometimes even state statutes. They did so without consideration of the difficulties that have agitated us at a later day with respect to the precise status of such law in the admiralty. To what extent was it state law subject to change by the states and to what extent federal law, perhaps derived from, but now independent of, state authority?

It was only in the series of decisions beginning with *Southern Pacific Co. v. Jensen* in 1917 that the Supreme Court attempted to give a definite

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9. Bradley, J., in *Insurance Co. v. Dunham*, *supra* note 4, at 24. See also *New Jersey Steam Navigation Co. v. Merchants' Bank*; *Jackson v. The Steamboat Magnolia*, both *supra* note 4; (Anon.) *History of Admiralty Jurisdiction in the Supreme Court of the United States* (1871) 5 AM. L. REV. 581. While European standards have been generally followed, the American jurisdiction has occasionally been more strictly limited. See *4,885 Bags of Linseed*, 1 Black 108, 113 (U. S. 1861); *Ex parte Easton*, 95 U. S. 68, 70 (1877).

10. On this general subject see *The Lottawanna*, 21 Wall. 558, 572-577 (U. S. 1874); *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215 (1917); *Panama Rr. Co. v. Johnson*, 264 U. S. 375, 385-386 (1924); Wright, *Uniformity in the Maritime Law of the United States* (1925) 73 U. OF PA. L. REV. 123, 126-131, 223, 236.

answer to that question. Recognizing that in several instances state statutes had been given effect in the admiralty, the Court limited their application by the declaration that

“. . . no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>11</sup>

Under this now familiar formula a small border zone is set apart, embracing primarily matters of local concern, in which state law is followed. But throughout the major portion of the admiralty jurisdiction national uniformity of law is required, and the states, whether by legislation or judicial decision, are rendered powerless to work change.<sup>12</sup> Now it so happens that this requirement of uniformity covers a greater field than the body of rules derived from the general maritime law. It embraces principles drawn from common-law sources,<sup>13</sup> and since these principles cannot be changed by the states it must follow that they have become federal law. It is thus clear that the courts, drawing upon such sources as they have thought desirable, have built up in admiralty a general system of federal case law, despite the protest of Mr. Justice Holmes<sup>14</sup> that the result constitutes unwarranted judicial legislation.

Over this hybrid body of substantive law extends the legislative power of Congress. While no such power is expressly granted by the Constitution, its existence has always been assumed. At one period there was a tendency to look to the commerce clause as the source of congressional authority.<sup>15</sup> But it eventually became settled that the power of legislation is derived by implication from the constitutional grant of judicial power over admiralty and maritime cases, with the aid

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11. *Southern Pacific Co. v. Jensen*, *supra* note 10, at 216. Cf. *The City of Norwalk*, 55 Fed. 98 (S. D. N. Y. 1893).

12. See *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160 (1920).

13. A familiar illustration is the substitution of the common-law doctrine of respondeat superior for the principles of limited liability contained in the general maritime law. See Cunningham, *Respondeat Superior in Admiralty* (1906) 19 HARV. L. REV. 445. Another instance is the incorporation into the maritime law of common-law rules as to master and servant. See Cunningham, *The Extension to the Admiralty of the Fellow Servant Doctrine* (1905) 18 HARV. L. REV. 294; *The Howell*, 273 Fed. 513 (C. C. A. 2d, 1921).

14. Dissenting in *Southern Pacific Co. v. Jensen*, *supra* note 10, at 218, 220-222, and in *Knickerbocker Ice Co. v. Stewart*, *supra* note 12, at 166, 167. It seems to be the view of Mr. Justice Holmes, when principles unknown to the general maritime law are applied in admiralty, that their source must lie in the common law of the States, that they are enforced as state law, and hence that they must be subject to change by the several States.

15. See *The Lottawanna*, *supra* note 10, at 577; Miller, *The Foreclosure of Vessel Mortgages in Admiralty* (1921) 70 U. OF PA. L. REV. 22.

perhaps of the clause in Section 8 of Article I which empowers Congress "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."<sup>16</sup> So far as the nature of the substantive maritime law is concerned, the control exercised by Congress is complete and covers the entire field of admiralty jurisdiction. The most characteristic principles of the maritime law may be abolished and others substituted.<sup>17</sup>

In other respects, however, the congressional power is subjected to two important constitutional limitations. One, only recently formulated, is that legislation (when not relating to matters primarily of local concern) must be coextensive with and operate uniformly in the whole of the United States.<sup>18</sup> This requirement of territorial uniformity is not suggested by the express terms of the Constitution and the imposition by the Supreme Court of such a restriction upon the legislative power seems unjustified. The second limitation relates to the boundaries of the admiralty jurisdiction. Since the judicial power is declared by the Constitution to extend "to all cases of admiralty and maritime jurisdiction," the legislative power derived from the grant must be similarly confined. And the determination of the common limits of the court jurisdiction and the legislative power necessarily depends upon the interpretation of the constitutional phrase. This, as the Supreme Court has repeatedly declared, is exclusively a judicial function.<sup>19</sup> It is as clearly so as the interpretation of the commerce clause or of due process of law. It is true, to be sure, that in determining a doubtful question the Court has been influenced by the action of Congress,<sup>20</sup> but the scope of the jurisdiction as ultimately fixed by the courts cannot be altered by legislation. This proposition would not require emphasis if it were not that there has been, and still is, a good deal of confusion as to the proper limits of the legislative power in this field and the distinction between such power and the judicial function.

16. See *Southern Pacific Co. v. Jensen*, *supra* note 10, at 214, 215; *In re Garnett*, 141 U. S. 1, 12 (1891); *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 555-557 (1889).

17. *Panama Rr. Co. v. Johnson*, *supra* note 10.

18. *Knickerbocker Ice Co. v. Stewart*, *supra* note 12; *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219 (1924). See Morrison, *Workmen's Compensation and the Maritime Law* (1929) 38 YALE L. J. 472.

19. See *The St. Lawrence*, 1 Black 522, 527 (U. S. 1861); *The Belfast*, 7 Wall. 624, 640-641 (U. S. 1868); *The Lottawanna*, *supra* note 10, at 575-576; *Butler v. Boston & Savannah Steamship Co.*, *supra* note 16, at 557; *The Blackheath*, 195 U. S. 361, 365 (1904); *Panama Rr. Co. v. Johnson*, *supra* note 10, at 386; *Crowell v. Benson*, 285 U. S. 22, 55 (1932).

20. See *The Genesee Chief v. Fitzhugh*, 12 How. 443 (U. S. 1851).

Of the general problems mentioned at the beginning of this discussion, the one remaining is that of the concurrent jurisdiction of the common-law courts in maritime cases. This matter does not call for much attention here, since it has little bearing on the major subject under consideration. It suffices to say that as an original proposition it is open to question whether the concurrent jurisdiction should ever have survived the adoption of the Constitution. Such a power in the "land courts" is not a typical accompaniment of a separate admiralty jurisdiction.<sup>21</sup> It seems to have originated in England as one of the many results of the common-law encroachment upon the admiralty; and following English precedent, it became established in the American colonies. It has been argued—and with force—that this institution, along with other English limitations upon the admiralty, should have been swept away by force of the federal Constitution.<sup>22</sup> The continuance of the concurrent jurisdiction was, however, authorized by Congress in the so-called "saving clause" of the Judiciary Act of 1789.<sup>23</sup> Since then its existence has been uninterrupted and time has doubtless foreclosed question as to its constitutionality. But it would seem at least that the existence of the common-law jurisdiction is subject to the will of Congress; in other words, that the enactment of the saving clause was a matter of grace, not of necessity.<sup>24</sup> Its effect has been limited by the recent establishment of the doctrine that the common-law courts, in deciding maritime cases brought before them under the saving clause, must apply the federal maritime law and not their own state law.<sup>25</sup>

## II

Such being in brief the manner in which these various problems have been solved, examination may now be made of the remedies available to litigants in admiralty. This is a matter to which our courts have

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21. In France, to take a leading example, although there were disputes with respect to the proper limits of jurisdiction, no concurrent jurisdiction became established. Attempts by other courts to invade the jurisdiction of the admiralty, unlike the common-law invasion of the English admiralty, were unsuccessful. See 1 VALIN, COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE DU MOIS D'AOUT, 1681 (1766) 112-127. The jurisdiction of the French admiralty was exclusive under the *Ordonnance*, Liv. I, Tit. II, Art. I and II. In England likewise, there originally seems to have been no concurrent jurisdiction. See *Steele v. Thacher*, Fed. Cas. No. 13,348, at 1205 (D. Me. 1825); *De Lovio v. Boit*, *supra* note 5. In Canada, admiralty jurisdiction is exclusively vested in the Exchequer Court. See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA (1916) 1, 33.

22. Bausman, *Admiralty and Maritime Jurisdiction* (1902) 36 AM. L. REV. 182.

23. Note 1, *supra*.

24. See *Panama Rr. Co. v. Johnson*, *supra* note 10, at 388, 390; *Wright*, *supra* note 10, at 136.

25. *Southern Pacific Co. v. Jensen*, *supra* note 10; *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372 (1918).

given little thought, and it may be worth while to inquire how far the results reached are consistent with the broad purposes of the maritime jurisdiction and the fundamental principles which elsewhere have controlled its exercise.

At the start it is necessary to review the state of the English law on this subject prior to and during the early period of American independence; for it is only in the light of the situation in the parent country that the development of the law in the United States can be understood. This, it will be remembered, was the period of eclipse of the English admiralty, when the jurisdiction of that court with respect to subject-matter was so radically limited by the prohibitions of the common-law courts. The same forces made themselves felt with respect to the remedial powers of the admiralty. The guiding principle has been thus stated by an English writer:

“Although the common lawyers were not able always to hold, firmly and consistently, the ground which they had taken, they seem, so far as they could, to have acted upon the broad rule that nothing was to be left to the Admiralty of which the common law could conveniently take cognizance. This principle, though not always avowed, and often hidden behind quaint arguments, and sometimes only loosely enforced, seems to have been the guiding principle of all the early decisions. Had the system of common law procedure been more elastic than it was, doubtless it would have been made to embrace the whole jurisdiction of the Admiralty, and one great anomaly in our law would have been removed. But the technical process of the Courts of common law limited their jurisdiction, and hampered their procedure; and it was impossible, with any show of justice, to prohibit suitors from resorting to the Admiralty in cases where that Court alone could afford a satisfactory remedy. So that, as matters at last adjusted themselves, the Admiralty judges, although compelled to abandon all claim to general maritime jurisdiction, were yet suffered to exercise undisputed authority in all maritime cases where the common law could not give redress.”<sup>26</sup>

This conception at once suggests the distinction between proceedings in rem and in personam. Since the common-law procedure made no provision for the former, the land courts could not give that sort of relief. Hence the jurisdiction of the admiralty over actions in rem remained unimpaired within the domain otherwise left to it by the courts of common law. But where the suit was in personam, there was no procedural difficulty at common law. And if the broad rule acted upon by the land courts were logically applied, it would necessarily follow that no jurisdiction at all in personam would be left to the admiralty. As a matter of fact just this position was taken by the common-law judges, although it was never enforced to its ultimate limits. In tort

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26. Roscoe, *op. cit. supra* note 5, at 8-9.



cases the admiralty always preserved some personal jurisdiction, although it perhaps was restricted to cases originally connected with the disciplinary authority of the admiralty and certainly was exercised to a much more limited extent than the jurisdiction in rem. In cases of contract, however, the restriction seems to have become complete and the jurisdiction in personam extinguished, with the exception only of suits for seamen's wages and suits based upon stipulations.<sup>27</sup>

Furthermore, in cases where relief other than money damages was sought, the powers of the High Court of Admiralty were consistently limited to proceedings which, in form at least, were in rem. This class of cases included disputes between part owners and actions to recover possession of ships. With respect to part owners of ships the major principles of substantive law governing their relations were, that the majority in interest had the right to use the vessel as they saw fit; that as between equal owners the one who was in possession had the power of a majority owner; and that as against the power of control vested in the majority, the minority interests, if they dissented from the voyage, had merely the right to security for the safe return of the vessel. This right was enforced by an action of restraint, in which the ship was arrested and detained by the court until the requisite security was furnished. In the event of disagreements between part owners the admiralty had no power to order a sale of the ship for purposes of partition, this apparently being regarded as too much in the nature of an exercise of jurisdiction in personam. If the minority were in possession and refused to surrender the ship, the majority could recover her in a possessory action, which, like the action of restraint, was a proceeding directly against the vessel herself.<sup>28</sup>

Similarly, in any case in which possession was wrongfully withheld from a shipowner, he could maintain a possessory action in admiralty. Formerly the jurisdiction had extended also to actions brought to try title to a ship (petitory actions). But this power had been taken away by the prohibitions of the common-law judges, so that even in an action for possession, once the title was put in substantial issue the jurisdiction of the admiralty was ousted.<sup>29</sup> It followed that that court could

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27. 2 BROWNE, CIVIL LAW AND THE LAW OF ADMIRALTY (1st Am. ed. 1840) 100-118; MAYERS, *op. cit. supra* note 21, at 5-26; Menetone v. Gibbons, 3 T. R. 267 (K. B. 1789); Queen v. Judge of the City of London Court, [1892] 1 Q. B. 273. *Cf.* De Lovio v. Boit, *supra* note 5, at 439.

28. Ouston v. Hebden, 1 Wils. 101 (K. B. 1745); The Apollo, 1 Hagg. Adm. 306 (1824); The Margaret, 2 Hagg. Adm. 275 (1829); ABBOTT, LAW OF MERCHANT SHIPS AND SEAMEN (14th ed. 1901) 117-128; ROSCOE, *op. cit. supra* note 5, at 43-46.

29. Thomson v. Smith, 2 Keb. 158 (K. B. 1667); The Guardian, 3 C. Rob. 93 (Adm. 1800); The Aurora, 3 C. Rob. 133 (Adm. 1800); Baxter v. Blanshard, 3 Dow. & Ry. 177 (K. B. 1823); 1 CONKLING, ADMIRALTY (2d ed. 1857) 330-339; 2 BROWNE, *op. cit. supra* note 27, at 114-118, 430-431; ROSCOE, *op. cit. supra* note 5, at 9, 37-40.

protect only the legal owner and could not enforce equitable titles or take cognizance of any equitable claims to the res. For the recognition of such rights would involve an inquiry into the state of the title as clearly as the determination of a disputed legal interest. This inability of the admiralty to deal with questions of title is enough to explain numerous limitations upon its powers with respect to relief of an equitable nature. In determining the majority interests in a possessory action equitable ownership could not be taken into consideration.<sup>30</sup> Trusts obviously could not be dealt with at all. So where transfer of the legal title had been secured by fraud, the maritime court could not restore possession to the defrauded owner. He had to resort to the chancery for relief.<sup>31</sup> Nor could the admiralty entertain a possessory action brought by the mortgagee of a ship. Not only was it debarred from giving him affirmative relief, but it could not recognize him in any way even when he appeared in a suit instituted by some one else, merely to protect his interest. The reason regularly stated for this lack of jurisdiction with respect to mortgages was that the admiralty could not interfere with questions of title or property.<sup>32</sup>

The question remains of equitable remedies in which no matters of title are involved. It has been suggested that with respect to powers analogous to those of a court of equity, the High Court of Admiralty was not subjected to the usual restrictions upon its jurisdiction. For the principal source of these restrictions lay in the prohibitions of the common-law courts, which were interested in the preservation of trial by jury; and they had no motive for taking from the admiralty powers which would only have to be turned over to another court.<sup>33</sup> This suggestion, however, cannot be given any general acceptance, since it leaves out of consideration the influence upon the admiralty jurisdiction of the equity court itself. The relations between the admiralty and the Chancellor have escaped the attention which has been paid to the famed struggle between the former and the courts of common law. In some respects their course was different. In the seventeenth century the court of chancery seems to have claimed a general concurrent jurisdiction with the admiralty and even asserted the right in the exercise of that jurisdiction to remove any cause out of the admiralty.<sup>34</sup> Poten-

30. *The Valiant*, 1 W. Rob. 64 (Adm. 1839); *The Sisters*, 5 C. Rob. 155 (Adm. 1804).

31. *The Pitt*, 1 Hagg. Adm. 240 (1824); *The Warrior*, 2 Dods. 288 (Adm. 1818).

32. *Morris*, *supra* note 5, at 119; *The Fruit Preserver*, 2 Hagg. Adm. 181 (1828); *The Portsea*, 2 Hagg. Adm. 84 (1827); *The Exmouth*, 2 Hagg. Adm. 88n (1828); *The Percy*, 3 Hagg. Adm. 402 (1837); *The Prince George*, 3 Hagg. Adm. 376 (1837). See also *The Neptune*, 3 Hagg. Adm. 129, 132 (1834); *The Fortitude*, 2 W. Rob. 217, 222 (Adm. 1843); *The Dowthorpe*, 2 W. Rob. 73 (Adm. 1843).

33. *Johnson, J.*, in *Ramsay v. Allegre*, 12 Wheat. 611, 620 (U. S. 1827); *Roscoe, op. cit. supra* note 5, at 8n.

34. *Blad v. Bamfield*, 3 Swanst. 604 (Ch. 1674); *Denew v. Stock*, 3 Swanst. 662 (Ch. 1677); *Rex v. Carew*, 3 Swanst. 669 (Ch. 1682).

tially the Chancellor was in a better position than the common-law judges to encroach upon the maritime jurisdiction, since his greater powers, particularly in the issuance of injunctions, made it possible for him to invade the field even of the action in rem in a way in which the common-law judges could not. But by the nineteenth century any exercise by the Chancellor of a real concurrent jurisdiction apparently had ceased, although some doubt was expressed as to its theoretical existence. This question arose principally with respect to the enforcement of the right of the minority owners of a ship to security for her safe return from a voyage from which they dissented. The normal remedy was an action of restraint in admiralty, but an injunction from the court of equity would be equally effective. What actually happened was that the latter court declined to interfere unless the ownership interests were in dispute. In such event the admiralty jurisdiction was ousted on account of the question of title and the Chancellor would grant relief by means of an injunction restraining the sailing of the vessel until security was given.<sup>35</sup>

The inability, or at least refusal, of the Chancellor to exercise a concurrent jurisdiction in cases like this did not, however, result in a very serious curtailment of his activities. For it applied only when the ordinary proceedings in rem in the admiralty were sufficient to afford adequate relief. In all proceedings in personam, and in instances where any characteristically equitable relief was called for, the Chancellor always exercised the same full jurisdiction in maritime that he did in non-maritime cases.<sup>36</sup> And the question of concurrent jurisdiction was eliminated by the exclusion of the court of admiralty from the field. The result was that such forms of relief as an accounting, specific performance, injunction, reformation or cancellation of contracts and relief against fraud generally, were available exclusively in chancery.<sup>37</sup> Where suits were brought in admiralty which called for equitable relief, the Chancellor would enjoin the prosecution of the action.<sup>38</sup> Although reported instances of these injunctions are few, they were as effective as the writs of prohibition issued by the common-law judges. The admiralty was so restricted that it even lacked the power, when a vessel had been

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35. *Haly v. Goodson*, 2 Meriv. 77 (Ch. 1816); *Christie v. Craig*, 2 Meriv. 137 (Ch. 1817); *Castelli v. Cook*, 7 Hare 89 (V. C. 1849); *Brenan v. Preston*, 2 De G. M. & G. 813 (Ch. 1852).

36. Subject to restrictions arising out of provisions of the ship registry acts with respect to the registration of equitable interests in ships. See (Anon.) *On Equitable Interests in Ships* (1862) 13 LAW MAG. & REV. 70.

37. *The Apollo*, *supra* note 28; *Haly v. Goodson*, *supra* note 35; *The John*, 3 C. Rob. 288 (Adm. 1801); *The Virtue*, 1 Spinks 77 (Adm. 1853); *ROSCOE*, *op. cit. supra* note 5, at 47-48; *MAYERS*, *op. cit. supra* note 21, at 60.

38. *Glascott v. Lang*, 3 Myl. & C. 451 (Ch. 1838); *Duncan v. M'Calmont*, 3 Beav. 409 (Rolls 1840).

sold in an action in rem and the maritime claims paid off, to distribute the balance of the proceeds to any non-maritime claimants such as mortgagees or supply-men. The most it could do was to hold the fund pending litigation in another court.<sup>39</sup> The relative position of the courts of equity and of admiralty is further revealed by the fact that when statutes were passed providing for limitation of the liability of ship-owners, jurisdiction over limitation proceedings was (prior to 1861) vested exclusively in the chancery and not in the admiralty.<sup>40</sup>

No inherent need is apparent for these limitations upon the powers of the admiralty in dealing with cases whose subject-matter is maritime. Originally in England such powers were certainly broader.<sup>41</sup> And it was always recognized that in the general exercise of its jurisdiction the admiralty was not bound by the technical limitations surrounding a court of common law, but could act in accordance with broad equitable principles.<sup>42</sup> This was natural enough since in its origin it was a court of civil law, whence it derived its procedure as well as the substantive principles of the general maritime law. But the scope of its specific remedial powers was not controlled by the same source. In the imposing of the limitations which developed as to equitable relief, two influences seem to have been at work. For one thing, certain procedural restrictions, such as the requirement that testimony be taken by deposition, prevented the admiralty from acting with the same freedom as a court of equity.<sup>43</sup> The second, and major, consideration seems to have been the same conception which governed the restriction of the maritime jurisdiction by the common-law courts—namely, that the admiralty should proceed only in rem. The dominant idea was that actions in rem belonged to the admiralty and actions in personam to the land courts, whether of common law or of equity.<sup>44</sup>

In England today these limitations have been swept away. The Admiralty Court Acts of 1840 and 1861,<sup>45</sup> which reestablished the maritime jurisdiction upon a normal basis, largely extended its remedial

39. *Bernard v. Hyne*, 6 Moore P. C. 56 (1847); *The Neptune*, 3 Knapp 94 (1835); *The Portsea*; *The Exmouth*, both *supra* note 32.

40. 7 GEO. II c. 15 (1734); 26 GEO. III c. 86 (1786); 53 GEO. III c. 159 (1813); 17 & 18 VICT. c. 104, § 514 (1854). See also 24 & 25 VICT. c. 10, § 13 (1861); *Milburn v. London & South Western Ry. Co.*, L. R. 6 Ex. 4 (1870).

41. See 1 BENEDICT, *op. cit. supra* note 5, §§ 621-623.

42. See *The Juliana*, 2 Dods. 504, 521 (Adm. 1822); *The Minerva*, 1 Hagg. Adm. 347, 357-358 (1825); *The Harriett*, 1 W. Rob. 182, 192 (Adm. 1841); *The Jacob*, 4 C. Rob. 245, 250 (Adm. 1802).

43. See *The Pitt*, *supra* note 31, at 243-244; *Duncan v. M'Calmont*, *supra* note 38, at 417-419; 1 CONKLING, *op. cit. supra* note 29, at 336-338.

44. See *The Neptune*, *supra* note 39, at 105, 117-118; *Mackenzie v. Ogilvie*, Mars. Adm. 134, 138 (1774).

45. 3 & 4 VICT. c. 65 (1840); 24 & 25 VICT. c. 10 (1861).

powers. The major restriction with respect to actions in personam was removed by the provision (Section 35 of the Act of 1861) that "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam." In actions between part owners the court was empowered to settle all accounts and to direct a sale of the ship. Another far-reaching change consisted in the grant of jurisdiction to hear cases involving ship mortgages and to decide all questions as to the title to or ownership of vessels. Finally, the restrictions with respect to types of relief in maritime cases have ceased to be of importance since the reorganization of the English courts under the Judicature Act of 1873.<sup>46</sup> By this statute the jurisdiction of the High Court of Admiralty was assigned to the Probate, Divorce and Admiralty Division of the High Court of Justice. And since that Division, as part of the High Court, may exercise all the jurisdictional powers of any judge thereof, it follows that the scope of relief, equitable or otherwise, available in a maritime case is now as complete as in any other class of litigation. Thus in England the old rules have ceased to be of more than historical importance. In the United States, on the other hand, their influence is still felt.

### III

In tracing now the development of the American law with respect to remedies in admiralty, the recurrent issue will be found to be whether or not these old English limitations should be followed and if so, to what extent. With respect to the primary matter of jurisdiction in personam the question was of critical importance. Since the courts of this country took a broad view of the scope of admiralty jurisdiction and generally refused to follow the narrow limits established in England with respect to its subject-matter, a far larger field existed than in England for disputes maritime in nature but in which there would be no maritime lien and hence no remedy in rem. If the admiralty courts here could not have entertained suits in personam, the exercise of this broader jurisdiction would have been largely crippled. Hence the rejection of the English tests of jurisdiction necessarily carried with it the rejection of the general English limitation with respect to personal actions, and that limitation never acquired a foothold in the United States so far as actions for money damages were concerned. That the opponents of the admiralty were alive to the significance of this is revealed by the vigorous protest of Mr. Justice Johnson in *Ramsay v.*

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46. 36 & 37 VICT. c. 66 (1873). See ROSCOE, *op. cit. supra* note 5, at 16-24, 37; MACLACHLAN, *MERCHANT SHIPPING* (6th ed. 1923) 49, 79, 98; MAYERS, *op. cit. supra* note 21, at 60, 69; *Nicholas v. Dracachis*, 1 P. D. 72 (1875); *The Horlock*, 2 P. D. 243 (1877); *Bow, McLachlan & Co. v. Ship "Camosun"*, [1909] A. C. 597, 608.

*Allegre*<sup>47</sup> in 1827, against the exercise of any greater jurisdiction in personam than that allowed to the High Court of Admiralty in England.

With regard to relief other than money damages, the English influence was not disposed of so easily, although there were a few other instances in which the American courts continued to show their independence. Thus in the case of suits between part owners, the course of development was much the same as with the major issue of the general scope of admiralty jurisdiction. There was a tendency on the part of a few of the early federal judges to regard themselves as bound by English rules and hence to hold that they had no power to decree a sale. But by a preponderance of authority it became established that here too the example of the mother country should be discarded.<sup>48</sup> And English precedents being eliminated, there was no more reason to doubt the power of the admiralty to decree a sale for purposes of partition between part owners than its power to sell the boat for the satisfaction of a maritime lien.

There did remain, however, the problem of determining the rules of substantive law which should govern such sales. The normal source of substantive rules was of course the general maritime law, and in this case that law was sought in the code of France.<sup>49</sup> This was a natural step, since during the formative period in this country the Marine Ordinance of Louis XIV was the greatest in prestige of the sea codes. The provisions of this code authorized the admiralty to sell at the suit of a part owner, but only under very limited conditions as compared with the codes of some other countries which freely allowed one part owner to force a partition upon the rest.<sup>50</sup> In the case of unequal ownership interests there was no such right at all, the majority having the full power of control over the use of the vessel. Even where the interests

47. *Supra* note 33. See also *The General Smith*, 4 Wheat. 438 (U. S. 1819); HENRY, JURISDICTION AND PROCEDURE OF THE ADMIRALTY COURTS (1885) § 115.

48. *The Orleans v. Phoebus*, 11 Pet. 175 (U. S. 1837); *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 22-23 (1885); *The Seneca*, Fed. Cas. No. 12,670 (C. C. E. D. Pa. 1829); *The Vincennes*, Fed. Cas. No. 16,944 (D. Me. 1851); *Burr v. The St. Thomas*, Fed. Cas. No. 2194a (S. D. N. Y. 1851); *The Annie H. Smith*, Fed. Cas. No. 420 (S. D. N. Y. 1878); *Coyne v. Caples*, 8 Fed. 638 (D. Ore. 1881); *The Akutan*, 17 F. (2d) 266 (W. D. Wash. 1927); *The Katalla*, 17 F. (2d) 268 (W. D. Wash. 1927). On the general subject of part owners see the excellent annotations in (1902) 90 Am. St. Rep. 355, and L. R. A. 1917A, 1108. As to the jurisdiction of the admiralty to decree the sale of a ship upon application of the master on the ground of unseaworthiness, see 1 BENEDICT, *op. cit. supra* note 5, § 112; 1 CONKLING, *op. cit. supra* note 29, at 311-317; 1 PARSONS, SHIPPING AND ADMIRALTY (1869) 74-78; 2 *id.* at 340-342.

49. *Ordonnance de la Marine*, Liv. II, Tit. VIII, Art. V & VI; 1 VALIN, *op. cit. supra* note 21, at 575-588.

50. See MACLACHLAN, *op. cit. supra* note 46, at 74-75, 78; JACOBSEN, LAWS OF THE SEA (Am. ed. 1818) 40-42; STORY, PARTNERSHIP (5th ed. 1859) § 437. *Cf.* France, Code of Commerce (1807) Art. 220; Italy, Code of Commerce (1883) Art. 495.

were equally divided, there was not a right of sale in every case. If one moiety wished to employ the ship and the other moiety wished to keep her idle, the former had the right to take her out in spite of the protest of the latter; and her employment being thus assured, no partition was authorized. But where both parties wished to use the ship but disagreed as to the voyage, the activity of the vessel would be paralyzed unless the law provided some means of breaking the deadlock. The English admiralty, having no power of sale, met this difficulty by bestowing upon the half-owner in possession the powers of a majority. But it was in this situation that the French admiralty was authorized to sell. In order that the owners of a half-interest might secure a partition, it was thus necessary for them to show that they proposed, on their part, a designated voyage, or at least for them to give plausible reasons for their objection to that desired by the other moiety.

These French rules were taken over bodily into the law of the United States.<sup>51</sup> But the law of France had this defect, that it did nothing to protect the interests of a dissentient minority owner. In England on the other hand, such owner had the right, non-existent on the Continent, to security for the safe return of the vessel, and it was the practice of the High Court of Admiralty to restrain the sailing of the vessel until such security had been given. This beneficent principle of the English law was incorporated into the American law along with the French rules as to the power of sale. Still another difficulty, however, was common to both the French and English law. The right of majority owners to control the use of the vessel was so complete that, if they chose, they could keep her idle.<sup>52</sup> This result seems inconsistent with the broad public interest in keeping the vessel in navigation, as well as with the interests of dissentient minority owners desirous of profiting from their investment. And under a few of the old codes it seems to have been possible, if the majority did not wish to employ the vessel, for the minority to send her to sea. So far as the French law is concerned, Valin justifies the rejection of such a rule on the ground that the majority must be presumed to have good reasons for wishing to keep the ship in port; and if the minority were permitted to send her out, an irresponsible part owner, having only a small interest in the ship, could expose the rest to risks which prudence would avoid. But the English device of

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51. It has been suggested by the American courts that the power of sale might be exercised in certain other situations where circumstances would otherwise prevent the employment of the vessel; but in actual practice sales have been ordered only where they would have been authorized under the Ordinance of Louis XIV. See *Tunno v. The Betsina*, Fed. Cas. No. 14,236, at 319-320 (D. S. C. 1857); *The Ocean Belle*, Fed. Cas. No. 10,402, at 525 (S. D. N. Y. 1872).

52. 1 VALIN, *op. cit. supra* note 21, at 582-583; 1 ABBOTT, *op. cit. supra* note 28, at 120; *The Elizabeth and Jane*, 1 W. Rob. 278 (Adm. 1841). The earlier English law may have been different. See MOLLOY, *DE JURE MARITIMO ET NAVALI* (1744) 220-222.

exacting security for the safe return of the vessel offered a means of meeting this difficulty. If the majority owners wished to leave the vessel idle, the public interest could be promoted by permitting the minority to employ her and the majority could be protected by requiring those taking the vessel out to give security for her safe return. While this logical step was not taken by the English courts, it is the view which has been favored in the United States.<sup>53</sup> The whole result constitutes an interesting illustration of the selective process involved in the formulation of our maritime law.

Today this subject of part owners is of small practical importance. But it is of significance in the present study because of the definite rejection by the American courts of English limitations upon the admiralty powers and because of the independence shown in the formulation from all available sources of a body of rules thought to be best adapted to American conditions. A similar point of view was taken when the issue first arose of whether our courts of admiralty had power to entertain a petitory action. It was declared by Justice Story in 1830 in a notable opinion delivered on circuit,<sup>54</sup> that the inability of the English admiralty to decide questions of title to ships was an artificial limitation upon the normal powers of maritime courts, that the English precedents were not of weight and that in this country there was no distinction in point of jurisdiction between petitory and possessory actions. This holding that the admiralty had power to decide questions of title as well as questions of possession was followed by the Supreme Court twenty-five years later, with the usual dissent from a representative of the group which sought to impose all the English limitations upon the admiralty jurisdiction in the United States.<sup>55</sup>

Thus far, then, the American courts consistently rejected the English rules, in order to establish the admiralty jurisdiction in this country upon a broad and sound basis. But it was at this point that their independence halted. When the matter of equitable rights and equitable relief was reached, they conformed to the English practice as regularly as in other instances they had departed from it. Thus, it having been determined that the admiralty courts of this country could try disputed titles, the question arose of whether equitable interests in the title to a ship could be considered. The accepted answer was that such interests

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53. See *The Orleans v. Phoebus*, *supra* note 48, at 184; *Lewis v. Kinney*, Fed. Cas. No. 8,325, at 485 (C. C. E. D. Mo. 1879); HUGHES, ADMIRALTY (2d ed. 1920) 339; STORY, *op. cit. supra* note 50, §§ 428, 434; 2 PARSONS, *op. cit. supra* note 48, at 239-242. Cf. *Willings v. Blight*, Fed. Cas. No. 17,765 (D. Pa. 1800).

54. *The Tilton*, Fed. Cas. No. 14,054 (C. C. Mass. 1830).

55. *Ward v. Peck*, 18 How. 267 (U. S. 1855). See also *Grigg v. The Clarissa Ann*, Fed. Cas. No. 5,826 (C. C. E. D. Va. 1877); *The Blairmore I*, 10 F. (2d) 35 (C. C. A. 2d, 1925).



were beyond the reach of a maritime court. So when a petitory action is brought in admiralty, the court must confine itself to a determination of the legal title. The establishment and protection of equitable interests in the ship must be left to the ordinary land courts of equity jurisdiction.<sup>56</sup> Similarly, an equitable right to possession may not be enforced in admiralty, although a legal right to possession may be so enforced even where it is based on some interest other than the title itself.<sup>57</sup>

So also where any of the ordinary types of affirmative equitable relief were sought, the view which received acceptance was that the admiralty did not possess the characteristic powers of a court of equity. It has accordingly been regularly held in this country that the admiralty may not grant an injunction,<sup>58</sup> maintain a bill or libel for specific performance,<sup>59</sup> administer or enforce a trust,<sup>60</sup> reform or cancel a maritime contract, or grant other equitable relief against fraud or mistake.<sup>61</sup> Nor may an action for an accounting be maintained, regardless of the maritime nature of the transaction involved.<sup>62</sup>

In all of these cases where equitable relief is denied, the same result would have been reached in England on the same facts. It must be

56. *The Eclipse*, 135 U. S. 599 (1890); *The Perseverance*, Fed. Cas. No. 11,017 (S. D. N. Y. 1833); *Cole v. The Brandt*, Fed. Cas. No. 2,978 (S. D. N. Y. 1841); *The William D. Rice*, Fed. Cas. No. 17,691 (D. Mass. 1857); *The C. C. Trowbridge*, 14 Fed. 874 (N. D. Ill. 1883); *The G. Reusens*, 23 Fed. 403 (S. D. N. Y. 1885); *The Ella J. Slaymaker*, 28 Fed. 767 (D. Del. 1886).

57. See *The Bonnie Doon*, 36 Fed. 770 (D. Del. 1888); *Sea Insurance Co. v. About 500 Tons of Steel Rails*, 191 Fed. 250 (E. D. Mich. 1911); *The Nellie T.*, 235 Fed. 117 (C. C. A. 2d, 1916).

58. *Paterson v. Dakin*, 31 Fed. 682 (S. D. Ala. 1887).

59. *Davis v. Child*, Fed. Cas. No. 3,628 (D. Me. 1840); *Kynoch v. The S. C. Ives*, Fed. Cas. No. 7,958 (N. D. Ohio 1856); *Deely v. The Ernest & Alice*, Fed. Cas. No. 3,735 (D. Md. 1868); *Paterson v. Dakin*, *supra* note 58; *The Robert R. Kirkland*, 92 Fed. 407 (D. N. J. 1899).

60. *The Eclipse*, *supra* note 56; *Davis v. Child*, *supra* note 59; *Kellum v. Emerson*, Fed. Cas. No. 7,669 (D. Mass. 1854); *Wenberg v. A Cargo of Mineral Phosphate*, 15 Fed. 285 (S. D. N. Y. 1883).

61. *Andrews v. Essex Fire & Marine Insurance Co.*, Fed. Cas. No. 374 (C. C. D. Mass. 1822); *The Union*, 20 Fed. 539 (N. D. Ill. 1884); *Williams v. Providence Washington Insurance Co.*, 56 Fed. 159 (S. D. N. Y. 1893); *Simmons Transportation Co. v. Alpha Portland Cement Co.*, 286 Fed. 955 (S. D. N. Y. 1922); *The Thomas P. Beal*, 298 Fed. 121 (W. D. Wash. 1924); *Koninklijke Nederlandsche Stoomboot Maatschappij v. Yglesias & Co., Inc.*, 37 F. (2d) 103 (S. D. N. Y. 1930).

62. *Grant v. Poillon*, 20 How. 162 (U. S. 1857); *Ward v. Thompson*, 22 How. 330 (U. S. 1859); *The Fair Play*, Fed. Cas. No. 4,615 (S. D. N. Y. 1830); *The H. E. Willard*, 52 Fed. 387 (C. C. D. Me. 1892). On the general subject of equitable relief, see further 1 BENELECT, *op. cit. supra* note 5, § 70; HENRY, *op. cit. supra* note 47, §§ 25, 107; 2 PARSONS, *op. cit. supra* note 48, at 344; *Dean v. Bates*, Fed. Cas. No. 3,704 (C. C. D. Mass. 1846); *The Owego*, 289 Fed. 263 (W. D. Wash. 1923); *Suzuki v. Central Argentine Ry.*, 27 F. (2d) 795, 807 (C. C. A. 2d, 1928), *cert. den.*, 278 U. S. 652 (1929).

apparent, however, from the foregoing review of the English law that there the limitations upon the powers of the maritime court were drawn along totally different lines. The High Court of Admiralty could not determine equitable interests in the title to a ship; but this was not because of any distinction between equitable interests and legal interests, but because the court was denied the power to deal with questions of title at all. The High Court of Admiralty could not cancel a maritime contract or order it specifically performed, not because the English judges drew any distinction between legal relief and equitable relief, but because the admiralty was denied the power generally to act in personam. In a court restricted to proceedings in rem, the matter of equitable relief was eliminated. While it is true that the English admiralty did in exceptional instances exercise some jurisdiction in personam, this was too limited in scope to affect the situation from the present point of view.

Why, then, should the courts of admiralty in the United States be denied an equitable jurisdiction, in view of the fact that here the basic English restrictions against entertaining suits in personam and against dealing with the title have been definitely rejected? So far as there was any further justification for the result in England, it lay in the fact that in the old days the High Court of Admiralty was subject to certain procedural limitations, which impaired its effectiveness as compared with the chancery. But these limitations have not existed in the United States. Hence in so far as English influence is responsible, the result reached here is inconsistent and illogical; and unless some independent justification can be found, it is unjustifiable. Perhaps the best way to see the situation in its true light is to apply the same technique which was resorted to in the determination of other major questions of admiralty jurisdiction in this country, as, for example, that of the extent of the waters subject to the admiralty, the test of jurisdiction in contract cases, and the power to act in personam. In each of these instances the same fundamental issue was involved. Did the Constitution contemplate the establishment of a maritime jurisdiction on the narrow and ineffective lines of the High Court of Admiralty, or was it the intention to establish that jurisdiction upon a broad and independent basis suited to the conditions existing in this country? In each instance, of course, the English model was rejected; and so far as precedents were needed the courts looked to the law and practice of the maritime tribunals of the Continent.<sup>63</sup>

Suppose that the matter of equitable relief were approached in the same way. The dominant conception would seem to be that when a

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63. See *The Genesee Chief v. Fitzhugh*, *supra* note 20; *The General Smith*, *supra* note 47; *Ramsay v. Allegre*, *supra* note 33; *Insurance Co. v. Dunham*, *supra* note 4.

separate maritime jurisdiction was created by the Constitution, it was created for the purpose of dealing effectively with maritime affairs, and should embrace such powers as are necessary adequately to do justice in maritime disputes. Now it is impossible to do justice in such disputes, any more than in non-maritime matters, without occasionally giving equitable relief. Hence, viewed as an original question, the conclusion would seem inevitable that the admiralty should possess such powers, equitable or otherwise, as are reasonably needed to accomplish that aim. To put the matter in another way, the purpose of the admiralty is not to give any particular kind of relief but to deal with a particular kind of subject-matter.

As a matter of principle therefore it would seem that the admiralty should be empowered to give equitable relief. As a matter of precedent also, there was no reason for the contrary result, once the English influence was eliminated. Continental authorities obviously afforded no support to the distinction between legal and equitable relief in admiralty, since the European judicial system did not follow such a classification. Whatever relief there was to be had in a dispute arising out of maritime subject-matter, was available in the courts of maritime jurisdiction. Much of the confusion in this matter is due to the fact that, after all, we have in our admiralty an intermingling of two different legal systems. The admiralty jurisdiction is an institution borrowed from the civil-law system, from which are derived the fundamentals of its substantive law as well as of its procedure. But to a considerable extent common-law elements have been added, and with respect to matters not seen to be specifically covered by the general maritime law, it has always been the habit of our federal judges to think and act in common-law terms. This is natural enough since they are trained primarily in the common law, and a large proportion of them ascend the bench with little or no knowledge of maritime law. Thus it is not surprising that, being familiar with the separate jurisdiction of courts of common law and of equity, they should have conceived of the admiralty as a court merely of common-law powers over maritime affairs, leaving to the chancery its special powers in both fields. It was therefore easy in this regard to fall into line with the English precedents and to lose sight of those fundamental purposes of the maritime jurisdiction, which usually have been vigilantly promoted.

This limited view of the remedial powers of the admiralty was taken in spite of a more general realization of the consequences of its civil-law origin. Its system of pleading, for example, is different from (and more simple than) that in use in our land courts. And in a broad way it has always been recognized that the maritime tribunal is not a common-law court and in its functioning is not restricted by common-law conceptions and technicalities. This may be illustrated by the following

quotation from an opinion of the Circuit Court of Appeals for the Second Circuit, where, referring to a statement of the District Court, it is said:

"The statement that 'the present action is not in equity, but at law,' must have been made inadvertently. The District Judge very well knew that the suit was neither at law nor in equity, but in admiralty, and an admiralty court administers maritime law by a procedure peculiar to itself and different from that followed by either courts of common law or of equity. The admiralty courts owe their origin largely to the civil law, and the process and methods of procedure in such courts, as was pointed out in *Richmond v. New Bedford Copper Co.*, 2 Lowell, 315, Fed. Cas. No. 11,800, are even more free from technical rules than is the case with the equity courts."<sup>64</sup>

In accordance with this general point of view the books are full of statements to the effect that the admiralty acts in accordance with equitable principles. For example:

"A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity. Its hands are not tied up by the rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction."<sup>65</sup>

It is only when the specific question of remedies is reached that the courts have departed from this general conception and, resorting to the Anglo-American distinction between law and equity, have held that the admiralty lacks the power to give equitable relief.

The question remains of whether there are any additional considerations, of either a practical or theoretical nature, which render it improper for the admiralty to administer equitable remedies. From a practical point of view there would seem to be no difficulty. The maritime jurisdiction is exercised by the federal District Courts sitting in admiralty. In the absence of specific statutory restriction no reason is apparent why a District Court hearing a case in admiralty should not act with as great freedom as when it functions as a land court. Potentially it is as capable in the one instance as in the other of issuing a decree of specific performance or one cancelling a maritime contract. That the prevailing limitation on the admiralty side is merely technical and not supported by any practical need, is plainly indicated by the extent to which the federal courts have gone in taking cognizance in maritime cases of equitable matters which come up indirectly or incidentally.

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64. *The Kalfarli*, 277 Fed. 391, 393 (C. C. A. 2d, 1921).

65. *The David Pratt*, Fed. Cas. No. 3,597, at 24 (D. Me. 1839). "Courts of Admiralty, on the matters within their jurisdiction, must be governed by equitable principles . . . They are chancery courts for the sea." *Packard v. The Louisa*, Fed. Cas. No. 10,652, at 962 (C. C. D. Mass. 1846). See also *United States v. Cornell Steamboat Co.*, 202 U. S. 184 (1906); *Brown v. Lull*, Fed. Cas. No. 2,018 (C. C. D. Mass. 1836); *Fiannacca v. Booth & Co., Inc.*, 39 F. (2d) 639 (E. D. N. Y. 1929).

Thus it is accepted doctrine that, although affirmative equitable relief is not available in the admiralty, that court will recognize and protect equitable interests which are asserted defensively. A typical case is *Chirurg v. Knickerbocker Steam Towage Co.*<sup>66</sup> There a libel was filed by the holder of the legal title to a ship to recover possession. The defense was that the libellant had secured the title by fraud, and that the respondent, who was in possession, was equitably entitled to retain the vessel. The court under these circumstances recognized the equitable rights involved and refused to give the libellant relief. In other instances also the courts have refused to give effect to a legal title or right secured by fraud, although at times the circumstances have been such that this has come close to constituting affirmative equitable relief.<sup>67</sup>

In cases such as these it is obvious enough that to enforce the legal title regardless of the equitable rights involved would be to promote the fraud and would result in intolerable injustice. In England, however, the thing was done in another way. When the land courts determined that the High Court of Admiralty should not deal with the title, they meant what they said, and it was necessary under circumstances such as these for that beleaguered tribunal to delay taking any action pending the determination by the chancery of the state of the title. The English were at least consistent. But our courts saw no reason why the litigants should be sent off to a state court, or compelled to start fresh litigation on the equity side of the District Court in the event that diversity of citizenship was present. No reason for such a course existed, once the foundations upon which the English practice rested had been rejected in this country. Eliminating English conceptions, it was simple enough for the admiralty to give effect to equitable rights asserted defensively. It would have been equally simple, and far more logical, to have gone the rest of the way and to have enforced equitable rights affirmatively as well as negatively. When the foundations were swept away, the superstructure should have gone with them. This is particularly true in the numerous cases where equitable relief in substance could be given through the typical admiralty forms of action.<sup>68</sup>

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66. 174 Fed. 188 (D. Me. 1909).

67. *The Taranto*, Fed. Cas. No. 13,751 (D. Mass. 1849); *Thurber v. The Fannie*, Fed. Cas. No. 14,014 (E. D. N. Y. 1876); *The Hero*, 6 Fed. 526 (E. D. Pa. 1881), *aff'd sub nom.*, *Hendrickson v. Wright*, 28 Fed. 242 (C. C. E. D. Pa. 1886); *The Daisy*, 29 Fed. 300 (D. Mass. 1886); *Higgins v. Anglo-Algerian Steamship Co.*, 248 Fed. 386 (C. C. A. 2d, 1918). So where a contract has been entered into by mutual mistake, although the contract may not be reformed in admiralty, the mistake may be set up as an equitable defense. *Meyer v. Pacific Mail Steamship Co.*, 58 Fed. 923 (N. D. Cal. 1893); *The Stanley H. Miner*, 172 Fed. 486 (E. D. N. Y. 1909). *Cf.* *The J. B. Lunt*, Fed. Cas. No. 7,246 (S. D. N. Y. 1853); *The Kalfarli*, *supra* note 64, discussed in (1922) 35 HARV. L. REV. 614.

68. See, for example, *Kynoch v. The S. C. Ives*, *supra* note 59; *The Amelia*, Fed. Cas.

The lack of any real practical objection to the giving of equitable relief in admiralty is made even more clear by the practice which has developed with respect to accounts. While it is regularly held that a libel will not lie for the sole purpose of an accounting, it is equally well settled that an accounting may be had where it comes up incidentally in a case which has other claims upon the maritime jurisdiction. As was said in *The L. B. Goldsmith*:

"... the matter is not so complicated as to disable the admiralty judge from passing upon the accounts of the parties. Sitting in admiralty, he may not enjoy as enlightened a conscience, as when sitting in the circuit, but he possesses the same power of facilitating his labors, by directing computation, and whether in the one or the other relation, the duty is incumbent of passing upon the various items of the accounts of the parties, and allowing or disallowing according to the rules of law, and the weight of the testimony."<sup>69</sup>

If the admiralty is thus competent to order an accounting as incidental to other relief, it is difficult to understand why it should be any the less capable of giving the same accounting by itself. Any difficulties that might exist would seem to be the same in either case. The distinction, again, was one unknown in England, where the High Court of Admiralty was denied the power to give such relief at all, incidental or otherwise. The American courts, in this field of remedies, have displayed a curious inconsistency in the way in which they have accepted or rejected English precedents. Perhaps the key to the distinctions actually made lies in an instinctive feeling that the rule denying equitable relief in admiralty lacks any substantial basis and hence in a willingness to depart from it when any special consideration of convenience is apparent. An illustration of this may be found in the matter of the disposal of a surplus remaining in the hands of the maritime court after a sale of a vessel for the satisfaction of maritime liens. Claims against such a fund are often asserted by the holders of non-maritime liens or claims against the ship. In England the High Court of Admiralty had no power to adjudicate such claims or to distribute the proceeds to the claimants, unless so directed by another court. In this country, however, it is held that, although unsecured creditors will be given no recognition, the admiralty does have the power to determine the validity of non-maritime liens or similar vested interests in the res and to distribute the surplus to such claimants.<sup>70</sup> Although this power was re-

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No. 275 (C. C. S. D. N. Y. 1877); *Wenberg v. A Cargo of Mineral Phosphate*, *supra* note 60; *The Robert R. Kirkland*, *supra* note 59.

69. Fed. Cas. No. 8,152, at 90 (D. Mich. 1856). See also *The John E. Mulford*, 18 Fed. 455 (S. D. N. Y. 1883); *The Emma B.*, 140 Fed. 771 (D. N. J. 1906); *Metropolitan Steamship Co. v. Pacific-Alaska Navigation Co.*, 260 Fed. 973 (D. Me. 1919).

70. *Schuchardt v. Babbidge*, 19 How. 239 (U. S. 1856); *The Lottawanna*, *supra* note

garded as equitable in nature, it has been felt that to turn the fund over to the general owner would be unjust; and, as in the other cases where cognizance is taken of equitable matters which come up defensively or incidentally, to require fresh litigation in the land courts would be unnecessarily cumbersome and inconvenient.

The ease with which direct equitable relief might be given in admiralty is further illustrated in an interesting way by the case of *The Olga*,<sup>71</sup> decided in the Eastern District of New York. There the majority owner of a vessel had agreed to sell her, and a libel was filed by the minority owner to prevent the former from transferring title unless a bond were given to the libelant to secure his share of the proceeds from the sale. The court thought that the case was analogous to those which hold that the admiralty has jurisdiction (where there is a dispute between owners regarding the employment of the vessel) to require the majority owners to give a bond for the safe return of the vessel, and said:

"I have been referred to no authority directly in point, but on principle it would seem that if an admiralty court has power to issue an injunction prohibiting majority owners from taking a vessel on a voyage contrary to the wish of a minority owner, unless they give a bond for its safe return, it has equal power to issue an injunction prohibiting owners from exercising other acts of ownership such as transferring title, unless a bond be given that, upon the transfer, the minority owner who objects to such transfer will receive his share of the proceeds."<sup>72</sup>

The court felt conscious of no objection to the issuance of an injunction, entirely losing sight of the doctrine that the admiralty is not supposed to give equitable relief and forgetting that the traditional method of exacting security for the safe return of the vessel has always been, not by injunction, but by an action of restraint, in which the vessel herself is seized and held in the custody of the court until the necessary bond is given.<sup>73</sup>

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10, at 582; *Harper v. New Brig*, Fed. Cas. No. 6,090 (E. D. Pa. 1835); *The Advance*, 63 Fed. 704 (S. D. N. Y. 1894); *National Bank v. Enterprise Marine Dock Co.*, 43 F. (2d) 547 (C. C. A. 4th, 1930); 1 CONKLING, *op. cit. supra* note 29, at 48-72; Admiralty Rules of Practice, Rule 42, 254 U. S. 697 (1920). Compare the admiralty practice of entertaining "libels of review," whereby a decree previously made will be set aside when there has been fraud, or similar irregularity, in the earlier suit. 1 BENEDICT, *op. cit. supra* note 5, § 275; *The Frederick der Grosse*, 37 F. (2d) 354 (S. D. N. Y. 1929); *The Astorian*, 57 F. (2d) 85 (C. C. A. 9th, 1932).

71. 254 Fed. 439 (E. D. N. Y. 1918). For comment upon this case, see Note (1919) 19 COL. L. REV. 239.

72. *Id.* at 440.

73. See the authorities cited note 28, *supra*; *Fox v. Paine*, Fed. Cas. No. 5,014 (E. D. Pa. 1839); *Bragdon v. The Kitty Simpson*, Fed. Cas. No. 1,798 (S. D. N. Y. 1857); *Sturges v. The Mary Staples*, Fed. Cas. No. 13,566a (S. D. N. Y. 1857); *The Marengo*,

Turning now to the more theoretical aspect of the general problem, the question may be asked whether, regardless of the lack of practical difficulties in the giving of equitable relief, such action would result in an infringement of any additional or extraneous principle limiting the exercise of admiralty jurisdiction. Such an objection has been raised in some of the cases, based upon the assumption that preliminary or collateral transactions are involved.<sup>74</sup> It is, of course, the established doctrine that jurisdiction in contract cases is dependent upon subject-matter.<sup>75</sup> In the application of this test, it has been regularly held that in order to be maritime a contract must in its subject-matter directly relate to maritime activities. Therefore, it is not sufficient that an agreement has some collateral relation to water-borne commerce or to navigation, or that it is merely preliminary to or grows out of another contract which is itself maritime.<sup>76</sup> For example, although a contract of affreightment is maritime, a contract to procure freight is not. So, an agreement to enter into a policy of marine insurance is non-maritime, although the policy itself is within the admiralty jurisdiction. It is on this ground, in part at least, that a partnership agreement to engage in a maritime enterprise is held to be outside the jurisdiction.<sup>77</sup>

Now the question is, to what extent is this doctrine properly involved in the cases where equitable relief is sought in admiralty. In a very few special instances, it should be recognized, the doctrine may afford a legitimate basis for denying such relief. There may be cases based upon certain trust agreements which would seem to be collateral to any

Fed. Cas. No. 9,066 (D. Mass. 1859); *The Susan E. Voorhis*, Fed. Cas. No. 13,633 (E. D. N. Y. 1879). Rule 19 of the Admiralty Rules of Practice, 254 U. S. 686 (1920), requires that in suits by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

74. See *Andrews v. Essex Fire & Marine Insurance Co.*, *supra* note 61; *Wenberg v. A Cargo of Mineral Phosphate*, *supra* note 60; *Williams v. Providence Washington Insurance Co.*, *supra* note 61; *The City of Clarksville*, 94 Fed. 201 (D. Ind. 1899).

75. *Insurance Co. v. Dunham*, *supra* note 4; *De Lovio v. Boit*, *supra* note 5.

76. *The Centurion*, Fed. Cas. No. 2,554 (D. Me. 1839); *The Thames*, 10 Fed. 848 (S. D. N. Y. 1881); *Fox v. Patton*, 22 Fed. 746 (S. D. N. Y. 1884); *The Crystal Stream*, 25 Fed. 575 (S. D. N. Y. 1885); *Marquardt v. French*, 53 Fed. 603 (S. D. N. Y. 1893); *The Harvey and Henry*, 86 Fed. 656 (C. C. A. 2d, 1898); *Richard v. Hogarth*, 94 Fed. 684 (D. N. J. 1899); *St. Paul Fire & Marine Insurance Co. v. Birrell*, 164 Fed. 104 (D. Ore. 1908); *Virginia-Carolina Chemical Co. v. Chesapeake Lighterage & Towing Co.*, 279 Fed. 684 (C. C. A. 2d, 1922). *Cf. Chase Bag Co. v. United States*, 71 Ct. Cls. 264 (1930); *F. S. Royster Guano Co. v. W. E. Hedger Co.*, 48 F. (2d) 86 (C. C. A. 2d, 1931), *cert. den.*, 283 U. S. 858 (1931).

77. *Vandewater v. Mills*, 19 How. 82 (U. S. 1856); *Ward v. Thompson*, *supra* note 62; *The Crusader*, Fed. Cas. No. 3,456 (D. Me. 1837); *Turner v. Beacham*, Fed. Cas. No. 14,252 (D. Md. 1858); *United States v. The Isaac Hammett*, Fed. Cas. No. 15,446 (W. D. Pa. 1862); *The Red Wing*, 10 F. (2d) 389 (S. D. Cal. 1925).



directly maritime matter, in the same sense as a partnership contract. In certain of the cases also where an accounting or relief against fraud is asked, the enforcement of some actual preliminary or collateral agreement may be the thing sought. On the other hand, in the great bulk of the cases involving equitable remedies, it seems plain that this doctrine as to preliminary and collateral contracts cannot properly be invoked. Certainly it has nothing to do with the issuance of injunctions or the specific performance of contracts. Even in cases where reformation or cancellation of contracts is sought on the ground of fraud or mistake, the primary issue ordinarily is the validity of an agreement which is admittedly maritime. There appears to be no justification for denying to a tribunal which is supposed to deal with maritime contracts, the power to determine whether such a contract should stand or what was the true intent of the parties. It is true that this may involve an investigation into the circumstances leading up to the execution of the agreement in question. But such an investigation is regarded as proper where it is material to the interpretation of a maritime contract or to the determination of its existence in a suit for money damages for its breach;<sup>78</sup> and it should be equally proper where it is necessary to the administration of those rights arising out of the agreement, which we call equitable. This situation should not be confused with a case where the direct enforcement is sought of a contract which in itself has no immediate relation to maritime commerce or navigation, but which is connected therewith only through the medium of a second, and maritime, agreement. The conclusion is definite, therefore, that except in a few special cases the general principles of admiralty jurisdiction in contract afford no justification for the broad doctrine that equitable relief may not be had in admiralty.

This conception that the giving of equitable relief would lead the admiralty too far afield from the point of view of the subject-matter of the jurisdiction, seems to have been at the root of another doctrine which has been gaining a foothold of recent years. This is the doctrine that even quasi contractual relief may not be given in admiralty. It may be illustrated by the case of *Israel v. Moore & McCormack Co.*<sup>79</sup> There the libelant had shipped coffee on the respondent's ship. During the voyage the ship jettisoned a part of the cargo without the knowledge of the libelant, who on arrival paid the whole freight due under the bills of lading, supposing the coffee was still on board. The libel sought the recovery of the freight paid upon the part jettisoned. Upon ordinary principles of quasi contract it is clear that a recovery would be allowed in order to prevent unjust enrichment. The District Court, however,

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78. See *Armour & Co. v. Fort Morgan Steamship Co.*, 270 U. S. 253 (1926).

79. 295 Fed. 919 (S. D. N. Y. 1920).

dismissed the libel for lack of jurisdiction. Judge Learned Hand, who heard the case, stated that he could see on principle no clear reason either way, but that the question was controlled by the decision of the Circuit Court of Appeals in *United Transportation & Lighterage Co. v. New York & Baltimore Transportation Line*.<sup>80</sup> This case, decided in 1911, apparently constitutes the starting point of the doctrine that the admiralty may not give relief in quasi contract. The facts were somewhat more complicated than in *Israel v. Moore & McCormack Co.*, and the court felt some question as to whether under ordinary principles relief could be had at law on quasi contractual grounds, or whether it would be necessary to resort to equity. It held, however, that in either event the court of admiralty had no jurisdiction. So far as equitable relief was involved, it had to be denied under the regular rule that equitable remedies may not be administered in admiralty. And even assuming that the case was of the sort where an action of assumpsit for money had and received would lie at law, a court of admiralty could not give such relief, "because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."

The court's reasoning is that a quasi contractual recovery is based upon an implied promise and that such promise is not a maritime contract, under the general rule that admiralty has no jurisdiction over agreements leading up to the execution of maritime contracts nor over non-maritime transactions growing out of the execution of maritime contracts. This conclusion is open to grave objection. So far as the general rule relating to preliminary and collateral matters is concerned, it is regularly accepted and there is no need to question its soundness.<sup>81</sup> The true issue is how far it should go. This should depend upon its underlying purpose. There is of course no clear line of demarcation between agreements whose subject-matter is maritime and those of a non-maritime character. The transition is gradual, and the existence of many close cases is inevitable. The guiding conception must be that the admiralty should not stray too far from its primary function of dealing with the transactions that arise out of navigation and maritime commerce. And where there are two distinct contracts, one admittedly maritime and the other maritime only to the extent that it is preliminary to or grows out of the first, it is reasonable enough that the line should be drawn between the

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80. 185 Fed. 386 (C. C. A. 2d, 1911). Since the decision of this case, quasi contractual relief has also been denied in *Boera Brothers v. United States*, 1924 A. M. C. 1474 (E. D. N. Y. 1924), and *Home Insurance Co. v. Merchants' Transportation Co.*, 16 F. (2d) 372 (C. C. A. 9th, 1926). Cf. *The Danebrog*, 1923 A. M. C. 405 (S. D. N. Y. 1923); *The Pacific Cedar*, 61 F. (2d) 187 (C. C. A. 9th, 1932), *cert. granted*, 289 U. S. 716 (1933).

81. But see Learned Hand, J., in *The Barryton*, 54 F. (2d) 282, 284 (C. C. A. 2d, 1931).

two. But can the case of quasi contractual recovery be assimilated with this situation? In the *United Transportation* case the Circuit Court of Appeals made the two look alike by adopting the common statement that a recovery in quasi contract is based upon an implied promise and then by regarding this promise as a separate and collateral contract. The reasoning is deceptive because the statement is false in fact. The talk of "implied promise" in quasi contract cases is purely a legal fiction. The truth of course is that there is no actual promise and no second contract. But a legal obligation to pay is imposed because this is necessary to prevent unjust enrichment from accruing as the result of mistake in the performance of the initial contract. From the point of view of admiralty jurisdiction, the true issue is whether the giving of this sort of relief is a proper function of the maritime tribunals.

It is hard for the writer to understand why there should be any difficulty about this question today. As has been stated repeatedly in this study, the cardinal conception which has guided the Supreme Court in the formulation of the law of admiralty jurisdiction in this country has been that that jurisdiction should be established upon a broad and comprehensive basis, such as will enable the maritime courts to deal adequately with maritime affairs. And certainly adequate power to deal with maritime affairs must include the power in some way to prevent unjust enrichment within that field. It is no answer that such relief is not based strictly upon the contract. The issue is whether the court is reaching beyond the sphere of maritime affairs and dealing with matters primarily related to the land and land commerce. The established, though arbitrary, limitation as to equitable relief is not involved here, since quasi contractual recovery under the Anglo-American system may be had at law. Nor can there be any general limitation requiring the admiralty to enforce only rights which are strictly in contract, or in tort. Any such possibility is foreclosed by the law of salvage and of general average. There is no function of the admiralty which is more peculiarly and characteristically maritime than the administration of these subjects. Rights of this character are not dependent on contract. One who saves property at sea acquires the right to an award of salvage, regardless of any agreement between him and the owner. Similarly, where cargo is jettisoned, the owner thereof becomes entitled to a contribution in general average from the owners of other cargo which has been saved, without the aid of a contract. In a broad way these rights may well be described as quasi contractual.<sup>82</sup> From a jurisdictional point

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82. See WOODWARD, QUASI CONTRACTS (1913) § 206, where the author says, referring to salvage, "Obviously, the essentials of quasi contractual liability, as set forth in the preceding sections (*ante*, §§ 191, 192, 197) are all present." See also MAYERS, *op. cit. supra* note 21, at 8; De Lovio v. Boit, *supra* note 5, at 444. Compare also the right in admiralty of one joint tortfeasor to recover contribution from another. 1 BENEDICT, *op. cit. supra* note 5, § 353; HUGHES, *op. cit. supra* note 53, § 151.

of view they seem indistinguishable from the ordinary quasi contractual right created to prevent unjust enrichment. In the latter case it should be sufficient that the contract out of the performance of which the unjust enrichment arises, is maritime.

Why the contrary doctrine should have come into existence as late as the present century is puzzling. The only rational basis for it would seem to lie in a desire to hold the maritime jurisdiction of the federal courts to the narrowest possible limits. Such a desire had wide vogue in the early days of the republic, and was responsible for the bitter controversy over the acceptance or rejection of the narrow English limits upon the admiralty jurisdiction. This was of course an incident to the greater controversy between the exponents of states' rights and those who believed in a powerful federal government. The resulting uncertainty in the early days as to the basic approach undoubtedly had much to do with the inception of the rule that equitable relief could not be given in admiralty. This old controversy, however, has been dead and buried too long to have been an active cause of the new doctrine as to quasi contractual relief, developed only within the last twenty-five years. The only explanation of this latest restriction upon the admiralty lies in the failure of the courts to penetrate to the true issues. Probably the rule as to equitable relief has been too long established to be overthrown by court decision. The doctrine that the admiralty cannot give a recovery in quasi contract, however, not only is of late origin but seems in conflict with certain earlier decisions upon the same question.<sup>83</sup> It has not, as yet, received the approval of the Supreme Court, and should be eradicated before it goes further.

#### IV

A precise understanding of the reasons why equitable and quasi contractual relief have not been given in admiralty would appear to be vital in the determination of another and important question—that of how far these rules established by court decision may be changed by statute. As was pointed out early in this article, Congress possesses an implied legislative power over the maritime law. This power is limited, however, by its source, which is found in the constitutional grant to the federal government of judicial power over “all cases of admiralty and maritime jurisdiction.” The interpretation of this phrase is a judicial function, and any act of Congress will be held unconstitutional which, in the opinion of the courts, attempts to extend the functions of the admiralty beyond the proper limits of the constitutional grant.<sup>84</sup> The question of

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83. For a discussion of these cases see Chandler, *Quasi Contractual Relief in Admiralty* (1928) 27 MICH. L. REV. 23. See also *St. Lawrence Sugar Refineries, Ltd. v. United States*, 31 F. (2d) 804 (S. D. N. Y. 1924).

84. Note 19, *supra*.

whether the established doctrine as to relief can be changed by Congress thus depends upon the extent to which it is based upon limitations of jurisdiction in the constitutional sense. If a suit in which equitable or quasi contractual relief is sought is not a "case of admiralty and maritime jurisdiction" within the meaning of the Constitution, it cannot be made so by statute. If, however, the rules laid down in the cases are to be regarded as limitations of substantive law, Congress may alter them at will.

So far as the cases themselves are concerned, it has been the regular practice of the courts to speak of the limitations laid down in terms of jurisdiction. But in the light of the broad interpretation generally given to the constitutional grant, it is impossible to believe that the Constitution wholly forbids the giving of equitable or quasi contractual relief in admiralty. And any such point of view has been emphatically rejected by the Supreme Court in the three instances in which it has had occasion to consider the constitutionality of legislation extending in this regard the powers of the maritime courts.

The first instance of this type of legislation is to be found in the Limited Liability Acts.<sup>85</sup> The general effect of these statutes is to enable a shipowner under specified circumstances to limit his liability for any loss, damage, etc., arising out of the operation of his vessel, to the value of such vessel and freight pending. The statutes do not specify how this limitation shall be made effective, but merely provide that the shipowners "may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."<sup>86</sup> The obviously appropriate manner of accomplishing this purpose is to bring into a single admiralty proceeding all claims coming within the scope of the legislation, which can be done through the issuance of an order restraining the prosecution of other suits. Accordingly, the Supreme Court has interpreted the statute as authorizing the issuance in admiralty of injunctions for this purpose.<sup>87</sup> Construing the Act in this way, the Court felt no doubt as to its constitutionality, although it has recognized that the proceedings are fundamentally equitable in nature. In *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, after referring to earlier decisions, the Court said:

"It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose

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85. Act of March 3, 1851, 9 STAT. 635 (1851); Act of June 26, 1884, § 18, 23 STAT. 57 (1884); Act of June 19, 1886, § 4, 24 STAT. 80 (1886), all 46 U. S. C. §§ 183-189 (1926).

86. Act of March 3, 1851, § 4, 9 STAT. 636 (1851), 46 U. S. C. § 184 (1926).

87. Admiralty Rules of Practice, Rule 51, 254 U. S. 703 (1920); *Norwich Co. v. Wright*, 13 Wall. 104 (U. S. 1871); *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578 (1883); 1 BENEDICT, *op. cit. supra* note 5, § 510.

of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell v. United States District Court*, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy . . ." <sup>88</sup>

The issuance of injunctions in admiralty was again authorized by Congress in the Longshoremen's and Harbor Workers' Compensation Act of 1927.<sup>89</sup> Section 21(b) of this Act provides that, if not in accordance with law, a compensation order may be suspended or set aside through injunction proceedings brought against the deputy commissioner making the order. In *Crowell v. Benson*,<sup>90</sup> the Supreme Court declared that this provision for injunction proceedings was not open to objection, saying that Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act. It was also said that, by statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings.

Finally, Congress has authorized the giving of equitable relief in admiralty in the United States Arbitration Act of 1925.<sup>91</sup> This statute provides (in Section 4) that a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition a court of the United States for an order directing that such arbitration proceed in the manner provided for in such agreement. In the case of contracts otherwise within the maritime jurisdiction, such proceedings are to be brought in admiralty. In the recent case of *Marine Transit Corporation v. Dreyfus*,<sup>92</sup> the constitutionality of this provision was attacked. It was argued by counsel that the effect of the Act was to confer upon the admiralty courts the equitable power to enforce specific performance of contracts, and that such power, under the well-established law as to its jurisdiction, is not vested in a court of admiralty. It was further argued that Congress cannot enlarge the jurisdiction of courts of admiralty, since the determination of what

88. 273 U. S. 207, 215-216 (1927). For further illustrations of the equitable nature of limitation proceedings, see *Oregon Rr. & Navigation Co. v. Balfour*, 90 Fed. 295 (C. C. A. 9th, 1898), *cert. den.*, 176 U. S. 685 (1900), and appeal dismissed, 179 U. S. 55 (1900); *The Salvore*, 36 F. (2d) 712 (C. C. A. 2d, 1929).

89. 44 STAT. 1424 (1927), 33 U. S. C. SUPP. VI §§ 901-950 (1932).

90. *Supra* note 19, at 49.

91. 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1926).

92. 284 U. S. 263 (1932).

matters fall within their jurisdiction is a purely judicial question. The Court, however, upheld the constitutionality of the statute, and disposed of the above arguments in the following language: .

"The general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the federal courts, and to regulate their procedure, is indisputable. The petitioner contends that the Congress could not confer upon courts of admiralty the authority to grant specific performance. But it is well settled that the Congress, in providing appropriate means to enforce obligations cognizable in admiralty, may draw upon other systems. Thus the Congress may authorize a trial by jury in admiralty, as it has done in relation to certain cases arising on the Great Lakes.<sup>93</sup> Courts of admiralty may be empowered to grant injunctions, as in proceedings for limitation of liability.<sup>94</sup> Similarly, there can be no question of the power of Congress to authorize specific performance when that is an appropriate remedy in a matter within the admiralty jurisdiction."<sup>95</sup>

These decisions make it perfectly plain that there is no constitutional objection to the issuance of injunctions or of decrees of specific performance in admiralty. The further question may be asked whether the situation is any different with respect to other forms of equitable relief. Certainly the attitude of the Supreme Court makes it apparent that so long as no more is involved than the matter of remedies, Congress may alter or enlarge the powers of the admiralty as it sees fit. The problem then becomes one of determining how far the giving of equitable relief reaches beyond the sphere of remedies and comes into conflict with other jurisdictional limitations. The only possible argument in this direction would seem to be based upon the conception previously discussed, that when a court of admiralty gives equitable relief it is taking jurisdiction not only over the primary maritime subject-matter before it, but over preliminary or collateral (and hence non-maritime) matters as well. If in fact such matters are involved, so that non-maritime agreements or transactions are being adjudicated, the conclusion may reasonably be drawn that the admiralty would be exercising jurisdiction in excess of that granted by the Constitution. For undoubtedly the general principle that preliminary and similar agreements are non-maritime embodies a limitation of jurisdiction in the constitutional sense. And it is this sort of limitation which cannot be altered by Congress. But if the analysis hereinbefore made is sound, the jurisdictional limitation in question can properly be invoked only in a few exceptional

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93. Act of February 26, 1845, c. 20, 5 Stat. 726; R. S. 566, U. S. C., Tit. 28, § 770; *The Genesee Chief*, 12 How. 443, 459, 460; *The Eagle*, 8 Wall. 15, 25. [Footnote by the Court.]

94. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207, 218. [Footnote by the Court.]

95. *Supra* note 92, at 278.

situations where a true preliminary agreement, or something analogous thereto, is actually involved. In the ordinary run of cases, where equitable or quasi contractual relief is sought, such relief can be given without the adjudication of any issues which are fundamentally non-maritime. All that is involved is the application of remedies which are needed in order to do justice in the adjudication of disputes arising out of maritime transactions. In other words, the general limitations as to equitable and quasi contractual relief established by the case law are not to be regarded as limitations of jurisdiction imposed by the Constitution, but merely as restrictions existing in the substantive maritime law. As such, Congress may remove them to such extent as it sees fit.

If this conclusion is correct that the Constitution does not prevent the giving of equitable and quasi contractual relief in admiralty, there arises afresh the question of why such remedies should not be administered without the aid of specific statutory authority. It is true of course that the constitutional grant of judicial power over "all cases of admiralty and maritime jurisdiction" is not self-executing. But the provision first contained in the Judiciary Act of 1789 by which the federal District Courts are given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction"<sup>96</sup> has always been in effect. Except as limited by the word "civil," the jurisdiction thus bestowed upon the District Courts has been regarded as coextensive with the constitutional grant; and certainly a case in which equitable or quasi contractual relief is sought comes within the category of "civil causes." It follows that the usual failure of the admiralty to give such relief cannot be attributed to any defect of jurisdiction, either constitutional or statutory. The results reached can be based only upon the theory that they are required by limitations of substantive law.

As an original proposition it is impossible to discover any good reason for such limitations in the substantive law. Within the scope of its constitutional authority, the admiralty should be deemed to possess such powers as are needed in order to do adequate justice in the settlement of maritime disputes. This was the view adopted when there were in controversy the issues of whether petitory suits, and suits between part-owners of a vessel for sale and partition,<sup>97</sup> could be maintained in admiralty. The major objection to the exercise of such power was based upon the argument that English precedents should be followed. Once the latter were rejected, no reason was apparent why the admiralty should not be endowed with liberal remedial powers. If the same point of view had been adhered to, these powers would also have included

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96. Note 1, *supra*.

97. It has been recognized that the restricted circumstances under which the admiralty will decree the sale of a vessel at the suit of a part owner are due to limitations of substantive law and not to limitations of jurisdiction. *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577 (1916).



the administration of equitable remedies. But here the course of development was different, and in the early cases there is considerable evidence to indicate that in denying equitable relief the courts of admiralty were swayed by the English rules. Why in this situation they should have bowed to that authority which was so emphatically rejected in the other very similar cases mentioned, is probably explained by two considerations. In the first place, the mental habits of judges trained in the Anglo-American legal system made it easy for them to think in terms of common-law and equity jurisdiction and to assimilate the admiralty jurisdiction with that of a court of common law. In the second place, the matter does not seem to have aroused as much controversy as did other similar questions regarding the jurisdiction and powers of the admiralty, and the true issues were never understood with the same clearness.

The lack of critical attention which has been paid to this subject of equitable remedies, together with the more recent denial of the admiralty's power to give quasi contractual relief, may perhaps suggest that after all the choice of forum is not a matter of great practical importance in these cases. But it is difficult to see why, for example, in litigation involving a maritime contract, the forum is not as important where specific performance or cancellation or reformation is sought, as where the libellant in an action in personam merely seeks money damages for its breach. The only difference would seem to be that the occasion for equitable relief arises more rarely. No doubt the need for a separate federal admiralty jurisdiction is not as great today as it was in 1789, but in interpreting the law it must be assumed that the reasons for it still exist. It was created not merely to provide for the adoption of the characteristic principles of the general maritime law, which could have been (and were) applied in state tribunals, but also to escape from local diversities and jealousies and to secure to maritime commerce the uniformity of legal administration which could be had only in the federal courts. What determines the need for these things is not the type of relief given, which from the jurisdictional point of view is merely incidental, but the maritime nature of the transactions with respect to which the relief is sought. If the separate admiralty jurisdiction has any value, it is absurd to force the litigant elsewhere merely because, upon the same subject-matter, justice demands some remedy other than money damages in tort or for breach of contract.<sup>98</sup>

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98. In the foregoing discussion of the American law, no consideration has been given to one important remedy—namely, the foreclosure in admiralty of mortgages on ships. While the matter of equitable relief is involved to some extent in such a proceeding, the power of the maritime courts over mortgages hinges also upon further problems of jurisdiction. These problems are so extensive that a discussion of them would unduly enlarge the bounds of the present study. Hence the subject will be left for consideration on another occasion.