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THE CONSTITUTIONALITY OF THE SHIP MORTGAGE ACT OF 1920

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IN an earlier number of this Journal¹ the writer discussed the remedial powers of the admiralty, particular consideration being given to the subject of equitable relief. In that discussion no attention was paid to one important remedy of an equitable nature—namely, the foreclosure of mortgages on ships. Since this is a matter which presents a special problem, treatment of it was postponed until the present occasion. Prior to the passage of the Ship Mortgage Act of 1920² the subject was dormant, for it had been settled since the decision of the United States Supreme Court eighty years ago in *Bogart v. The John Jay*³ that ship mortgages could not be foreclosed in admiralty. Jurisdiction was left wholly to the ordinary courts of equity.

That this should have been the result reached seems natural enough in view of the general doctrine that the admiralty may not give equitable relief or deal with equitable interests. That result was supported of course by the English precedents.⁴ The complete inability of the High Court of Admiralty, prior to the statutory enlargement of its jurisdiction, to deal with the title to ships was enough in itself to prevent that tribunal from exercising any jurisdiction over mortgages. While the admiralty jurisdiction in the United States was established on a broader basis than in England and actions to try the title to ships were entertained, the court's power was restricted to the legal title, and equitable interests were not considered. Since such interests are involved in a mortgage and since foreclosure proceedings constitute a characteristic equitable remedy, it would naturally follow from the general limitations just mentioned that such proceedings would fall outside the domain of the admiralty.

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1. (1933) 43 YALE L. J. 1.

2. 41 STAT. 1000-1006 (1920), 46 U. S. C. A. §§ 911-984 (1926).

3. 17 How. 399 (U. S. 1854).

4. The English and American law and precedents on these general questions have been discussed in my earlier article. See note 1, *supra*.

The same would of course be true with respect to an action brought by the mortgagor to redeem the mortgaged property. In a number of the early cases the power of the admiralty to deal with mortgages was denied on the specific ground that equitable interests in the title and equitable remedies were involved.⁵

When, however, the matter reached the Supreme Court in the leading case of *Bogart v. The John Jay*, the Court was not content to rest its decision on that ground alone. The libel there was one in rem seeking the foreclosure of a ship mortgage given to secure the amount due under a contract of purchase of the craft. The decision below, dismissing the libel for want of jurisdiction, was affirmed. The Supreme Court made the statement that courts of admiralty could not secure to the parties to such a mortgage the remedies and protection which they would have in a court of chancery, and that therefore they had "never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship."⁶ In addition the Court looked beyond the nature of the remedy to the status of the mortgage contract itself, and used language which has generally been taken to mean that the contract in its very nature was non-maritime and hence outside the admiralty jurisdiction.⁷ In subsequent cases no particular inquiry was made as to the exact grounds upon which the Court meant to place its decision, since the decision itself remained unquestioned. But with the enactment of the Ship Mortgage Act in 1920, the matter ceased to be one of academic interest merely and became one of vital importance. For the constitutionality of the Act hinges upon the effect to be given to *Bogart v. The John Jay*.

The Ship Mortgage Act forms a part of the Merchant Marine Act of 1920,⁸ which Congress enacted with the declared purpose of developing

5. *Leland v. The Medora*, 15 Fed. Cas. No. 8,237, p. 298 (C. C. D. Mass. 1846); *Dean v. Bates*, 7 Fed. Cas. No. 3,704, p. 299 (C. C. D. Mass. 1846); *The J. B. Lunt v. Merritt*, 13 Fed. Cas. No. 7,247, p. 428 (S. D. N. Y. 1853); *The John Jay*, 13 Fed. Cas. No. 7,352, p. 686 (C. C. S. D. N. Y. 1853), *aff'd sub nom. Bogart v. The John Jay*, 17 How. 399 (U. S. 1854); *The Martha Washington*, 16 Fed. Cas. No. 9,148, p. 871 (D. Me. 1860).

6. 17 How. 399, 401-402 (U. S. 1854).

7. In *The J. E. Rumbell*, 148 U. S. 1, 15 (1893), the Supreme Court said:

"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it." (Citing *The John Jay*.)

See also *The William D. Rice*, 29 Fed. Cas. No. 17,691, p. 1296 (D. Mass. 1857); *The Guiding Star*, 9 Fed. 521 (S. D. Ohio, 1881); *Britton v. The Venture*, 21 Fed. 928 (W. D. Pa. 1884); *The Clifton*, 143 Fed. 460 (C. C. A. 4th, 1906); *The Rupert City*, 213 Fed. 263 (W. D. Wash. 1914); *The Ocean View*, 21 F. (2d) 875 (D. Md. 1927).

8. 41 STAT. 988-1008 (1920), 46 U. S. C. §§ 861-984 (1926).

and encouraging the maintenance of the merchant marine of the nation. Its specific function is to establish a class of mortgages on ships which shall be enforceable in admiralty. Mortgages executed in compliance with certain conditions enumerated in the Act are denominated "preferred mortgages." With respect to mortgages not so executed, but otherwise valid, the legal situation is left unchanged, and mortgagees must resort to the land courts for relief as before. With respect to the enforcement of "preferred mortgages," the basic provisions of the Act, contained in Subsections K and N, are as follows:

"Subsection K. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. . . ."

"Subsection N. (a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this section, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof."⁹

The statute also provides (in Subsection M) that a preferred mortgage shall have priority over certain other classes of maritime liens, but this provision is not open to constitutional objection provided the legislation is upheld in its jurisdictional aspects. For if jurisdiction over these mortgages can properly be vested in the courts of admiralty, Congress has full power to declare that they shall constitute maritime liens, to fix their priority in relation to other maritime liens and otherwise to lay down the substantive law which is to control. The critical question is whether Congress has the constitutional power to vest jurisdiction in the admiralty at all over suits to foreclose the mortgage lien.

In the face of the decision in *Bogart v. The John Jay* this matter seems obviously open to doubt, as was recognized at the time of passage of the law.¹⁰ And in view of the large number of preferred mortgages which have been executed since the Act became effective, it is strange that the question of constitutionality should not have reached the Supreme Court until the present year. It is raised, however, in the case now pending of *The Thomas Barlum*,¹¹ in which a writ of certiorari has been granted

9. 41 STAT. 1003, 1004 (1920), 46 U. S. C. §§ 951, 954 (1926).

10. See *Report of the Committee on Admiralty and Maritime Law* (1920) 6 A. B. A. J. 414.

11. 68 F. (2d) 946 (C. C. A. 2d, 1934). Cert. granted, *Detroit Trust Co. v. The Thomas Barlum*, 54 Sup. Ct. 717 (1934).

For comment upon the decision of the Circuit Court of Appeals, see (1934) 43 *YALE L. J.* 1172, and (1934) 34 *COL. L. REV.* 1129.

to review a decision of the Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals felt that the statute could not be upheld, unless its scope of application was radically limited.

There have also been several other reported cases in which the constitutional issue was presented, but in these instances no appeal was taken from the District Court, which in each case upheld the validity of Subsection K of the Act.¹² In none of the cases so far have the opinions been very satisfying. The reasoning upon the problem has been too often obscured by a seeming failure to distinguish clearly between statutory changes in or additions to the substantive maritime law and the delineation of the constitutional limits of jurisdiction—in other words, between the relative functions of the Congress and the judiciary. This is unfortunate, because a clear understanding of the distinction is fundamental in the determination of the question of constitutionality and of the bearing upon that question of the decision in *Bogart v. The John Jay*. If the Ship Mortgage Act involves an extension of admiralty jurisdiction beyond the limits fixed by the Supreme Court in its function of interpreting the constitutional grant of power, it is plain as the result of repeated decisions of the Court,¹³ that the statute must be held unconstitutional. If, on the other hand, the Act may be viewed, not as an extension of jurisdiction, but merely as an extension or development of the substantive law, it as clearly must be held constitutional.

The determination of this issue brings us back to a closer examination of *The John Jay*. It can be demonstrated at the outset that in that case it was not necessary for the Supreme Court to decide any constitutional question. It should be remembered that no statutory law was involved in the case. The question was whether in the absence of any relevant legislation, a court of admiralty could in some way foreclose the mortgage on the vessel. The decision that this could not be done might have rested upon the ground that a mortgage is not a maritime contract and hence that any suit to enforce it would fall outside the constitutional limits of admiralty jurisdiction. On the other hand the libel could easily have been disposed of upon the basis of recognized limitations as to remedies or of substantive law.

12. *The Oconee*, 280 Fed. 927 (E. D. Va. 1921); *The Nanking*, 292 Fed. 642 (N. D. Cal. 1923); *The Lincoln Land*, 295 Fed. 358 (D. Mass. 1924); *The Acropolis*, 1924 A. M. C. 1510 (E. D. N. Y. 1924); *The Fort Orange*, 5 F. Supp. 833 (S. D. N. Y. 1933).

The Ship Mortgage Act was applied, without reference to the question of its constitutionality, in *Morse Drydock and Repair Co. v. Northern Star*, 271 U. S. 552 (1926).

The constitutionality of the Act has been discussed in Canfield, *The Ship Mortgage Act of 1920* (1923) 22 MICH. L. REV. 10, and Miller, *The Foreclosure of Vessel Mortgages in Admiralty* (1921) 70 U. OF PA. L. REV. 22.

13. See *The St. Lawrence*, 1 Black 522, 527 (U. S. 1861); *The Belfast*, 7 Wall. 624, 640-641 (U. S. 1868); *The Lottawanna*, 21 Wall. 558, 575-576 (U. S. 1874); *Butler v.*

With respect to the mortgagee's remedies there were several possibilities. Foreclosure might have been sought along the lines commonly followed in equity. It is obvious, however, that this would be in conflict with the orthodox rule that the admiralty cannot give equitable relief, and the libel in *The John Jay* did not attempt to proceed on such a theory. On the other hand a sort of strict foreclosure would be possible within the forms familiar to the admiralty, by resort to a possessory and petitory action to establish possession and title in the mortgagee. This was in fact the theory upon which was based one of the two prayers for relief contained in the libel in question. It is apparent, however, that this procedure would have conflicted with the doctrine, also orthodox, that the admiralty cannot deal with equitable interests in the title; and the Supreme Court felt no hesitation in denying relief along such lines.

The other prayer for relief contained in the libel in *The John Jay* was based on quite a different theory. It sought a decree for the payment of the unpaid purchase-money and asked that the vessel might be condemned to pay therefor. In other words, the libellant sought to proceed in the same manner as the holder of a bottomry bond. Bottomry of course is a form of hypothecation of vessels to secure indebtedness which is an integral part of the general maritime law. The enforcement of such a bond presents no difficulty from the point of view of the remedial powers of the admiralty, since the bond gives rise to a maritime lien which is enforced, like any such lien, in the everyday action in rem. If the mortgagee could proceed in the same fashion, all trouble as to the form of remedy would be eliminated.

A fresh difficulty would then arise, however, with respect to the substantive law. The ordinary action in rem is maintainable, according to the sea law, only to enforce a maritime lien. Bottomry gives rise to such a lien, but could it be said that a mortgage does likewise? So far as the general maritime law is concerned, as that law was understood at the time of *The John Jay*, the answer plainly is in the negative. The only form of express hypothecation recognized in that system was the bottomry bond (together with the analogous device of respondentia in the case of cargo); and the normal requisites of bottomry were lacking in the ordinary mortgage.¹⁴ In other words, if the general maritime law

Boston & Savannah Steamship Co., 130 U. S. 527, 557 (1889); *The Blackheath*, 195 U. S. 361, 365 (1904); *Panama Rr. Co. v. Johnson*, 264 U. S. 375, 386 (1924); *Crowell v. Benson*, 285 U. S. 22, 55 (1932).

The extent of the admiralty jurisdiction is a constitutional question, since the jurisdiction is derived from Article III, Section 2, of the federal Constitution, which declares that "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

14. "The essentials of a bottomry bond are, that it shall bind the ship for the payment of the money, provided the ship perform a certain voyage and arrive in safety; and if

was to prevail, there could be no maritime lien nor any substantive law of mortgage at all, aside from the law of bottomry. Of course it is true that to a certain extent our admiralty courts have supplemented the general maritime law by doctrines drawn from the Anglo-American land law, and conceivably this might have been done as to the law of mortgage (assuming there are no obstacles of jurisdiction in the constitutional sense). However, the hypothesis would be perfectly plausible that the Supreme Court, in deciding *The John Jay* was unwilling to do this and felt that, so far as the substantive law is concerned, the whole matter should be left in the lap of Congress.

It may also be noticed parenthetically that in cases where services have been rendered to a vessel, a maritime lien will normally be created by operation of law; but this does not affect the mortgage situation. If a mortgage debt were incurred in order to aid the vessel, a maritime lien might exist (provided there were no waiver); but it would arise out of the benefit to the ship independently of the mortgage.¹⁵ In *The John Jay*, however, the mortgage was not executed to secure the payment of any sums due for services rendered to the vessel, but to secure the amount payable under a contract of sale. The existence of a maritime lien under such circumstances would be inconsistent with the general legal principles governing such liens. In short it is fair to assume that the sea law, as it existed at the time of *The John Jay*, had no place for the ordinary mortgage, and that the libel in that case would have been dismissed regardless of the Court's ideas as to what the proper jurisdictional limitations might be.

The question remains whether the Supreme Court actually did place its decision upon the ground that as a matter of substantive law the mortgagee had no rights in the admiralty, or whether it went on to decide the jurisdictional question of whether the mortgage could be deemed a maritime contract. The critical paragraphs of its opinion are as follows:

"It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in

the ship be lost, no part of the sum borrowed is to be repaid; and because the lender takes upon himself this risk, he may charge for the use of the money, maritime interest, or extra interest, which will cover and compensate him for the risk he runs, which interest would be usurious but for that risk." 1 PARSONS, SHIPPING AND ADMIRALTY (1869) 134-135.

See also *Maitland v. The Atlantic*, 16 Fed. Cas. No. 8,980, p. 522 (E. D. La. 1855); *The Mary*, 16 Fed. Cas. No. 9,187, p. 938 (C. C. D. Conn. 1824); *Leland v. The McDora*, 15 Fed. Cas. No. 8,237, p. 298 (C. C. D. Mass. 1846); *The William D. Rice*, 29 Fed. Cas. No. 17,691, p. 1296 (D. Mass. 1857).

15. See *The Hilarity*, 12 Fed. Cas. No. 6,480, p. 142 (S. D. N. Y. 1829); *The Hunter*, 12 Fed. Cas. No. 6,904, p. 951 (D. Me. 1833). Cf. also *Hurry v. The John & Alice*, 12 Fed. Cas. No. 6,923, p. 1017 (C. C. D. Pa. 1805).

the United States. No case can be found in either country where it has been done. In the case of *The Neptune*, 3 Hagg. Adm. Rep., 132, Sir John Nicholl, in giving his judgment, observes: 'Now upon questions of mortgage, the court of admiralty has no jurisdiction; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the court of admiralty, which never decides on questions of property between the mortgagee and owner.'

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law.¹⁶ Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime. . . ."¹⁷

It is this language that is the basis for the general assumption that *The John Jay* held that a mortgage contract is non-maritime and hence in its subject-matter falls outside the scope of admiralty jurisdiction. The assumption, however, may not be warranted. A court does not normally decide constitutional questions when a case may be disposed of on other grounds; and, as has just been shown, the relief sought in the libel under consideration would in all probability have been denied even if the mortgage could have been deemed a maritime contract. A decision on the constitutional question was thus quite unnecessary. But did the Court nevertheless purport to decide it? Certainly some of the language used is capable of such an interpretation. On the other hand it need not necessarily be given that meaning. Remembering the alternatives, it may at least be regarded as ambiguous. The first paragraph

16. "In *Bogart v. The John Jay*, 17 How. 399, 15 L. Ed. 95, the jurisdiction of the admiralty court to enforce payment of the mortgage of a vessel by its condemnation was denied. Mr. Justice Wayne said that the cause of the denial was not the jealousy of the courts of common law. But his reference to English courts and cases makes it probable that the jurisdiction would have been admitted if the jealousy had not existed in the past." Lowell, J., in *The Underwriter*, 119 Fed. 713, at 744 (D. Mass. 1902).

17. 17 How. 399, 401, 402 (U. S. 1854).

quoted, with its citation of English authority, would seem to have reference to the doctrine that the admiralty may not deal with equitable interests in the title. The second paragraph may well have been directed at the issue of substantive law. The libellant had sought relief in the form of an ordinary action in rem, which would presuppose the existence of a maritime lien as in bottomry. It may have been the intention of the court merely to point out that the mortgage lacked the essential characteristics of a bottomry bond, under which the lender takes the risk of the voyage and in return receives a high rate of interest, and that hence it was impossible as a matter of existing substantive law to assimilate the two. From this point of view it could easily be said that a mortgage "is a contract without any of the characteristics or attendants of a maritime loan," and that "there cannot be anything maritime in it."

The supposition that the Court did not necessarily mean to decide the question of constitutional jurisdiction is fortified by another statement made at the end of the opinion. After referring to the fact that in England the admiralty jurisdiction with respect to mortgages had been enlarged by statute, it is said: "Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been."¹⁸ Not only would this statement seem to indicate that the Court meant to place its decision on the point of substantive law, but it may be used as an argument for the proposition that the Court regarded the mortgage contract as falling within the constitutional limits of admiralty jurisdiction. Otherwise it could not be declared maritime by Congress. The argument, it should be conceded, is not conclusive, since in 1854 the constitutional limitations upon the powers of Congress with respect to the scope of admiralty jurisdiction were not as clear as they have been made by subsequent decisions of the Supreme Court.¹⁹

II

This examination of *Bogart v. The John Jay* has been made, perhaps in undue detail, because the precedent created by that decision has been regarded as a principal obstacle to upholding the constitutionality of the Ship Mortgage Act. The foregoing study leads to the conclusion that that case need not influence the determination of the present question. So far as the decision rests upon the point that equitable interests and

18. *Id.* at 403.

19. It has sometimes been said that the statement last quoted should be discarded as dictum. But on the other side it may be said with equal—or greater—propriety that such references as there may be in the opinion to the question of jurisdiction should be regarded as the dicta. For a determination of this constitutional question was unnecessary to the decision.

equitable remedies are involved, the result clearly may be changed by statute.²⁰ So far as the decision rests upon other limitations of substantive law, those limitations may be removed by Congress; and this is exactly what Congress did when it provided in Subsection K of the Ship Mortgage Act that a preferred mortgage should constitute a lien upon the vessel enforceable by suit in rem. The legislative power unquestionably covers to its full extent the field of admiralty jurisdiction vested in the federal judiciary by the Constitution. Nor, as sometimes seems to have been supposed, is there any constitutional reason why Congress may not extend the scope of the maritime lien to cases where there has been no benefit to the vessel. The normal requirement of service to the ship, as the basis of contract liens, is a limitation merely of substantive law.

The only difficulty is whether or not, as a matter of interpretation of the constitutional grant of judicial power over all cases of admiralty and maritime jurisdiction, a ship mortgage may be regarded as a maritime contract.²¹ Since *The John Jay* can be explained on other grounds, there is no reason why the courts may not approach this problem as an open question.²² Viewed in this way, the determination of the proper result is not altogether simple. It is settled, of course, that admiralty jurisdiction over contracts depends upon their subject-matter; but this test is not an easy one to apply where agreements of a novel character are involved. And from this point of view a mortgage is decidedly novel, since it was a device unknown to the older maritime law.²³

No matter how novel the question may be, however, it is impossible to escape the search for precedent, which may be resorted to by way of analogy, at least. In the old sea law the obvious analogy to the mortgage is, of course, the bottomry bond. Both instruments constitute forms of hypothecation of the vessel. Bottomry, however, is a hypothecation of a peculiarly limited nature. Its essential characteristic is that the lender takes the risk of the voyage.¹⁴ If the ship is lost, all right of recovery is lost with her. In return for this risk the lender is permitted to charge

20. See Morrison, *supra* note 1, at 28-32.

21. Some provisions of the Ship Mortgage Act might be upheld under the commerce clause of the Constitution. But Subsection K, since it involves the exercise of jurisdiction by the courts of the United States, apparently cannot be sustained under the commerce clause. See 1 BENEDICT ADMIRALTY (5th ed. 1925) § 77; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 451-453 (U. S. 1851); *The Belfast*, 7 Wall. 624, 640-641 (U. S. 1868).

22. Even if it be assumed that *The John Jay* did decide the constitutional question of jurisdiction, it has been urged that that case should be frankly overruled, if in the light of changed conditions the contrary result is found to be the sound one. See *The Nanking*, 292 Fed. 642 (N. D. Cal. 1923). See also HENRY, JURISDICTION AND PROCEDURE OF THE ADMIRALTY COURTS (1885) § 16.

23. See 1 PARSONS, SHIPPING AND ADMIRALTY (1869) 132.

an extraordinary rate of interest, which would otherwise be usurious. These features are wholly lacking in the ordinary mortgage, and so far as the substantive law is concerned it may be assumed that there is a decisive difference between the two instruments. The critical question is whether or not the distinction between them should likewise be decisive from the point of view of jurisdiction, the substantive law having been changed by statute.

At this point it becomes material to consider the purpose for which the mortgage has been executed. Let it be assumed in the first place that the instrument secures an indebtedness which has been incurred in order to meet the needs of the ship or for a purpose which is in some way beneficial to her. Under these circumstances the indebtedness of course might have been secured by a bottomry bond, enforceable by a libel in rem. From the point of view of jurisdiction should it not be equally possible to secure the same indebtedness by a mortgage, which by statute has now been made enforceable by a libel in rem? Aside from the names used, the only material difference would be that the loss of the vessel would not prevent the mortgagee from pursuing his normal remedy in personam and that he would receive only an ordinary rate of interest. While it may be of the essence of the substantive law of bottomry that the money loaned be at the risk of the lender during the voyage, it is difficult to see why this should be of the essence so far as jurisdiction is concerned.²⁴ It is more sensible to conclude that the correct principle of jurisdiction is that where an indebtedness has been incurred in order to aid a vessel, she may be hypothecated as security by an instrument enforceable in admiralty. The question of who shall stand the risk of loss of the ship should depend upon the proper rules of substantive law, statutory or otherwise. This result is strengthened by the fact that where services are rendered to a vessel, a maritime lien normally arises by operation of law. If under such circumstances the vessel is impliedly hypothecated in order to secure the resulting indebtedness, there is no substantial reason why, as a matter of jurisdiction, she may not be expressly hypothecated by an instrument called a mortgage. The rights and obligations of the parties would be only slightly altered, since where the lien is implied, the lender's rights in personam are not cut off by the loss of the vessel, as they would have been had he taken a bottomry bond.

24. It has been suggested that a bottomry bond executed to meet the needs of the ship ought to be good even though it provided for common interest only and for payment by the shipowner of the money borrowed, whether the vessel be safe or lost. See 1 PARSONS: SHIPPING AND ADMIRALTY (1869) at 135. If this view be accepted, there would appear to be no differences at all between a bottomry bond and a mortgage which would be material from the jurisdictional point of view.

The conclusion may safely be reached, therefore, that in a case where the creation of the indebtedness was of benefit to the vessel, the mortgage is a maritime contract, and that as applied to such a case Subsection K of the Ship Mortgage Act, authorizing the enforcement of a "preferred mortgage" in admiralty, is constitutional.

III

Now let it be supposed that the incurring of the mortgage debt did not promote the activities of the encumbered vessel. In *The John Jay*, for example, the mortgage was executed to secure the amount due under a contract of sale of the ship. Or it may be that the indebtedness has been incurred for a purpose which has no connection whatever with the vessel or with maritime commerce. The shipowner may have borrowed money in order to build himself a house. Here the problem assumes a very different aspect. In the situation previously discussed, the contract the performance of which was secured by the mortgage, being in aid of the vessel, would itself be maritime. Under such circumstances the mortgage, too, should be maritime. There would seem to be no serious objection to the same result in any case where the mortgage secures a maritime contract. But in the situation now under consideration the vessel is hypothecated in order to secure the performance of a contract which has no maritime character at all. The thing mortgaged is still a ship, but the effect of foreclosure is to consummate a transaction which, of itself, lies wholly outside the admiralty jurisdiction.

The distinction between these two situations was seized upon by the Circuit Court of Appeals in the case which is now pending before the Supreme Court—*The Thomas Barlum*.¹¹ There preferred mortgages upon two vessels had been executed in compliance with the provisions of the Ship Mortgage Act. The proceeds of the mortgage loans were to be used largely to meet obligations which had no connection with the vessels or with any maritime activity. The conclusion of the Circuit Court of Appeals (one judge dissenting) was that the Ship Mortgage Act should not be construed to extend to transactions of this character. It therefore held that the libels seeking foreclosure of the mortgage liens must be dismissed. The Court apparently assumed that the statute was constitutional as applied to cases where the mortgage loan was incurred for maritime purposes. But it felt that the Act could not be upheld as applied to non-maritime loans, and in order to avoid this constitutional difficulty it construed the Act in such manner as to exclude such a case.

It is safe to say that if it had not been for the constitutional difficulty, the Act would never have been given such a narrow application. There is nothing in the language of the statute itself to suggest any limi-

tation upon the purposes for which preferred mortgage loans may be made. Furthermore the intent of Congress was to make it possible for shipowners freely to use their property as security for loans. Prior to 1920 a ship mortgage was of uncertain value as security because it was inferior to all maritime liens,²⁵ and the resulting difficulty in raising money upon the security of such property was a substantial deterrent to investment in ships. This deterrent Congress sought to remove, and its purpose would be in large part defeated if the only result of its enactment were to facilitate the raising of money for strictly maritime purposes.

The ultimate issue is whether or not the Constitution requires that the operation of the Ship Mortgage Act be so radically restricted as largely to destroy its usefulness. Again approaching the problem by the path of precedent and looking at the analogy of bottomry, the question would be this: could a bottomry bond, executed to secure an indebtedness which had no connection with the ship or things maritime, be enforced in admiralty? This question cannot be answered with complete certainty.²⁶ The only relevant case in the Supreme Court reports is *Conard v. Atlantic Insurance Co.*,²⁷ decided in 1828. This case involved a respondentia bond on cargo, executed to secure a loan which had no connection with the voyage. In the course of its opinion the court said:

"It is not necessary, that a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not, at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made, after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage."²⁸

It may be assumed that both respondentia and bottomry would be controlled by the same principle.²⁹ The authority of the case, however, is not conclusive, because a determination of the point now under discussion does not appear to have been necessary to the decision. The

25. See *The J. E. Rumbell*, 148 U. S. 1 (1893).

26. The question could arise only when the bottomry bond was executed by the owner of the ship, and this was not common. Usually such bonds were executed by the master, and it is clear that his implied authority to take such action exists only for the purpose of meeting the necessities of the ship or of the voyage. *The Aurora*, 1 Wheat. 96 (U. S. 1816); *The Grapeshot*, 9 Wall. 129 (U. S. 1869); 1 PARSONS, SHIPPING AND ADMIRALTY (1869) 140.

27. 1 Pet. 386 (U. S. 1828).

28. *Id.* at 436-437.

29. PARK, MARINE INSURANCE (2nd Am. ed. 1799) 410. But see *Greely v. Smith*, 10 Fed. Cas. No. 5,750, p. 1077 at 1083 (C. C. D. Me. 1847).

case was not in admiralty, but was an action of trespass at law brought by the holder of the alleged respondentia bond against a federal marshal who had levied upon the encumbered goods as the property of their original owner, the maker of the bond. The plaintiff in support of his claim did not rely merely upon the bond, but also upon an express assignment to him of the property in the goods, an assignment which had been executed at the same time as the bond. In the argument before the Supreme Court plaintiff's counsel conceded that the bond did not create a lien and contended that whether there was a good respondentia bond or not, there was a transfer of the goods to the plaintiff for a sufficient consideration.³⁰ The validity of this assignment was recognized and relied upon by the Court.³¹ Thus the result would have been the same regardless of whether or not there was a valid respondentia bond, and under these circumstances the case can hardly be regarded as an authority of much weight on the question of admiralty jurisdiction.

A few years later, however, Mr. Justice Story, who wrote the opinion in the *Conard* case, handed down on circuit a decision which is squarely in point. This was in *The Draco*.³² The owners of a ship had executed a bottomry bond to secure a loan made in connection with their general business as merchants. The creditor libeled the vessel in rem in admiralty to enforce the bond. It was argued on behalf of the owners that since the loan had not been incurred for any maritime purpose, the instrument was not a valid bottomry bond and that hence there was no jurisdiction in admiralty. This argument was rejected and a decree given for the libellant. In the course of his opinion Justice Story made an extensive examination of continental authorities in order to determine what was the rule of the general maritime law on the point, and came to the conclusion that it was not essential to a good bottomry bond that the money be advanced either for the necessities of the ship or for the cargo or for the voyage. He may have been right as to the continental law in general, although the matter is not free from doubt and in France at least, under the Marine Ordinance of Louis XIV, the law was the other way.³³

Whatever the European law may have been, *The Draco* was not received with general approval in this country. Kent took the same view as Story,³⁴ but the decision was strongly criticized by Conkling,³⁵ who

30. 1 Pet. 386, 418-421 (U. S. 1828).

31. Id. at 445-450.

32. 7 Fed. Cas. No. 4,057, p. 1032 (C. C. D. Mass. 1835).

33. See 2 VALEN, COMMENTAIRE SUR L'ORDONNANCE DE LA MERINE DU MOIS D'AOUT, 1681 (1766) 9. Cf. EMERIGON, MARITIME LOANS (Am. ed. 1811) 33; RAIKES, *Foreign Maritime Laws* (1886) 12 LAW MAG. AND REV. (Fourth Series) 67.

34. 3 KENT, COMMENTARIES ON AMERICAN LAW (14th ed. 1896) 361-362. The doctrine of *The Draco* also finds some support in *The Mary*, 16 Fed. Cas. No. 9,187, p. 938 (C. C. D. Conn. 1824), and *Greeley v. Waterhouse*, 19 Me. 9 (1841).

35. 1 CONKLING, ADMIRALTY (2d ed. 1857) 282-289.

was a writer of considerable competence. In the Eastern District of Pennsylvania Judge Hopkinson refused to follow *The Draco*, and his decision was affirmed on appeal by the Circuit Court, although the opinion of the latter is not reported.³⁶ In two instances also the soundness of the conclusion reached by Story was questioned by Mr. Justice Woodbury, while sitting on circuit. In *Leland v. The Medora*,³⁷ in 1846, he expressed doubt as to what was the correct result, although he found it unnecessary to pass upon the point. In *Greely v. Smith*,³⁸ in the following year, it became necessary for him to render a decision. This time he definitely expressed his personal disapproval of *The Draco*, but felt that he should follow it, until it was overruled by the Supreme Court.

Since 1847 the question does not appear to have arisen in any reported case. Probably it will not come up again, since today bottomry has become practically obsolete. If it should do so, the state of these old authorities is such that a decision by the Supreme Court would not be dictated by the mere force of precedent. *Conard v. Atlantic Insurance Co.* and *The Draco* are not of such weight but that the Court would feel free to disregard them if that course seemed desirable. To an even less extent is the Supreme Court likely to be swayed by these cases in determining the jurisdictional status of ship mortgages. And even if *The Draco* were to be regarded as established law, it would not necessarily follow that the rule applicable to a bottomry bond should be applied also to a mortgage. Certainly the arguments used by Story and Kent do not lead to that result. In their minds the characteristic and decisive thing about bottomry, that gave it its maritime status, was the marine risk assumed by the lender. They thought this so fundamental as to make the purpose of the loan an unimportant factor. Doubtless Story, at least, would also have been willing to regard any hypothecation of the ship as maritime which was made to secure the performance of a maritime contract. In other words there were two factors either of which would have been thought a sufficient basis for admiralty jurisdiction: First, the assumption by the lender of the marine risk; second, the promotion of navigation and maritime commerce through the hypothecation of the vessel to secure a maritime contract. In any mortgage the first factor is non-existent. And in the situation under present consideration, where the loan secured by the mortgage has no connection with the sea, the second factor is also absent. To say that under these circumstances the mortgage constitutes a maritime contract, for the sole reason that a ship is the thing put up as security, is to go further than the old judges would have foreseen.

36. *Knight v. The Attila*, 14 Fed. Cas. No. 7,881, p. 755 (E. D. Pa. 1838).

37. 15 Fed. Cas. No. 8,237, p. 298 (C. C. Mass. 1846).

38. 10 Fed. Cas. No. 5,750, at 1083 (C. C. Me. 1847).

All this examination of the cases leads us to the rather negative conclusion that there is no reason why the Supreme Court, in determining the constitutionality of the Ship Mortgage Act, should be materially influenced by any prior authorities with regard either to mortgages or to bottomry. Of course, having made its decision, it can be expected to rely upon such existing cases as may support its conclusion. But this reliance will be the consequence rather than the cause of the decision.

IV

We may pass then to a consideration of the broader question of what result is likely to be reached through the application to our problem of the general tests of admiralty jurisdiction in contract. Although it is settled that the jurisdiction depends on subject-matter, no satisfactory definition of a maritime contract has been devised. In *De Lovio v. Boit*, Mr. Justice Story said that the admiralty jurisdiction comprehends all contracts "which relate to the navigation, business or commerce of the sea."³⁹ In the leading case of *Insurance Co. v. Dunham*, the nearest the Supreme Court came to a definition was in the statement that, as to jurisdiction, "the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions."⁴⁰ These statements are too general to be of much help in the decision of particular cases. The text writers, however, have attempted to be somewhat more specific. Thus Benedict says:

"It is not always easy to determine what is a maritime contract. The dividing line between causes maritime and non-maritime, is not always strongly marked. It is believed that a sure guide, in matters of contract, is to be found in the relation which the cause of action has to a ship, the great agent of maritime enterprise, and to the sea as a highway of commerce. A contract relating to a ship in its use as such or to commerce on navigable waters is subject to the maritime law and the case is one of admiralty and maritime jurisdiction, whether the contract is to be performed on land or water."⁴¹

Hughes makes a similar statement:

"Rights arising out of contract are maritime when they relate to a ship as an instrument of commerce or navigation, intended to be used as such or to facilitate its use as such."⁴²

If these definitions are to be accepted, it is questionable whether a ship mortgage, executed to secure a non-maritime loan, could be brought

39. 7 Fed. Cas. No. 3,776, at 444 (C. C. Mass. 1815).

40. 11 Wall. 1, 26 (U. S. 1870).

41. 1 BENEDICT, ADMIRALTY (5th ed. 1925) § 63.

42. HUGHES, ADMIRALTY (2d ed. 1920) 18.

within them. Certainly the mortgage does not relate "to a ship in its use as such"; nor does it relate to "commerce on navigable waters" in such a direct way as could be said of it if it had been executed to secure the performance of a maritime obligation. The phraseology of Hughes is not altogether happy, but probably his meaning is equivalent to Benedict's. It may be, however, that these definitions are too narrow. Very likely they were phrased in an attempt to cover the various types of agreements which are recognized as maritime, and at the same time to exclude three important contracts which have been regarded as non-maritime—contracts for ship construction, contracts for the sale of vessels, and the ship mortgage itself. The latter has generally been assumed to be non-maritime upon the authority of *Bogart v. The John Jay*. Construction contracts on several occasions have been held by the Supreme Court to be outside the admiralty jurisdiction.⁴³ Contracts of sale also have been regularly regarded as falling within the same category, although the question of their status has never reached the Supreme Court for decision.⁴⁴

The grouping together of these three contracts has some logical basis. They differ from the ordinary run of maritime obligations in that they do not relate to the ship in her actual use as an instrument of navigation, nor do they, in a direct way at least, form a part of the conduct of maritime commerce. A contract of affreightment or a charter party, on the other hand, arises immediately out of the use of the vessel in her primary function of transportation. Other typical maritime agreements are designed to facilitate the operation of the ship, such as supply and repair contracts, or contracts of pilotage, towage or wharfage. Even the policy of marine insurance more directly involves the activities of maritime commerce in giving protection against those dangers of the sea which, in the absence of such protection, would hamper and limit the use of the vessel in navigation. The construction, sale and mortgage agreements bear a somewhat more remote relation to maritime commerce. Such a relation is not wholly absent, however, owing to the fact that these agreements do at least deal with the ship as a ship—that is, they do not purport to deal with her in any different capacity. In this respect they differ from certain other contracts which involve the use of the vessel for a purpose other than that of transportation by water. For example, on the Great Lakes where navigation is closed during the winter season, it is common to make contracts for the storage of grain or similar commodities

43. *People's Ferry Co. v. Beers*, 20 How. 393 (U. S. 1857); *Roach v. Chapman*, 22 How. 129 (U. S. 1859); *Edwards v. Elliott*, 21 Wall. 532 (U. S. 1874); *The Winnebago*, 205 U. S. 354 (1907); *Thames Towboat Co. v. The Francis McDonald*, 254 U. S. 242 (1920).

44. The leading case is *The Ada*, 250 Fed. 194 (C. C. A. 2d, 1918). Cf. *Stewart & Co. v. Rivara*, 274 U. S. 614 (1927).

on board ships which are tied up for that period. Such contracts are held non-maritime because they relate neither to navigation nor to maritime commerce, and because under these conditions the ship is not being used as a ship but merely as a warehouse, indistinguishable for the time being from an ordinary warehouse on land.⁴⁵

In this latter situation there is adequate justification for the conclusion that the subject-matter of the contract is non-maritime. But the construction, sale and mortgage contracts are at least as far removed from this class of obligation as they are from the orthodox types of maritime agreement. They form an intermediate group, which will or will not fall within the admiralty jurisdiction depending upon whether a broad or a narrow view is taken as to its proper scope. Hence it is not altogether surprising that their maritime status should have been doubted and even denied. But the question of whether or not this is the proper result calls for further inquiry.

In this regard it is the construction contract which has been the principal center of attention. Whereas mortgages were unknown in the older maritime law, shipbuilding has been familiar in all times and places. Hence the historical approach has a significance here which is lacking in the case of the mortgage. And such an approach has usually been important in charting the limits of the admiralty jurisdiction. The Constitution does not explain what is a case "of admiralty and maritime jurisdiction." Some standard of reference is necessary, and during the formative period the great controversy was as to whether or not that standard should be the artificially restricted jurisdiction of the High Court of Admiralty in England or the broader jurisdiction which was established on the continent of Europe and elsewhere. In his celebrated opinion in *De Lovio v. Boit*, in 1815, Mr. Justice Story stood for the adoption of the latter standard,⁴⁶ and, owing in no small measure to his influence,

45. *The Pulaski*, 33 Fed. 383 (E. D. Mich. 1888); *The Richard Winslow*, 71 Fed. 426 (C. C. A. 7th, 1896); *Pillsbury Flour Mills Co. v. Interlake S. S. Co.*, 40 F. (2d) 439 (C. C. A. 2d, 1930). But even these cases may be close to the line—cf. *James Shewan & Sons, Inc. v. U. S.*, 266 U. S. 108 (1924); *In re Great Lakes Transit Corporation*, 53 F. (2d) 1022 (N. D. Ohio 1931), aff'd 63 F. (2d) 849 (C. C. A. 6th, 1933). See also 1 *BENEDICT, ADMIRALTY* (5th ed. 1925) § 66.

46. "The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind." *De Lovio v. Boit*, 7 Fed. Cas. No. 3,776 at 443 (C. C. D. Mass. 1815).

it was the view which in general prevailed. It therefore became necessary, in determining whether or not any particular contract was maritime, primarily to look at the position of that contract in the general maritime law.

An outstanding illustration of this technique is to be found in the opinion of Mr. Justice Bradley in *Insurance Co. v. Dunham*, decided in 1871. The issue there was whether or not a policy of marine insurance was within the admiralty jurisdiction. This was the same variety of contract which was before Justice Story in *De Lovio v. Boit* and which he held to be maritime. But the question had not come before the Supreme Court prior to the *Dunham* case. In reaffirming the conclusion reached by Justice Story, Justice Bradley relied largely upon an examination of the status of marine insurance in the general maritime law. His inquiry revealed that the substantive law of marine insurance had its source in the law of the sea and that it constituted an integral part of that law. And Justice Bradley adds: "Can stronger proof be presented that the contract is a maritime contract?"⁴⁷

Now if the contract of ship construction be examined in the same manner, it will be found with equal clearness to have fallen within the historic scope of the admiralty jurisdiction. And when the question first reached the Supreme Court in the leading case of *People's Ferry Co. v. Beers*,⁴⁸ in 1857, this fact was made plain by libellant's counsel, who was arguing in favor of the jurisdiction. Furthermore counsel for the other side admitted as much, and based his argument squarely upon the proposition that the standard of jurisdiction should not be found in the general maritime law at all, but in the jurisprudence of England. It is this argument which seems to have prevailed with the Court and was the basis of its decision that the contract was non-maritime. The District Court had looked at the matter differently. In the course of its opinion it had said that it was not controlled by the restricted jurisdiction of the admiralty of England, but that the rules administered by the admiralty courts of this country were more in conformity to the principles of the civil law, as administered by the maritime nations of continental Europe. It then pointed out that the European law even gives the shipbuilder a maritime lien. But the Supreme Court after quoting this opinion rejected its reasoning, and said:

"So far from the contract being purely maritime, and touching rights and duties appertaining to navigation, (on the ocean or elsewhere), it was a contract made on land, to be performed on land."⁴⁹

This statement indicates that the Court was simply following the

47. 11 Wall. 1, 34 (U. S. 1870).

48. 20 How. 393 (U. S. 1857).

49. *Id.* at 402.

precedents established in England, where the test of jurisdiction in contract cases was one of locality. Under the subject-matter test, as normally applied in this country, the fact that the agreement was made and was to be performed on land is unimportant, as the Supreme Court in other cases has made abundantly clear.⁵⁰ The objection would apply of course as fully to a marine insurance policy as to a construction contract. It is evident, then, that the conclusion reached in the shipbuilding cases was not the result of any working out of principles in the application of the subject-matter test of jurisdiction, but was a throw-back to the English locality test. Why the Court should have taken a position so inconsistent with the views generally adopted by it in working out the limits of the admiralty jurisdiction is explainable by the fact that at the time of *People's Ferry Co. v. Beers* the long struggle against the continental conceptions of jurisdiction was still being carried on by the proponents of the English standards. And for once the latter won a victory. During the period when the views of Justice Story had been dominant, the foundations of the admiralty had been established on the broader lines. But after his death the Court for a time came under the influence of the opposing school. *People's Ferry Co. v. Beers* was a result. That this was a merely temporary departure by the Court from its usual point of view, is amply demonstrated by its decision in *Insurance Co. v. Dunham* less than fifteen years later. So far as shipbuilding contracts are concerned, however, the authority of the *Beers* case has been maintained. It was reaffirmed as late as 1920 in *Thames Towboat Co. v. The Francis McDonald*, when the Court made the following comment:

"Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water."⁵¹

Thus the Supreme Court regarded the question as foreclosed by the doctrine of *stare decisis*, though recognizing that the result reached was of questionable soundness. Certainly there is ample ground for criticism. As a matter of history, the result is demonstrably wrong.⁵² As a

50. *Insurance Co. v. Dunham*, 11 Wall. 1, 28-30 (U. S. 1870); *North Pacific S. S. Co. v. Hall Bros. Co.*, 249 U. S. 119 (1919).

51. *Thames Towboat Co. v. The Francis McDonald*, 254 U. S. 242, 244 (1920).

52. On several occasions the Supreme Court has explicitly recognized that according to the general maritime law the contract of ship construction was maritime. See *Morewood v. Enequist*, 23 How. 491, 494 (U. S. 1859); *Edwards v. Elliott*, 21 Wall. 532, 554 (U. S. 1874). See also 1 BENEDECT, ADMIRALTY (5th ed. 1925) §§ 68, 69; 1 VALLE, *op. cit. supra* note 33, at 112, 151.

matter of principle, also, it can scarcely be supported. There is no great difference between the contract of the repairman whose work preserves the ship and that of the builder who creates her. The furnishing of the instrument of navigation is as essential to maritime commerce as the supply of the coal that is burned under the ship's boilers.⁵³ As a practical proposition, shipbuilding is closely linked to other maritime activities; and if, as Justice Story said, the admiralty jurisdiction comprehends all contracts which relate to the navigation, business or commerce of the sea, contracts of ship construction should be included. There is no particular argument the other way, once the element of locality is eliminated.

If, however, the doctrine that these building contracts are non-maritime is to be crystallized into a principle, such principle must be substantially that which is suggested by the definitions of Benedict and Hughes. It must be that the admiralty jurisdiction is confined to contracts which relate to the actual navigation of the ship or in a direct and immediate way promote the conduct of maritime commerce. It is not enough that some activity ultimately essential to such commerce is involved, nor that the contract contemplates the ship as an instrument of navigation. It is necessary that the agreement relate to the ship *in her use as such*. The difference is one of degree, but a line of that sort must be drawn.

The conception that the shipbuilding cases stand for some such principle probably explains why it has generally been taken for granted that contracts for the sale of vessels are non-maritime. The status of these contracts has seldom been discussed and has never been determined by the Supreme Court. From the historical point of view they should be held maritime, since they were embraced within the general maritime law.⁵⁴ But as a matter of logic they can hardly be distinguished from a construction contract. Neither form of agreement relates to the ship in her use as such. Both, on the other hand, view her as a prospective instrument of navigation. And while neither involves an immediate participation in the physical activity of commerce by sea, both fulfill a function

53. "It is begging the question to say that the *wages* of a shipwright have nothing to do with the voyage, when the *work* of the shipwright has everything to do with every voyage." 1 BENEDICT, ADMIRALTY (5th ed. 1925) § 68.

54. See 1 VALIN, *op. cit. supra* note 33, at 112-113, 367. Under the laws of many countries a maritime lien on the ship is given to secure purchase money due under a contract of sale, as well as to secure sums due under buildings contracts. For example: Argentine Republic, Code of Commerce (1889) Art. 1377; France, Code of Commerce (1807) Art. 191; Italy, Code of Commerce (1883) Art. 675; Netherlands, Code of Commerce (1838) Art. 313, 315; Portugal, Code of Commerce (1889) Art. 578; Spain, Code of Commerce (1886) Art. 580. See also 1 RIPERT, DROIT MARITIME (troisième édition, 1929) § 410-412.

In the early days in England also, the admiralty exercised jurisdiction over contracts of sale. *Englisshe v. Regland*, 2 Select Pleas in the Court of Admiralty (Selden Society) 5 (1547).

which is necessary to the ultimate conduct of such commerce. Shipbuilding is of course essential, and from a practical point of view the sale and purchase of ships is hardly less so. Therefore logic would require that the one contract be given the same status as the other.⁵⁵

It remains now to compare the jurisdictional position of the ship mortgage with that of the contract of sale (it being assumed that the former instrument has been executed to secure a non-maritime loan). Historically considered, the argument for the mortgage is weaker, but from a practical point of view it is stronger. So far as abstract theory is concerned, the two cases would seem to be indistinguishable, and the remarks just made about the contract of sale would apply to the mortgage as well. The latter does not relate to the immediate navigation of the ship. Yet it does view her as an instrument of navigation rather than in any different capacity; and it does promote maritime commerce by stimulating and facilitating investments in ships. The Ship Mortgage Act, it may be observed, has back of it a policy which is not dissimilar from that of the limited liability legislation.

From the historical point of view, the position of the mortgage is weaker, because the hypothecation of ships was unknown to the traditional maritime jurisdiction except through the technical device of bottomry.⁵⁶ Within that jurisdiction, on the other hand, construction and sales contracts were familiar enough. It does not necessarily follow, however, that the modern admiralty jurisdiction in the United States should not embrace the mortgage because the traditional jurisdiction confined itself to bottomry. The activities of the old maritime courts were limited; they did not deal with much that would have to be regarded as coming within their sphere from a jurisdictional point of view. Certainly in this country the scope of the constitutional grant of judicial power over maritime affairs should not be completely crystallized upon the basis of the things that were familiar in 1789. The needs of maritime commerce vary from one period to another, and some room must be left for growth, for adaption to changing conditions in the commercial world. Striking support for this view is to be found in the decision of the Supreme Court in *The Genesee Chief v. Fitzhugh*,⁵⁷ which extended the admiralty juris-

55. It is of interest to notice that the similarity between these two types of contract has been emphasized by one of the leading European authorities on maritime law. In discussing the French law (which gives a maritime lien both to the builder and to the seller of ships) Ripert states that "It is the seller who furnishes the instrument necessary to the maritime enterprise." He then says that the builder also has a right to the lien of the seller, because the building contract is essentially one for the "sale of a future thing." 2 RIPERT, *op. cit. supra* note 54, § 1103.

56. Still earlier in the history of the maritime law, however, some sort of maritime mortgage was in use. See 2 RIPERT, *op. cit. supra* note 54, § 1022.

57. 12 How. 443 (U. S. 1851).

diction to inland navigable waters. The Court felt that on a developing continent this result was demanded by the practical needs of commerce, and in order to meet those needs it not only disregarded the English precedents (as it usually did), but ignored the European law as well,⁵⁸ and even overruled its own prior decisions.⁵⁹

To state the case negatively, it may thus be said that there is nothing either in the underlying theory of jurisdiction or in the historical setting, which necessitates the conclusion that the ship mortgage be excluded from the admiralty jurisdiction. In this condition of affairs, it would seem appropriate that the Supreme Court place its decision upon practical and realistic grounds. What does the actual welfare of maritime commerce demand? To this question there can be only one answer, and it is here that the argument for admiralty jurisdiction over mortgages becomes stronger than in the case of contracts for the construction or for the sale of ships. Of course in any of these cases litigants are likely to prefer the admiralty jurisdiction, for the sake of its general advantages. But so far as the actual substantive law is concerned, the principles applied by the admiralty in any ordinary personal action for breach of contract do not differ much from the land law which would be applied in a state court. The big difference has to do with the matter of a lien. The state court may enforce a possessory lien, a mechanics' lien or an ordinary mortgage, but it is only in the action in rem in admiralty that a maritime lien can be foreclosed. A consequence of this is that any maritime lien is superior to any non-maritime encumbrance.⁶⁰

The most important practical effect, therefore, of denying a maritime status to one of these obligations is to prevent its being secured by a maritime lien. In the case of construction and sale contracts, the non-existence of such a lien is not particularly serious. But in the case of the mortgage, the lien is everything. If this obligation cannot be classed as a maritime contract, it means that every ship mortgage must be subordinated to any and all maritime liens which may arise on a vessel in the course of its wanderings. Under these conditions such mortgages are a highly ineffective means of raising funds, since their security is uncertain in the extreme. This was amply demonstrated by long experience with the common-law mortgage prior to 1920.⁶¹

58. The jurisdiction of the admiralty of France did not extend above tidewater. 1 VALIN, *op. cit. supra* note 33, at 129. See also 1 RIPERT, *op. cit. supra* note 54, § 146 ff.

59. The Genesee Chief overruled on this point *The Thomas Jefferson*, 10 Wheat. 428 (U. S. 1825), and *The Orleans v. Phoebus*, 11 Pet. 175 (U. S. 1837).

60. *The J. E. Rumbell*, 148 U. S. 1 (1893).

61. "Prior to the enactment of the Ship Mortgage Act ships were about as available for credit for general purposes as the snows of last December. The object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least

The plain truth is that if the ship mortgage is to be of practical value as a device for raising funds, it must be given some sort of a preferred status in competition with the normal run of maritime liens. It may be subordinated to some such liens without practical harm, but it cannot be subordinated to all. The establishment of such a preferred status is of course just what the Ship Mortgage Act accomplishes, and its usefulness is revealed by the great importance which has been placed upon it in the business world and by the large number of preferred mortgages which have been executed pursuant to its terms.

The need for giving a more favored position to ship mortgages has been appreciated in other countries as well as in our own. In England the jurisdiction of the High Court of Admiralty was extended to cover such mortgages by the Admiralty Court Acts of 1840 and 1861.⁶² Experience in civil-law countries has been similar to that of the United States prior to 1920. Although in the older law there was no ship mortgage but only the bottomry bond, during the course of the last century most maritime states have established in their law the maritime mortgage. In most countries this involves no jurisdictional difficulty today, because the maritime jurisdiction is a part of the broader field of commercial jurisdiction. But under the laws of the various countries the mortgage is generally ranked last among maritime liens. As a result, its value has been impaired, and disappointment has been felt abroad over the limited use made of ship mortgages. The suggestion has been made in Europe that this difficulty could be met and the security of the mortgage increased by reducing the allegedly excessive number of maritime liens. In a few countries this has actually been done.⁶³

The problem arising out of the competition between mortgages and maritime liens has also been dealt with by means of an international convention, which has been ratified by a number of states.⁶⁴ This convention enumerates certain liens which are to be preferred, and provides that mortgages on vessels shall rank immediately thereafter. Any other liens created by national laws must be inferior to the mortgages. In other words the general method adopted by this convention

a part of the facility enjoyed by investors in structures on land." *The Owego*, 292 Fed. 403, 405 (E. D. La. 1923). See also Burnham, *Vessel Documenting and Conveyancing Law and the Necessity of Revision*, 1925 A. M. C. 1.

62. 3 & 4 Vict. c. 65 (1840); 24 & 25 Vict. c. 10 (1861).

63. Belgium, Greece and Netherlands.

See, generally, 2 RIEPERT, *op. cit. supra* note 54, §§ 1024-1025, 1103; CONSTANT, *THE LAW RELATING TO THE MORTGAGE OF SHIPS* (1920) 124.

64. Convention for the Unification of Certain Rules relating to Maritime Mortgages and Liens of April 10, 1926, Arts. 2 and 3, 3 HUDSON, *INTERNATIONAL LEGISLATION* (1931) 1845. See also HURD, *MARINE INSURANCE* (1930) chaps. XI and XIII; 2 RIEPERT, *op. cit. supra* note 54, § 1026.

for the purpose of securing a uniform solution of the problem is that adopted by Congress in the Ship Mortgage Act. Now in the United States, with our separate constitutional jurisdiction, this desirable result can be accomplished only through the enforcement of the mortgage lien in admiralty; and a necessary prerequisite to such enforcement is the assumption that the mortgage is a maritime contract.

In short we may fairly come to the conclusion that the decisive argument in favor of the constitutionality of the Ship Mortgage Act is one of practical necessity under modern conditions. The admiralty jurisdiction has been historically—and it should be practically—a commercial jurisdiction. It should embrace what the welfare of maritime commerce demands. And it seems incredible that the Constitution must be so construed as to handicap such commerce by denying to the ship mortgage a normal commercial value and by preventing shipowners from raising money upon the security of their property in the way that other property owners may do.

Nor should the path of progress be blocked by the doctrine of *stare decisis*. *Bogart v. The John Jay* is no real obstacle. It can readily be distinguished and those statements in the opinion which touch on the constitutional question may be discarded as *dicta*. That case is hardly as serious a precedent as *People's Ferry Co. v. Beers*, which established the rule that shipbuilding contracts are non-maritime. In fact the fate of the Ship Mortgage Act might hinge upon the view that is taken of that decision and those which have followed it. If this line of cases is believed to embody a sound general principle, it is logical to assume that the mortgage likewise should be excluded from the admiralty jurisdiction, along with the contract of sale. But although the Supreme Court has recently refused to overrule *People's Ferry Co. v. Beers*, it has recognized that the doctrine of the case was open to criticism. It has also said in considering other types of contracts that the effect of that decision was not to be extended by implication to other cases.⁶⁵ It is fair to conclude therefore that the Supreme Court does not regard the case as the embodiment of any sound principle.

The proper thing would be squarely to recognize that *People's Ferry Co. v. Beers* is wrong as a matter both of history and of principle. If *stare decisis* prevents it from being overruled on its own facts, at least the result should be recognized as an anomalous exception to normal standards, not to be used as a precedent in analogous cases. Common sense and the practical needs of the business world should not be sacrificed to a strictly logical conformity to a principle derived from an admittedly unfortunate decision.

65. *Insurance Co. v. Dunham*, 11 Wall 1, 28 (U. S. 1870); *Morewood v. Enequist*, 23 How. 491 (U. S. 1859).

The issue is important to maritime commerce, and it is to be hoped that in reviewing the pending case of *The Thomas Barlum*, the Supreme Court will reverse the decision of the Circuit Court of Appeals.

V

JURISDICTION IN PERSONAM

The foregoing discussion has been directed primarily at Subsection K of the Ship Mortgage Act, which makes a preferred mortgage a lien and authorizes its enforcement by a suit in rem in admiralty. Some mention should be made also of Subsection N, which declares that the mortgagee, in addition to all other remedies granted by the Act, may bring suit in personam in admiralty against the mortgagor for the amount of the outstanding mortgage indebtedness secured by the vessel or any deficiency in the full payment thereof.

From the jurisdictional point of view this provision is more radical than Subsection K, and certainly its constitutionality is open to greater doubt. It contemplates, first, that in a foreclosure suit brought under Subsection K the admiralty court may, in addition to enforcing the mortgage lien in rem, render a deficiency judgment against the mortgagor in personam. Secondly, Subsection N appears to authorize the mortgagee to bring suit in personam in admiralty upon the principal obligation independently of foreclosure proceedings and without any enforcement of the mortgage lien at all. If Subsection K is unconstitutional, of course Subsection N falls with it. But even if Subsection K is upheld, the further question arises of whether it is constitutional to vest in the admiralty this additional jurisdiction in personam.

Where the mortgage has been executed to secure the performance of a maritime contract, the matter presents no difficulty. Jurisdiction in personam exists in the absence of a mortgage, and there is no reason why its existence should be affected by the hypothecation of the ship. But the more important situation is that where the mortgage has been executed to secure a non-maritime loan. The purpose of the latter may have been to raise money to build a house, or to pay off past debts. The contract may have taken the form of a promissory note or of an issue of bonds, which may have passed into many hands. Here, in the absence of a mortgage, the principal obligation lies wholly outside the sphere of the admiralty. The effect of Subsection N is to bring the obligation squarely within the maritime jurisdiction, if it has been secured by a mortgage on a ship. To authorize the admiralty merely because of such added security to entertain a suit purely in personam to collect a promissory note of this character is going rather far.

The difficulty, by the way, is one which did not arise in the law of bottomry, even under the broad doctrine of *The Draco*. For whether the bond was executed to meet the needs of the ship or to secure a non-maritime loan, it was characteristic of the law of bottomry that the only remedy was upon the bond in rem. There was no liability upon the shipowner in personam, and consequently if the ship were lost, there was no remedy at all.

The natural line of argument in support of the constitutionality of Subsection N is that if the admiralty may constitutionally be given jurisdiction over the foreclosure proceedings in rem, such jurisdiction should carry with it as an incident the authority to proceed in personam also. It is true that under certain limited circumstances the admiralty has been permitted to exercise jurisdiction over non-maritime matters. The most notable illustration of this is to be found in the limitation of liability for non-maritime torts. This situation arises out of the adoption of a locality test, rather than a subject-matter test, of jurisdiction in tort cases. Where a vessel collides with, or otherwise causes injury to, a land structure, it is held that since the injury has its substance and consummation on land, the tort has its locality on land and hence is outside the admiralty jurisdiction.⁶⁶ But in order to make effective the policy of the limited liability legislation, it has been necessary to give the admiralty the power to limit the liability of the shipowner for all torts committed by the ship, regardless of their locality. The legislation has been upheld by the Supreme Court in this respect, although without any particular discussion of the theoretical difficulty of jurisdiction.⁶⁷

This extension of the admiralty power to non-maritime torts as an incident to limitation proceedings, may by analogy lend support to the proposition that jurisdiction over the mortgage foreclosure proceedings should carry with it jurisdiction over the non-maritime personal obligation. But in the latter instance the argument for the jurisdiction does not seem so strong as in the former. There is not the same necessity for vesting control in the admiralty. It is impossible effectively to limit the shipowner's liability, unless all the activities of the vessel are included. From this point of view it is immaterial whether the tort has been consummated on land or on water. The whole difficulty here is due to the locality test of jurisdiction in tort, a test which has been

66. The leading case is *The Plymouth*, 3 Wall. 20 (U. S. 1865). For a review of the subsequent decisions of the Supreme Court on the point, see *Report of the Committee on Admiralty and Maritime Law* (1931) 56 A. B. A. REP. 311.

67. *Richardson v. Harmon*, 222 U. S. 96 (1911); *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207 (1927).

widely regarded as a mistake.⁶⁸ As an original question, there is no reason why the jurisdiction should not extend to all torts committed by a ship. From a practical point of view, locality of itself should no more be decisive than in contract cases. Thus when the admiralty limits liability for non-maritime torts, it is merely dealing with matters over which it ought to have been given full control. The vesting in the maritime court of this much power was a necessary step to meet a defective principle of jurisdiction.

In the mortgage situation, on the other hand, no such factors are present. Where a foreclosure suit is brought in rem, it may be very convenient for the maritime court to be able to give a deficiency judgment. But this is not so essential as the inclusion of non-maritime torts in the limitation proceedings, where the aims of the law can be accomplished in no other way. It is quite possible, although not so convenient, for substantial justice to be done to the mortgagee without vesting in the admiralty the power to give judgment in personam for breach of a non-maritime contract. The admiralty can render its decree purely in rem, as it does in bottomry cases. Then, if there is a deficiency, the mortgagee can sue the mortgagor in personam in a land court. The two proceedings are separable, whereas no separation is possible in the limitation of liability. Furthermore, from a broad point of view, the exercise by the admiralty of any jurisdiction over mortgages is more extreme than the limitation of liability for a vessel's torts even though such torts are committed on land. Assuming that jurisdiction in rem over the mortgage contract may be upheld, it lies at the outer edge of the domain of the admiralty. The exercise of jurisdiction in personam over the principal obligation goes further still and encroaches on a field which normally would belong to the land courts.

Whatever weight may be given to the ruling upon limitation of liability in considering whether the admiralty should be permitted to give a deficiency judgment as an incident to the foreclosure proceedings, that precedent becomes much less relevant when we consider a case where the mortgagee brings an independent suit in personam without seeking enforcement of the mortgage lien. Here the analogy is stretched extremely thin. The case would not be helped, even if the admiralty could apply the rule of equity jurisdiction that the tribunal, once having acquired jurisdiction, may go ahead to give complete relief; for in the present instance there is no specifically maritime issue already before the court.

68. See *Report of the Committee on Admiralty and Maritime Law* (1930) 55 A. B. A. REP. 303; (1931) 56 id. 311; Brown, *Jurisdiction of the Admiralty in Cases of Tort* (1909) 9 COL. L. REV. 1; Farnum, *Admiralty Jurisdiction and Amphibious Torts* (1933) 43 YALE L. J. 34.

Moreover, the admiralty law recognizes no such general principle.⁶⁹ So broad a power would be inconsistent with the constitutional basis of the admiralty jurisdiction, which has no counterpart in the distribution of power between the chancery and the courts of common law. The only qualification to be made to this statement arises out of limitation proceedings. It sometimes happens that after the admiralty court has assumed jurisdiction over all claims, maritime and non-maritime, it determines that the shipowner is not entitled to a limitation of his liability. The court may then go ahead and give complete relief by adjudicating all the claims before it upon their merits. In sanctioning this, the Supreme Court has specifically recognized that the result is an exception to the normal principle that the admiralty, having obtained jurisdiction over some portion of a controversy, may not proceed to give complete relief by adjudicating matters that normally fall outside its sphere. But the Court felt that this exception was necessary in order to do justice to the non-maritime claimants, since otherwise the shipowner might by means of the limitation proceeding prevent his creditors from resorting to any other forum until it was too late to obtain relief there.⁷⁰

Perhaps the vesting in the admiralty of this exceptional authority affords as strong a precedent as there is in the existing law for upholding the statutory grant of power to give judgments in personam against the mortgagor. Even here, however, the analogy is far from close. In the limitation proceeding the admiralty has already taken jurisdiction over the non-maritime torts of the ship, under circumstances which are deemed consistent with the Constitution. The only issue is whether when the limitation fails, it must surrender the jurisdiction once constitutionally assumed. To do so would result in substantial injustice, and the result reached is induced by compelling circumstances. In the mortgage case there is no such pressure of necessity. In fact no analogous situation is presented. Even when a foreclosure action in rem has been filed, there is no question of surrendering a jurisdiction once assumed; the only problem is whether the maritime court may exercise any jurisdiction in personam at all. And where the mortgagee brings only an independent suit in personam, the analogy fails entirely.

69. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207 (1927); *The Ada*, 250 Fed. 194 (C. C. A. 2d, 1918).

70. "It seems but common equity, therefore, when a petitioner, choosing, within certain limits, his own forum, enjoins all other suits or actions, brings such claimants into his own proceeding and submits his rights to the court, that that court, if it refuses his prayer for exemption or limitation, shall have power to go further and decree affirmatively against him in the full amount of the damages which have been proved against him in his own proceeding, before the commissioner whom he himself has asked to have appointed to receive those very claims." 1 *BENEDICT, ADMIRALTY* (5th ed. 1925) § 488. See *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207 (1927).

Leaving now the matter of non-maritime torts, it would seem more relevant to consider how far in the past the admiralty has exercised jurisdiction over non-maritime contracts. While this has been done to some extent, such action has been confined within narrow limits. The general conceptions are familiar. The problem comes up in dealing with "mixed contracts"—in other words, contracts some of whose terms are maritime and some non-maritime. The initial inquiry in such a case is into the separability of the contract. If the maritime and non-maritime elements are separable, the admiralty assumes jurisdiction over the maritime matters, but must leave the non-maritime matters for adjudication in a land court. If, however, the contract is inseparable, it is necessary that the entire dispute be disposed of in one tribunal. The accepted principle is that in such event the admiralty may take jurisdiction only if the principal subject-matter of the contract is maritime and the non-maritime features are merely incidental.⁷¹ The same principle has been applied, where there are two contracts, one maritime and one non-maritime, and where the two are inseparably connected.⁷²

Probably it is this situation which affords the closest analogy to be found in the books to the problem created by Subsection N of the Ship Mortgage Act. And if the same principles should be applied, it appears doubtful whether Subsection N could be sustained, even in the simpler case of the deficiency judgment given in the course of foreclosure proceedings. Here we have two contracts, not one. The first—the principal obligation—is non-maritime. The second—the mortgage—is assumed to be a maritime contract. Where a deficiency judgment for breach of the first is given in the course of the proceeding *in rem* for the enforcement of the second, perhaps it might be said that the deficiency judgment is merely incidental to the foreclosure. But even so, the usual conception is that the initial inquiry must be into the matter of separability, and that if the two agreements, or parts of an agreement, are separable, the admiralty must confine itself to the maritime portion of the affair. From this point of view the two obligations in question are separable, since the admiralty can easily foreclose the mortgage lien and give its decree *in rem*, without rendering a deficiency judgment for breach of the primary obligation. Perhaps such a technicality will not bother the Supreme Court, if it gets to this point.

71. On the application of these principles, see 1 *BENEDICT, ADMIRALTY* (5th ed. 1925) § 62, and cases therein cited; also *Luckenbach S. S. Co. v. Gano Moore Co.*, 293 Fed. 343 (S. D. N. Y. 1923); *Compagnie Francaise de Navigation à Vapeur v. Bonnasse*, 19 F. (2d) 777 (C. C. A. 2d, 1927); *Pillsbury Flour Mills Co. v. Interlake S. S. Co.*, 40 F. (2d) 439 (C. C. A. 2d, 1930); *F. S. Royster Guano Co. v. W. E. Hedger Co.*, 48 F. (2d) 86 (C. C. A. 2d, 1931).

72. See *Turner v. Beacham*, 24 Fed. Cas. No. 14, 252, p. 346 (D. Md. 1853).

In the second situation, where the mortgagee brings suit in personam for breach of the primary obligation, without proceeding in rem to enforce the lien, no support at all for the admiralty jurisdiction can be found in the existing law on the subject of mixed contracts. Here the court is dealing exclusively with the principal and non-maritime obligation. The secondary obligation—the mortgage—which alone has a maritime aspect, is completely out of the picture. So far as it is the intent of Subsection N to authorize this sort of action, its constitutionality cannot be supported upon the basis of existing precedents. No doubt it would be highly convenient and desirable to the business community to have the Ship Mortgage Act upheld in all respects. But the theoretical difficulties justify the statement that if the Supreme Court eventually upholds the Act in its entirety, the result will constitute the most radical extension of the admiralty jurisdiction which has yet been made in this country.