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## Security at Sea: A Review of the Preferred Ship Mortgage

### Cover Page Footnote

The author wishes to acknowledge the helpful suggestions of Martin Gold, Esq. and Lloyd Reed, Esq. of the New York Bar. \*Member of the New York Bar

# SECURITY AT SEA: A REVIEW OF THE PREFERRED SHIP MORTGAGE†

RICHARD GYORY\*

IN JUNE 1920, Congress climaxed a burst of legislative activity directed to the Merchant Marine by passing the Ship Mortgage Act.<sup>1</sup> Its purpose was to furnish realistic financing for the maritime field, and to help the Government dispose of three billion dollars' worth of tonnage acquired during World War I.<sup>2</sup>

Entering its fifth decade, the preferred ship mortgage is the subject of extensive economic activity on the part of the Government and private investors.<sup>3</sup> At the same time, the preferred ship mortgage is undergoing the most intense litigational period in its history.<sup>4</sup> This litigation

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† The author wishes to acknowledge the helpful suggestions of Martin Gold, Esq. and Lloyd Reed, Esq. of the New York Bar.

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1. Merchant Marine Act of 1920 § 30, 41 Stat. 1000, as amended, 46 U.S.C. § 911 (1958).

2. 58 Cong. Rec., pt. 8, 8153 (1919).

3. Figures are not available for recorded preferred ship mortgages, but the current government program of insurance furnishes a guide to one sector of this activity. See notes 166-72 *infra* and accompanying text. The Administrator announced that such insurance during the first half of 1961 had risen by \$27 million, to a total of \$468 million in commitments with an additional \$127 million pending. Maritime Administration Press Release, No. 61-64, July 28, 1961.

4. There were nine reported opinions in 1961, and five in 1960 which dealt with preferred ship mortgages, or with aspects defining rights and remedies of such mortgages. *United States v. The Zarco*, 187 F. Supp. 371, 1961 Am. Mar. Cas. 78 (S.D. Cal. 1960); *The Valiant Power*, 193 F. Supp. 460, 1961 Am. Mar. Cas. 266 (E.D. Va. 1961); *Wall St. Traders, Inc. v. Wang*, 1961 Am. Mar. Cas. 986 (Sup. Ct.), *aff'd mem.*, 13 App. Div. 2d 767, 217 N.Y.S.2d 501, 1961 Am. Mar. Cas. 2214 (1st Dep't 1961), related proceedings, *Barnouw v. The Ozark*, 304 F.2d 717, 1962 Am. Mar. Cas. 1675 (5th Cir. 1962) (cert. pending); *Merchants & Marine Bank v. The T. E. Wells*, 289 F.2d 188, 1961 Am. Mar. Cas. 1042 (5th Cir. 1961); *The Seneca (St. Louis Shipbuilding & Steel Co. v. First Nat'l Bank & Trust Co.)*, 287 F.2d 366, 1961 Am. Mar. Cas. 1617 (5th Cir. 1961); *Meridian Trading Corp. v. The Kingston*, 1961 Am. Mar. Cas. 1321 (S.D. Tex. 1961); *The Irving Trust Co. v. The Golden Sail*, 197 F. Supp. 777 (D. Ore. 1961); *Crabtree v. The Julia*, 290 F.2d 478 (5th Cir. 1961); *First Nat'l Bank & Trust Co. v. The Seneca*, 179 F. Supp. 847, 1960 Am. Mar. Cas. 766 (E.D. La. 1960); *First Safe Deposit Nat'l Bank v. The North Star*, 185 F. Supp. 815 (D. Mass. 1960); *United States v. The Audrey II*, 185 F. Supp. 777, 1960 Am. Mar. Cas. 1977 (N.D. Cal. 1960); *Meridian Trading Co. v. The Denton*, 1960 Am. Mar. Cas. 2264 (S.D. Tex. 1960), *aff'd sub nom. Brandon v. S.S. Denton*, 302 F.2d 404, 1962 Am. Mar. Cas. 1730 (5th Cir. 1962); *The Valiant Power (American Tramp Ship & Devel. Corp. v. Coal Export Corp.)*, 276 F.2d 570, 1960 Am. Mar. Cas. 2301 (4th Cir. 1960). Only three other years produced equal or greater numbers of reported opinions directly or tangentially dealing with the preferred ship mortgage: eleven in 1923, six in 1924,

arises largely out of the wave of foreclosures commencing in 1960. In view of this recent experience of defaults, the cautious investor may be led to ask his counsel for an opinion as to the soundness of this somewhat unfamiliar form of investment. The purpose of this article is to furnish a guide to that opinion.

### I. PREHISTORY

Prior to 1920, a "mortgage" on a ship was an indefinite right to ask for whatever remained in court in a proceeding started by a "maritime lienor," after all the maritime liens had been satisfied.<sup>5</sup> The "mortgagee" was not a maritime lienor. He could not initiate a proceeding against a ship. His "right" in the property was little more than a personal claim against the owner, with some possibility of collecting out of a fortuitous surplus left after satisfying seamen's, repairmen's, suppliers' and possibly other claims.

The Supreme Court in 1854,<sup>6</sup> relying largely on an English case, *The Neptune*,<sup>7</sup> held itself to be without jurisdiction over a ship mortgage which, it said, was nonmaritime. Mr. Justice Wayne noted that the British courts had been given jurisdiction<sup>8</sup> after *The Neptune*, but that

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eight in 1938. Generally, the earlier reports were more brief and limited both in the type of problem, and in the consideration given.

5. The *Lottawanna* (*Wilson v. Bell*), 87 U.S. (20 Wall.) 201 (1873) indicates some hesitation as to the right of the mortgagee to proceeds in the absence of the owner's consent. However, when the same matter came up again, 88 U.S. (21 Wall.) 558 (1874), the Court entertained no doubt on the point, citing *Bogart v. The John Jay*, 58 U.S. (17 How.) 399 (1854), which case did not pass upon the question, but rather suggested an ephemeral remedy in equity. In *The Angeliue* (*Schuchardt v. Babbidge*), 60 U.S. (19 How.) 239 (1856), *The John Jay* was cited to deny the foreclosure. The Court stated that by petition the mortgagees could have applied against the fund resulting from other proceedings based on maritime liens.

6. *Bogart v. The John Jay*, *supra* note 5. The narrowness of the Court's outlook in this and subsequent ship mortgage cases contrasted sharply with its usual broad approach in which it claimed a wide range for admiralty jurisdiction. See *Stevens, Erie R.R. v. Thompkins* and the Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950).

7. 3 Hagg. Adm. Rep. 129, 132, 166 Eng. Rep. 354, 355 (P. 1834). The remarks rolled on were in the nature of dicta. The major issue was whether the materialman had a lien and whether such lien transferred from ship to proceeds of sale. The rights of the mortgagee, if any, were held subordinate to those of the owner-mortgagor. Thus if the materialman had a lien, and the court so held, the mortgagee, whatever his rights, was subordinated to the materialman. Curiously, the Supreme Court did not add that the decision they cited was reversed in *The Neptune* (*Hodges v. Sims*), 3 Knapp 94, 12 Eng. Rep. 584 (P.C. 1835), where the court held the materialman lost his lien by giving up possession. The materialman was not even entitled as of right to the proceeds in court. The mortgagee was then given the proceeds on the basis of possession of the ship when process was instituted.

8. Admiralty Court Act of 1840, 3 & 4 Vict., ch. 65. The British act was very limited in its application; it apparently gave little more than a right to the proceeds in the court.

our courts would have to wait "until this shall be done in the United States by Congress. . . ."<sup>9</sup> The Court did not mention the recording act<sup>10</sup> which permitted, and indeed, seemed to require, recording of the mortgage. Subsequently, however, the Court dismissed a reference to this statute as a "mere registry act,"<sup>11</sup> leaving the maritime industry with the bare form of a mortgage law and a suggestion for later action.

That the Court's suggestion was not acted upon for sixty-six years must be attributed to lack of pressure from the industry, itself. The decline of the American Merchant Marine during the years following the Civil War and prior to World War I suggests a flight of capital to different ventures. By contrast, the other maritime nations of the world were busily adding ship mortgage provisions to their laws.

The First World War drastically changed America's economic position in the world and dramatically altered its shipping industry. With a sudden need for large ships in great numbers, the Government quickly became the owner of a fleet of unparalleled size.<sup>12</sup> With the end of the war, it faced the next phase of the problem: What to do with all the ships, a large part of which was now unnecessary? The climate of the time was highly unfavorable to continued government ownership, and more so to government operation.<sup>13</sup> But even at reduced prices, there was no prospect of cash sales.<sup>14</sup> And beyond immediate disposal, the members of Congress were conscious of the need to create the prospect of a long-term structure of financing with the possibility of refinancing in order to put the maritime industry on a par with other industries.<sup>15</sup> As one judge colorfully phrased it:

Prior to the enactment of the Ship Mortgage Act . . . ships were about as available

This had been granted without need of statute in America. See *The Lottawanna*, supra note 5. There was, however, an extension of the British mortgagee's rights in the Admiralty Court Act of 1861, 24 & 25 Vict., ch. 10; see Price, *The Law of Maritime Liens* 98-99 (1940).

9. *The John Jay*, supra note 5, at 402.

10. Ship Mortgage Act of 1920, 41 Stat. 1000, 46 U.S.C. § 921 (1958).

11. *The J. E. Rumbell*, 148 U.S. 1, 16 (1893). Conversely, a district judge passing upon the constitutionality of the Ship Mortgage Act of 1920, in a case which was ultimately to be sustained by the Supreme Court, held the act valid because it was merely a procedural innovation. *The Thomas Barlum*, 56 F.2d 455, 1932 Am. Mar. Cas. 931 (W.D.N.Y. 1932).

12. Congressman Bankhead reported the size as fourteen million tons. See note 2 supra. At the outbreak of World War I the United States had just over one million tons, which doubled by the time we entered the war. See also 58 Cong. Rec. pt. 8, 8150, 8152 (1919). The figure reached eight million in 1919. Total world merchant tonnage in 1919 was listed by Lloyds as approximately fifty-one million. *Id.* at 8146.

13. *Id.* at 8143-44, 8152-53, 8160; see also 59 Cong. Rec., pt. 7, 7225 (1920).

14. 58 Cong. Rec. pt. 8, 8157, 8161 (1919); see also 59 Cong. Rec., pt. 7, 7225 (1920).

15. See 59 Cong. Rec., pt. 7, 7223-27 (1920); see also note 17 infra.

for credit for general purposes as the snows of last December.<sup>16</sup> The object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least a part of the facility enjoyed by investors in structures on land.<sup>17</sup>

The act of 1920, designed to meet both the immediate ship disposal problem of the Government and the long standing financial difficulties of the industry, passed Congress with no substantial opposition and little debate.

## II. THE ACT IN BRIEF

The Ship Mortgage Act created a new type of security in that it permitted "vessel[s] of the United States" to be effectively pledged by the shipowner.<sup>18</sup> The mortgagee no longer had to await the action of another creditor, and then only receive whatever remained after the maritime lienors had taken their share.

The legislators did not attempt a finely drawn description of the substantive rights which were given to creditors. In many respects the statute is less descriptive than the chattel mortgage developments which were in progress at approximately the same time.<sup>19</sup> Much of the text was devoted to procedural details.<sup>20</sup> A large part of the statute consisted of a re-enactment of the earlier recording provisions<sup>21</sup> and, with some changes, of the Federal Maritime Lien Law of 1910.<sup>22</sup> But in the

16. "Mais ou sont les neiges d'antan." Villon, Ballade.

17. *The Owego*, 292 Fed. 403, 405, 1923 Am. Mar. Cas. 1060, 1061 (E.D. La. 1923). After a lapse of many years this purpose has been reiterated in a recent case, *Merchants & Marine Bank v. The T. E. Wells*, 289 F.2d 188, 1961 Am. Mar. Cas. 1042 (5th Cir. 1961), in which little or no reference was made to the attempt to achieve such parity; cf. *The Jane B. (United States v. Jane B. Corp.)*, 167 F. Supp. 352 (D. Mass. 1958), 73 Harv. L. Rev. 423 (1959); *The Fort Orange*, 5 F. Supp. 833, 1934 Am. Mar. Cas. 240 (S.D.N.Y. 1933); *The Thomas Barlum*, 56 F.2d 455, 1932 Am. Mar. Cas. 931 (W.D.N.Y. 1932); *The Northern No. 41*, 297 Fed. 343, 1924 Am. Mar. Cas. 583 (S.D. Fla. 1924); *The Nan-king*, 292 Fed. 642, 1923 Am. Mar. Cas. 1191 (N.D. Cal. 1923).

18. Ship Mortgage Act of 1920, 41 Stat. 1000, as amended, 46 U.S.C. § 922 (1958) (Supp. III, 1959-1961) as originally enacted specified such ships be over 200 tons. This was revised in 1935 to include all vessels "of the United States" except various harbor craft. 49 Stat. 424 (1935), as amended, 46 U.S.C. § 922 (1958) (Supp. III, 1959-1961). In 1961, the limit for excepted harbor craft was reduced to twenty-five tons. 75 Stat. 661 (1961), 46 U.S.C. § 922 (Supp. III, 1959-1961). See also note 149 *infra*. Most merchant vessels can now be mortgaged, but pleasure craft although they may be registered federally, ordinarily are registered locally and, therefore, not subject to a preferred ship mortgage.

19. Cf. Uniform Chattel Mortgage Act, A.B.A. Conference 1926-1927, Nat'l Conference of Comm'rs on Uniform State Laws (2d ed. 1927).

20. Ship Mortgage Act of 1920, 41 Stat. 1000, as amended, 46 U.S.C. § 922 (1958) (Supp. III, 1959-1961). See also Gilmore & Black, *Admiralty* § 9-57, at 590 (1957).

21. 41 Stat. 1000 (1920), 46 U.S.C. § 921 (1958).

22. 41 Stat. 1005 (1920), 46 U.S.C. §§ 971-75 (1958).

sections dealing with foreclosure<sup>23</sup> and priority<sup>24</sup> significant changes were accomplished.

The lender was permitted by the act to sue the ship in rem on the admiralty side of the federal courts.<sup>25</sup> A new personal right in admiralty was also established.<sup>26</sup> Upon default, foreclosure of the lien was allowed to the full extent of the outstanding debt.<sup>27</sup> The mortgagee's claim was given priority over all but "preferred maritime liens," consisting of liens prior in time and a few specified liens irrespective of time.<sup>28</sup> In short, the act purported to make a ship mortgage a "mortgage." It remained to be seen what reception the law would be given in the courts. There was doubt as to both its constitutionality and legal effect.

### III. EARLY HISTORY

Despite several early challenges to the constitutionality of the statute, it was not until fourteen years had elapsed that the Supreme Court met this issue.<sup>29</sup> Considering the opportunities to test the law, as well as the speed with which another portion of the same act reached the Court, it is surprising that the decision was so long in coming.<sup>30</sup> So far as the Government was concerned, a major part of the objective of the act had already been answered in 1934 when the law was held constitutional.<sup>31</sup> The original government mortgages on ships disposed of by postwar sales had in large part matured, and their sales price was substantially

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23. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958). For further discussion of these provisions, see notes 83 & 132 *infra* and accompanying text.

24. 41 Stat. 1004 (1920), 46 U.S.C. § 953 (1958).

25. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958).

26. 41 Stat. 1004 (1920), 46 U.S.C. § 954 (1958).

27. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958).

28. 41 Stat. 1004 (1920), 46 U.S.C. § 953 (1958).

29. In *The Thomas Barlum*, 293 U.S. 21, 52, 1934 Am. Mar. Cas. 1415, 1417 (1934), the Supreme Court held the Ship Mortgage Act constitutional. Earlier the question had been raised and passed upon in *The Fort Orange*, *supra* note 17; *The Northern No. 41*, *supra* note 17; *The Acropolis*, 1924 Am. Mar. Cas. 1510 (E.D.N.Y. 1924); *The Lincoln Land*, 295 Fed. 358 (D. Mass. 1923), modified on rehearing, 295 Fed. 363, 1924 Am. Mar. Cas. 194 (1924); *The Nanking*, *supra* note 17; *The Oconee*, 280 Fed. 927 (E.D. Va. 1922).

30. The Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), which formed a part of the Merchant Marine Act of 1920, was held constitutional in *Panama R.R. v. Johnson*, 264 U.S. 375, 1924 Am. Mar. Cas. 551 (1924). An earlier preferred ship mortgage case reached the Supreme Court in *Morse Drydock & Repair Co. v. Steamship Northern Star*, 271 U.S. 522, 1926 Am. Mar. Cas. 977 (1926), but the issue of constitutionality was not raised.

31. The act provided that the Government might sell vessels with mortgages up to fifteen years, 41 Stat. 990 (1920), as amended, 46 U.S.C. § 864 (1958). The final provision replaced an earlier version of the bill which permitted the Government to give mortgages only up to ten years. 58 Cong. Rec., pt. 8, S146, S150 (1919).

realized prior to the contingency of the Court passing adversely on the constitutional issue.

The first wave of cases following the early postwar depression resulted in only one case which reached the Supreme Court<sup>32</sup> and surprisingly there was little extended attack upon the jurisdictional doubts which beset the draftsmen of the statute. The lower courts were favorable to the mortgages generally, but a high degree of emphasis on the formalities of the act developed. It has been suggested that the early strictness of construction was due to a combination of factors; namely, the doubts attending the validity of the legislation, a desire to save the law by construing it narrowly and the extended period which elapsed before the Supreme Court finally pronounced the Ship Mortgage Act constitutional.<sup>33</sup>

The depression, starting with the crash of 1929, produced a somewhat smaller volume of reported cases than the earlier depression of the 1920's, but was far more significant in setting out the markers for the future history of the preferred ship mortgage. In particular, it gave rise to *The Thomas Barlum*,<sup>34</sup> which posed a formidable challenge to both the scope and the constitutionality of the act. The first encounter in the district court appeared simple enough.<sup>35</sup> The mortgagee, Detroit Trust Company, as trustee, sought to foreclose on two defaulted mortgages. Opposition came not from other lienors, but (at least formally), from the mortgagors who claimed that the act was unconstitutional. This assertion was disposed of in a brief opinion which held the act merely a procedural innovation. Then, having perfunctorily denied the initial challenge, the court tried the case on the basis of a new issue.<sup>36</sup> The mortgagors' counsel argued that the proceeds of the loans secured by the mortgage had been applied to uses unrelated to the ship and to the maritime industry. The judge, after trial, found this claim to be true. Notwithstanding his finding, however, he held the purpose of the act was to encourage the financing of ships, reasoning that to encourage investment in ships, one must protect the investor rather than the shipowner. The burden of policing the use of the funds by the shipowner, therefore, was not to be placed on the investor. A majority of the appellate court did not agree.<sup>37</sup>

Judge Manton held that if the funds lent to the shipowner were not

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32. *Steamship Northern Star*, supra note 30.

33. Lord & Glenn, *The Foreign Ship Mortgage*, 56 *Yale L.J.* 923, 927 (1947). One writer felt the delay also inhibited American participation in international conventions. Price, op. cit. supra note 8, at 231-33.

34. See note 29 supra.

35. 56 F.2d 455, 1932 *Am. Mar. Cas.* 931 (W.D.N.Y. 1932).

36. 2 F. Supp. 733, 1933 *Am. Mar. Cas.* 1384 (W.D.N.Y. 1933).

37. 68 F.2d 946, 1934 *Am. Mar. Cas.* 464 (2d Cir. 1934).



used for shipping purposes, they were outside the scope of the admiralty law, and therefore, outside the protection of the act. The act, he said, was constitutional, but only as limited to the narrowly bounded jurisdiction of the maritime field. The opinion emphasized the personal, freewheeling transactions of Mr. Barlum, chief stockholder of the owner-corporation and dwelt upon the importance of the recording provisions of the statute. Somewhat gratuitously, Judge Manton referred to the mortgagee's knowledge, although the mortgagee was only a trustee for the investors.

Judge Augustus Hand dissented, noting that the Detroit Trust Company was a trustee of publicly offered bonds within the ambit of the act. Demonstrating an awareness of the underlying significance of public financing and credit devices, Judge Hand said that real estate attracted capital precisely because the use of the funds was unrestricted. Curiously, the argument of estoppel on the part of the mortgagor who received the fruits of the bargain (even if illegal) was not used by any of the judges,<sup>38</sup> all of whom considered only the broader issues. With the issues clearly drawn, the Supreme Court granted certiorari,<sup>39</sup> and in the next term rendered a unanimous opinion.<sup>40</sup>

Chief Justice Hughes, in a characteristically articulate opinion, commenced with a factual recitation which foreshadowed his conclusion. In particular, he stated that the case was one dealing with negotiable bonds largely held by the general public. He considered the historical antecedents of bottomry and respondentia bonds which, he noted, were not limited to maritime purposes. He reiterated and expanded Judge Hand's argument that Congress set no limitation on the use of funds invested in ship mortgages for the very purpose of attracting capital to the maritime field. The decision reversed the holding of the circuit court which technically had also held the Ship Mortgage Act constitutional, but the Chief Justice went much further. The mortgage was made the object of the act's protection and investors were, in effect, informed that the future course of the law would tack in their favor.

#### IV. PECULIARITIES OF MARITIME SECURITY

*The Thomas Barlum* assured both industry and finance that the preferred ship mortgage was here to stay. It remained to be seen, however,

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38. The brief of libelants-appellees did assert estoppel. Brief for Libelants-Appellees, pp. 38-43, pt. IV, *The Thomas Barlum*, 68 F.2d 946, 1934 Am. Mar. Cas. 464 (2d Cir. 1934), although it was not mentioned on re-argument. The claim again appeared in a short paragraph of the petition for writ of certiorari (id. at 34, pt. IV), but did not appear in the succeeding briefs, nor was any response made by the other party.

39. 292 U.S. 619, 1934 Am. Mar. Cas. 328 (1934).

40. See note 29 supra.

to what degree the peculiarities of the maritime field would modify this new type of security.

Ship mortgage problems of a legal nature may be classified as (a) those affected by jurisdiction and (b) somewhat facetiously, "all others."<sup>41</sup> We shall, however, characterize the latter category as "priorities of maritime liens." The classification is, of course, arbitrary, but the writer deems it a convenient approach to a large area in which comparatively little definition has been achieved by case law. In fact, the problems raised under the term "jurisdiction" represent special modifications of priorities as well as procedure. We start with the former category because it will lead the general reader or practitioner into more familiar patterns and, at the same time, touch on the broader problems to which the maritime mortgage is subjected.

### A. *Intrajurisdictional Problems*

Competition among various courts to obtain lawsuits, such as characterized a large part of the jurisdictional development of the English legal system, is not a notable feature of our judicial life today. Indeed, it sometimes appears to be the reverse, with the courts inviting litigants to go elsewhere. The federal system has a special jurisdictional situation which arises out of the branches of law set up as separate jurisdictions *within* the federal courts by the Constitution and by subsequent legislation.<sup>42</sup>

Pragmatically, there are strong reasons for giving this our first attention. Since foreclosure is the main weapon of the mortgagee (and this by the terms of the act can only be accomplished in admiralty),<sup>43</sup> any frustration in instituting such a suit is a primary source of concern to the mortgagee. It is in the competing federal sources of jurisdiction,

41. The N.Y. Times Business Activities Index contains two categories of "Carloadings": "Miscellaneous" and "All Others"; they are not facetious.

42. See U.S. Const. art. III, § 2, cl. 1, and the Judiciary Act of 1789, now 28 U.S.C. § 1333 (1958), which deals with admiralty jurisdiction. Bankruptcy jurisdiction is set forth in 28 U.S.C. § 1334 (1958) and patents in 28 U.S.C. § 1338 (1958). In addition, the grants are spelled out in the individual titles. Various other areas, e.g., administrative acts, criminal and equity jurisdiction, and others are listed and discussed in 4 Benedict, Admiralty 187-281 (Knauth 6th ed. 1940). See also Gilmore & Black, Admiralty § 1-17, at 43, § 9-91, at 654, § 9-92, at 656 (1957); Robinson, Admiralty § 59, at 415 (1939).

43. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958); see 4 Benedict, op. cit. supra note 42, § 614, at 237; The Fort Orange, 5 F. Supp. 833, 1934 Am. Mar. Cas. 240 (S.D.N.Y. 1933). However, Gilmore & Black, op. cit. supra note 20, § 9-94, suggests the bankruptcy court might be so empowered. See also Waechter, Adjudication of Maritime Liens in Bankruptcy Proceedings, 10 Tul. L. Rev. 461, 466 (1936); 1 Benedict, op. cit. supra note 42, § 17, at 28.

specifically bankruptcy,<sup>44</sup> that such procedural frustrations are likely to arise first.<sup>45</sup>

Historically, the greater part of the pertinent case law is contemporaneous with *The Thomas Barlum*, which arose out of the Great Depression that contributed the second wave of preferred ship mortgage cases.<sup>46</sup> Situations of insolvency and bankruptcy, involving resort to the bankruptcy and equity side of the federal courts, reflect the deeper economic difficulties of that period. Although the number of such cases is scant, they provide almost all the authority extant on procedural conflicts arising from intrajurisdictional sources in the federal courts.

In *The Fort Orange*,<sup>47</sup> the mortgagor had defaulted on a three million dollar loan, and the mortgagee sought foreclosure both in admiralty and in equity. The mortgages, four in number, which covered four Hudson River liners as well as shore-side property, had been recorded in Manhattan at the customs house and at the county clerk's office. Judge Knox entertained the suitors now as equity or bankruptcy judge, now as admiralty, and sometimes all at once.<sup>48</sup> The result was a single disposition of the many faceted situation with what appears to have been a minimum of court time. The court did not appear to be troubled by the suggestion that invoking equity might have vitiated the admiralty phase. Hence,

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44. Theoretically and practically, the other areas may cut across or overlap admiralty's sphere, e.g., criminal (*The Maberhex*, 6 F.2d 415, 1925 Am. Mar. Cas. 1503 (D.R.I. 1925)), but no conflict appears likely.

45. The bankruptcy court is given exclusive jurisdiction over the bankrupt and its estate, with control over assets and the right to determine title. Collier, *Bankruptcy Manual* § 2, at 30-31 (1948). Chapter XI arrangements vest exclusive jurisdiction of the debtor and his property, where located, and a chattel mortgagee must have leave of the court to retake possession. Collier, *supra* para. XI-1, at 1060. The state courts furnish a possibility of this phenomenon within very narrow limits in accordance with the strictures laid down in *Moran v. Sturges*, 154 U.S. 256 (1894). See also *The Willamette Valley*, 62 Fed. 293 (N.D. Cal. 1894), *aff'd*, 66 Fed. 565 (9th Cir. 1895); *The J. G. Chapman*, 62 Fed. 939 (D. Minn. 1894); *cf.* *Paxson v. Cunningham*, 63 Fed. 132 (1st Cir. 1894) which indicates libels in admiralty are permitted if the state court authority lacks custody or has allowed the vessel to go into another jurisdiction. See also *The Ironsides*, 13 Fed. Cas. 103 (No. 7059) (N.D. Ill. 1869) (*dictum*). This opinion has interesting remarks on bankruptcy and admiralty jurisdiction. One of the few articles in point is Waechter, *supra* note 43, 10 Tul. L. Rev. 461 (1936).

46. Although the early preferred ship mortgage cases cited elsewhere in this article involved insolvency, the question of jurisdiction did not receive comment. In one of the earlier matters before a bankruptcy court, the case went forward by stipulation that all admiralty rights could be asserted there. *In re Atlantic, Gulf & Pac. S.S. Co.*, 3 F.2d 309, 310-11, 1924 Am. Mar. Cas. 131 (D. Md. 1923).

47. 5 F. Supp. 833, 1934 Am. Mar. Cas. 240 (S.D.N.Y. 1933).

48. See 1 *Benedict*, *op. cit.* *supra* note 42, § 17; *Gilmore & Black*, *op. cit.* *supra* note 20, § 9-94.

*The Fort Orange* represented a practical combination of the federal sources of jurisdiction which enabled the mortgagee to foreclose with a minimum of procedural obstacles. If anything, the plurality of legal areas aided the solution.<sup>49</sup>

A different result is illustrated by *The Alabama* cases.<sup>50</sup> There a mortgagee sought access to his security without avail. Apparently, a receivership had been initiated in an equity proceeding to which the mortgagees, if not consenting participants, were at least acquiescent observers. On the first attempt to reach the mortgaged ship, the court observed that the lender's debt was in no danger. To allow immediate foreclosure, the opinion said, would be inequitable to junior lienors and holders of certificates of indebtedness.<sup>51</sup>

The Alabama mortgagees made a second try to reach their security with no greater success than the first, notwithstanding the remark by the appellate court that it doubted the receivership would operate at a profit. The court did not delve into the Ship Mortgage Act or its intent, but it did compare the situation to that of ordinary mortgages. The circuit judges concluded that a court of equity with plenary power was more likely to represent the interest of *all* creditors than was an admiralty court. Then, in a rather formal conclusion to an otherwise generalized approach, the court invited the mortgagees to enter the equity proceedings.<sup>52</sup>

The jurisdictional problems in *The Alabama* were possibly more diverse than in *The Fort Orange*. The Alabama was one of six vessels owned by

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49. For foreclosure on different types of property in the same court simultaneously involving admiralty and equity, see *Collier Advertising Serv. Inc. v. Hudson River Day Line*, 14 F. Supp. 335, 1936 Am. Mar. Cas. 206 (S.D.N.Y. 1936).

50. *The Alabama (Consumers' Co. v. Goodrich Transit Co.)* 53 F.2d 972, 1932 Am. Mar. Cas. 418 (7th Cir. 1931), cert. denied, 286 U.S. 548 (1932), later proceedings, 63 F.2d 273, 1933 Am. Mar. Cas. 976 (7th Cir.), cert. granted but decree reversed with direction to dismiss as "moot," 290 U.S. 585 (1933) (per curiam). For a description of equity receiverships at various historical stages see 4 Benedict, *op. cit. supra* note 42, at 211.

51. The rights of creditors for the period during which the vessel has been in the court's jurisdiction have not been well defined, although several opinions treat various aspects of the problem, e.g., *New York Dock Co. v. Steamship Poznan*, 274 U.S. 117, 1927 Am. Mar. Cas. 723 (1927); *United States v. The Audrey II*, 185 F. Supp. 777, 1960 Am. Mar. Cas. 1977 (N.D. Cal. 1960). For pre-preferred mortgage situations see note 45 *supra*.

52. A similar suggestion was made by Judge Learned Hand in *In re Interoccean Transp. Co. of America*, 232 Fed. 408, 410 (S.D.N.Y. 1916). However, in *In re Munson S.S. Line*, 1938 Am. Mar. Cas. 837 (S.D.N.Y. 1938), Judge Coxe indicated that the Government as mortgagee had not waived its rights because there had been no prior voluntary appearance, and also because of an express reservation. See also *Robinson, op. cit. supra* note 42, § 59, at 417; *Hudson v. New York & Albany Transp. Co.*, 175 Fed. 519 (S.D.N.Y. 1909), *aff'd*, 180 Fed. 973 (2d Cir. 1910).

the debtor corporation. It was the only vessel operating at a profit, as well as the only ship covered by a mortgage. Presumably, the other five ships were in another judicial district which may have deprived the equity court of jurisdiction. The case poses the problem which the mortgagee may face upon default: The security may not be available for prompt satisfaction of the debt.

In a recent series of foreclosures commencing in 1960, a preliminary step taken by one group of mortgagors was to file Chapter XI petitions for voluntary reorganization.<sup>53</sup> The filing had the immediate effect of sealing off the assets so far as the mortgagee and other lienors were concerned. The referee assumed he had jurisdiction of all the corporate assets and that pursuant to local rules,<sup>54</sup> process could not be issued against the debtor's estate. One eager creditor libelled a vessel on the west coast,<sup>55</sup> returned to the New York proceeding,<sup>56</sup> confessed his actions and received absolution, thus permitting the libel to go forward. Another filed libels in rem in New York<sup>57</sup> where the corporations were, but not the ships. He then proceeded to request the referee's permission to libel the ship in rem in Texas and to intervene in another proceeding in France.<sup>58</sup> Other creditors literally followed suit. Shortly thereafter,

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53. *In re North Atl. Marine Co.*, 60-B-20, S.D.N.Y.; *In re Marine Bulk Carriers, Inc.*, Civil Nos. 94621-22, 60-B-3, S.D.N.Y.; see also Civil Nos. 94614-17, 60-B-3, S.D.N.Y.

54. Bankruptcy Rules, S.D.N.Y., 15(b); Bankruptcy Rules, E.D.N.Y., X-11(b). There is a question as to whether these rules fall within the ambit of *Miner v. Atlas*, 363 U.S. 641, 1960 Am. Mar. Cas. 1267 (1960). In that case, the Court held certain rules to be beyond the power of the local courts in admiralty. The decision casts a cloud upon the indirect incursion of these bankruptcy rules into the admiralty sphere. In nonmortgage matters, libels in rem were restrained where no permission had been obtained from the bankruptcy court. *Moran Towing & Transp. Co. v. Barge Puerto Rico*, 1958 Am. Mar. Cas. 130 (S.D. Fla. 1958). The brief report is devoid of details. Judge Morton in *The Robert & Edwin*, 32 F.2d 390, 1929 Am. Mar. Cas. 686 (D. Mass. 1929) similarly held that bankruptcy placed the vessel in custodia legis, putting the vessel beyond admiralty process, although no receiver or trustee had been appointed and the petition was voluntary. The court added that the same judge would be reviewing the questions, whether in bankruptcy or admiralty. In a seaman's personal injury claim, denial of a civil jury trial was held to be arbitrary where the court below had indicated that the claim against the debtor in bankruptcy was to be tried before a master. *Foust v. Munson S.S. Lines*, 299 U.S. 77, 1936 Am. Mar. Cas. 398 (1936).

55. *Irving Trust Co. v. The Golden Sail*, 197 F. Supp. 777 (D. Ore. 1961) (later proceedings).

56. *In re Marine Bulk Carriers, Inc.*, Civil Nos. 94621-22, 60-B-3, S.D.N.Y.

57. *The Wang Importer*, 60 Ad. 59, S.D.N.Y., Jan. 18, 1960; *The Ozark*, 60 Ad. 60, S.D.N.Y., Jan. 18, 1960.

58. E.D. Tex., Ad. 678, modified sub nom. *Barnouw v. The Ozark*, 304 F.2d 717 (5th Cir. 1962); *The Wang Importer*, Tribunal de Grande Instance, St. Nazaire, May 26, 1961 (unreported French opinion). See also note 93 infra.

permission was given to proceed with the admiralty actions, and the Chapter XI proceedings were dismissed.

The briefness of the proceedings before the referee, together with his orders permitting the admiralty matters, were probably responsible for the lack of reported opinions on this phase of the litigation. The bankruptcy court was alert to the practical effect of the petitions and was quick to divest itself of jurisdiction when the economic situation proved hopeless.

A case which posed many of the issues raised by diverse jurisdiction within the federal court system, but which goes unnoted except for a few footnotes in the treatises, is *Texas Co. v. Hauptman*.<sup>59</sup> In February 1936, the California shipowner commenced a section 77B bankruptcy proceeding<sup>60</sup> in California and obtained a court order to continue the business. In May of that year, a trustee in bankruptcy was appointed and a restraining order issued. In July, Texas Company, a California corporation, asserting a lien for oil supplied in the previous year, libelled the ship in rem in Texas. The trustee promptly obtained an order to show cause in California to obtain the ship's release. The federal judge directed release of the vessel and restrained further action without leave of his court.

On appeal, the appellate judges drew a line between suit against the debtor and suit against the debtor's property.<sup>61</sup> They said the district judge's order restraining suit was not authorized under the Bankruptcy Act.<sup>62</sup> Nevertheless, the majority found a property right in the trustee over which the California court had exclusive *jurisdiction* which preempted the Texas court. Since there were other property rights over which the lower court had no jurisdiction, the appellate court held that the district court order was too broad and suggested modification unless those other rights were inseparable.

The casual comment indicating that the rights were separable and that the vessel might be sold subject to the right of the trustee, appeared to provide a built-in guarantee for confusion, thereby undoing most of the reasoning of the opinion. No indication was given by the court as to the nature of the sale it envisioned in Texas, *i.e.*, whether it was a pro-

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59. 91 F.2d 449, 1937 Am. Mar. Cas. 1217 (9th Cir. 1937) cited in 1 Benedict, *op. cit.* supra note 42, § 17, at 29, as authority for the bankruptcy court's superiority.

60. Bankruptcy Act § 77b, 47 Stat. 1474 (1933), as amended, 11 U.S.C. § 205(b) (1958).

61. A British court made a similar holding with respect to a sale in Egypt with court approval. Since the court held the sale was in bankruptcy, the salvage lien in admiralty was not affected. The *Goulandris*, [1927] P. 182.

62. 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 1-1255 (1958) (Supp. III, 1959-1961).

ceeding involving all lienors in a ranking of priorities with a distribution of the fund in Texas, or a sale of the supply lienors' interest subject to the interest of the trustee or any other lien. Nor is it clear what, as a practical matter, was left to the trustee in bankruptcy.<sup>63</sup>

The dissent said that a trustee gets only the interest of the debtor and that the trustee, therefore, never had what the Texas court possessed.<sup>64</sup> Thus, the minority gives geographic jurisdiction to the lienor in Texas and permits the California trustee to go there to assert his rights. The majority, on the other hand, reverses the geographic initiative.<sup>65</sup> If ships were operable in sections and the rights in them were in separate physical segments, this theory might make sense. But absent these conditions, the solutions suggested by the court appear to raise as many potential problems as are solved.

The case is instructive for showing that none of the judges felt the difference of districts, per se, created difficulties. It also indicates the power of the federal courts to deal with intricate situations likely to arise under the Ship Mortgage Act, although it may have little to offer in situations even slightly more complex. The remark in the majority opinion that the district court in California could deal with the situation if it found the rights of the various parties in the vessel were inseparable, points the way to a constructive solution of many problems since, as a practical matter, it is doubtful that the case would be otherwise.

In *The Tradewind*,<sup>66</sup> another solution was provided. The shipowner filed a voluntary petition in bankruptcy in the District of Columbia. The following day, a supply lienor libelled the ship in the federal court in Baltimore. The Washington proceeding was then transferred to the District of Maryland where other claimants intervened. The ship, which was the only asset of the corporation, was sold by the marshal pursuant to an admiralty decree, and the proceeds were distributed to the lienors. Obviously, the geographic facts simplified the process, but the case is instructive. It demonstrates flexibility within the federal system and, in this respect, is similar to *The Fort Orange*.<sup>67</sup>

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63. The trustee appeared to have a definitive interest, at least with respect to a \$20,000 right in the mortgage, which lends some practical sense to the language in both the majority and minority remarks.

64. 91 F.2d at 452-55, 1937 Am. Mar. Cas. at 1223-28.

65. Mr. Knauth felt the discussion of this case with respect to possession and title was significant. 4 Benedict, op. cit. supra note 42, § 614, at 237 n.31. In terms of operating large deep-sea vessels, "possession" is a vague concept except at the symbolic moment the marshal is physically present to serve the ship.

66. *Atlantic Steamer Supply Co. v. The Tradewind*, 144 F. Supp. 403, 1956 Am. Mar. Cas. 1731 (D. Md. 1956), later proceedings, 153 F. Supp. 354, 1957 Am. Mar. Cas. 2196 (D. Md. 1957).

67. See note 47 supra.

The situation of the maritime mortgagee, on the whole, is not markedly different from the shore-side counterpart where bankruptcy in some form intervenes. Perhaps the maritime lienor may draw comfort not afforded the real or chattel mortgagee to the extent the ship sale in foreclosure must be in admiralty.<sup>68</sup> However, the trustee of the debtor may have to invoke local remedies in ordinary real or chattel dispositions in bankruptcy, in which event, questions of control of the sale may arise. Practically speaking, the bankruptcy court (or the federal judge exercising his varied functions) has shown little inclination to insist on general creditors' rights as against secured creditors' rights in the few ship mortgage cases where a possible conflict arose. Usually the ship was the sole asset of significance and the course was very well marked in this regard.

A factor which realistically inhibits the incursion of other jurisdictions into admiralty is the nature of the res. The vessel is a chattel, but a rather special type, especially the large merchantman.<sup>69</sup> There is not only the ordinary venture risk attendant upon any court involvement in an ailing business, but unusual costs of maintenance, wharfage, watchmen or stand by crew, "winterizing" and so forth. These are not conducive to procrastination. The exigencies call for prompt action. The attorneys in these circumstances are not likely to enter into academic debates over a court's jurisdiction, but, under the pressures of the immediate situation, are more apt to ask a court's indulgence and cooperation so that the value of the ship may be conserved. The high cost of the preservation of the res renders interim solutions generally undesirable.<sup>70</sup> Even the small delays encountered with jurisdictional problems may cause justifiable anxiety on the part of the secured creditor.

The case law on questions of intrafederal jurisdiction is insufficient to furnish definitive answers. New situations will undoubtedly be dealt with on an *ad hoc* basis and probably with the consent of the parties. The

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68. But see note 43 *supra*. The secured maritime creditor has been held not subject to bankruptcy expenses, although preservation expenses will have priority. *The Bethulla*, 200 Fed. 879 (D. Mass. 1912).

69. In 4 *Benedict*, *op. cit. supra* note 42, § 613 a few of the obvious physical dangers to creditors are noted. Other nonphysical problems involve the status of interim creditors. See note 51 *supra*.

70. Apparently, the rarity of receiverships with respect to vessels must be attributed to this. In *The Southern Cross*, 23 F. Supp. 613, 1938 Am. Mar. Cas. 839 (E.D.N.Y. 1938), the court exhibited great reluctance to appoint a receiver in the absence of a provision in the mortgage, notwithstanding the statutory language of the Ship Mortgage Act of 1920, 41 Stat. 1004, 46 U.S.C. § 952 (1958). In *Tietjen & Lang Dry Dock Co. v. The Deepwater*, 1939 Am. Mar. Cas. 668 (S.D.N.Y. 1939), strict protective measures were laid down by the court as a condition to granting the mortgagee's receivership request in what the court deemed an unpromising situation.



case law does indicate sufficient resourcefulness on the part of the federal courts to facilitate prompt solutions and this is much to the benefit of the mortgagee.

### B. *Problems of Federalism*

The Ship Mortgage Act<sup>71</sup> is national in character and hence, the substantive content to be supplied in interpreting the law should be consonant with the national needs of the Merchant Marine rather than an accommodation of localisms.<sup>72</sup> There has been little or no dispute with respect to the foregoing proposition, but potential difficulties attend its realization. The act, although detailed with respect to certain formalities, is largely a generalized outline built on unstated assumptions which flow from a long history of mortgage law. However, with respect to many of its intricacies, mortgage law has had different developments in the different jurisdictions within the United States thus suggesting areas of ambiguity for which no clear guide is afforded.

The lawyer, like others, tends to consider problems in terms of references which reflect his own local experience. Where the new problem appears in familiar guise, the usual process of identification is reinforced. Unless the act gives specific direction, the lawyer is likely to supply the content of his local mortgage law without considering the possibility of alternate solutions. This danger of parochialism springs more from unawareness of the existence of questions (or time pressures which do not permit sufficient consideration and research to raise and cover such questions), rather than from a conscious preference for local law.

Fortunately, this is largely a theoretical problem for few cases have exhibited any aspects of it, and even there, the results were justifiable on other grounds. The problem is, therefore, scarcely a risk factor for the investor, but it calls for an admonition to the attorney both as draftsman and advocate which may help him focus on points that might otherwise be overlooked or unjustifiably taken for granted. The exigencies of practice frequently cause the initial views of counsel to pattern his approach to particular problems and consequently, the lawyer will not easily be led to question the generalizations upon which his views are drawn.

The effect of a mortgage on after-acquired property is illustrative of potential problems of the type under discussion. Thus, Judge Healy in *The Huntington Sanford*,<sup>73</sup> holding that certain appurtenances to the

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71. 41 Stat. 1000 (1920), as amended, 46 U.S.C. §§ 911-84 (1953) (Supp. III, 1959-1961).

72. See Gilmore & Black, *op. cit. supra* note 20, § 9-57, at 590-92.

73. 73 F. Supp. 67, 1948 Am. Mar. Cas. 960 (D. Mass. 1947). See also text accompany-

ship were covered by the mortgage, noted that the items were, if not on the ship at the time of the mortgage, replacements of such items. The rationale implicit in his remarks is that absent the replacement feature or the presence of the items at the time the mortgage was made, the mortgage would not have covered the items. This is, in effect, the Massachusetts rule which holds that even with an after-acquired property clause the mortgage is ineffective to create an equitable mortgage in personalty.<sup>74</sup> However, only a few jurisdictions follow this rule.<sup>75</sup> Parenthetically, on the merits, it might be added that the view does not seem to be in accord with the nature of the shipping chattel, still less with the statutory "whole vessel."<sup>76</sup> The draftsman is not given much scope by the Massachusetts view, but the advocate might be alert to draw the court's attention to the alternative views which exist and which may provide a more appropriate interpretation of the Ship Mortgage Act.<sup>77</sup>

Judge Chesnut in *Bard v. The Silver Wave*,<sup>78</sup> discussing the nonpreferred mortgage, referred to the mortgagee in legal theory as being the owner. Yet, this is true of real mortgages in only a few states;<sup>79</sup> and it is by no means universal as regards chattels.<sup>80</sup>

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ing note 138 *infra*. Restatement, Conflict of Laws § 265 (1935) notes the problems caused by conflicting after-acquired property rules.

74. See *Moody v. Wright*, 54 Mass. (13 Met.) 17 (1847). This, however, does not apply to items added by accession as fixtures to realty where no after-acquired clause is necessary. See Osborne, *Mortgages* § 41, at 103 (1951). But difficulties arise as to what constitutes a fixture, *id.* at § 38; see also 2 *Tiffany, Real Property* § 606 (3d ed. 1939).

75. See Osborne, *op. cit. supra* note 74, § 37, at 83 n.91.

76. 41 Stat. 1000 (1920), 46 U.S.C. § 921 (1958); see also text accompanying notes 140-51.

77. Judge Knox in *The Fort Orange*, *supra* note 17, distinguished between federal law as applied to maritime property and local law with respect to shore-side personalty where the equitable mortgage on after-acquired property was recognized, but subordinated to the general creditors and the trustee in bankruptcy.

78. 98 F. Supp. 271, 1951 Am. Mar. Cas. 1079 (D. Md. 1951).

79. Osborne, *op. cit. supra* note 74, §§ 14-15; Walsh, *Mortgages* § 5 (1934); 2 *Wiltsie, Mortgage Foreclosure* § 827 (3d ed. 1939).

80. Regarding a chattel mortgage on a ship: "A mortgage in Texas, no matter what the form of the papers by which it is given, only gives a lien, conveys no title. In Texas once a mortgage, always a mortgage." *The Oriole* (*Jones v. Horton & Horton, Inc.*), 100 F.2d 345, 346, 1938 Am. Mar. Cas. 1580, 1582 (5th Cir. 1938). Even the rule with respect to title transfer in chattel mortgages in New York, though broadly stated, is subject to many limitations. Cf. *North River Coal & Wharf Co. v. McWilliams Bros.*, 32 F.2d 355, 1929 Am. Mar. Cas. 716 (S.D.N.Y. 1929), *aff'd*, 37 F.2d 22, 1930 Am. Mar. Cas. 204 (2d Cir. 1930) (ship chattel mortgage matter). The Supreme Court indicated it followed the title theory states for purposes of ship mortgages (before the act of 1920), *The John Jay*, 58 U.S. (17 How.) 399 (1854) (dictum), but later remarks are more cautious, e.g., the nonpreferred lien is "much closer to ownership" than a tax lien. *New York v. Maclay*, 288 U.S. 290, 294 (1933).

The mechanics of foreclosure under the act provide another opportunity for diverse interpretations. Detailed instructions, provided by most state laws in foreclosure proceedings, is lacking in the federal law, and the hints given are, if not obscure, ambiguous.<sup>81</sup> In view of the strict jurisdictional provisions,<sup>82</sup> the variety and scope permitted in the various state statutes (and common law) may not be available to the preferred maritime mortgagee, but it would not hurt to add clauses of right to possession and power of sale, leaving to the courts the question of their efficacy.<sup>83</sup>

Judge Leibell, in a matter before him, told counsel they would be well advised to follow the procedure outlined in the New York Real Property statute to obtain a discharge of record from a recalcitrant mortgagor and a balking customs collector.<sup>84</sup> But this was a conscious choice, insisting not on the letter of local law but general principles of equity and notice, to supply a guide. This ability to focus on permissible solutions under the act and to make conscious choices is the end which the advocate must seek if inept distortions of the law are to be avoided.<sup>85</sup>

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81. See note 132 *infra*.

82. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958).

83. The Ship Mortgage Act says nothing of nonjudicial foreclosure, thus raising an ambiguity as to whether it is permissible. A few cases indicate that it is: *The Challenger* (*Challenger Inc. v. Durno*), 227 F.2d 918 (5th Cir. 1955), where however, the failure to foreclose privately per mortgage provision was held a waiver of those rights; *The Maberhex*, 6 F.2d 415, 1925 Am. Mar. Cas. 1508 (D.R.I. 1925). In realty mortgages, some states forbid the mortgagee's possession under any circumstances. *Teal v. Walker*, 111 U.S. 242, 252 (1884). Some permit possession if the agreement so provides; some allow it as a matter of law, with various times for exercising the right after default. *Osborne, op. cit. supra* note 74, § 127. The power of sale is also a form of nonjudicial foreclosure, but one closely controlled by statute. See, e.g., *Dingus, Mortgages-Redemption After Foreclosure Sale in Missouri*, 25 Mo. L. Rev. 261 (1960). Nebraska judicially denies such a power, *Osborne, op. cit. supra* note 74, § 337, at 992 n.11. For general discussion of the power in realty mortgages, see 2 *Wiltsie, op. cit. supra* note 79, at 1360-79. The Ship Mortgage Act is silent on the subject, but trust deed mortgages which characteristically have the power are expressly recognized in the act. Under the Bankruptcy Act, 30 Stat. 544 (1898), as amended, 11 U.S.C. §§ 1-1255 (1958) (Supp. III, 1959-1961), the Secretary of Commerce, as assignee of the defaulted mortgage, is expressly authorized to "institute foreclosure proceedings and in connection therewith repossess the mortgaged vessel forthwith. . . ." 68 Stat. 1273 (1954), as amended, 46 U.S.C. § 1275(c)(1) (1958). The jurisdictional limitation on foreclosure, 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958), is a strong argument against the power of sale and possessory foreclosure. The problems of title and the inability to render the ship free and clear of all liens would be strong practical arguments against a mortgagee taking such a step in lieu of judicial foreclosure. The mortgagee can, however, take the step and take his chances on priority of his lien without divesting either his own or other liens. Cf. *The Bergen*, 64 F.2d 877, 1933 Am. Mar. Cas. 877 (9th Cir. 1933).

84. *The Skipper III* (*In re Suttmeier*), 112 F. Supp. 196, 1953 Am. Mar. Cas. 371 (S.D.N.Y. 1952).

85. The following are areas of difference in state law which might pose a question for

*C. International Jurisdictional Problems*

In terms of theoretical potential, there are few commercial problems which are likely to be more complex than the varying legal consequences attending the departure of a vessel for foreign shores. Notwithstanding the broad seas of legal complexities, there is little which has been written directly on the subject. The international aspects of admiralty law are generally incidental or historical subjects in most of the standard works, leaving the practitioner to odd and assorted (as well as infrequent) cases, occasional law review material and diverse works in related fields of conflict of laws or international law.<sup>86</sup> Unfortunately, admiralty situations do not usually present themselves in categorized fashion, at least not in the particular categories in which the treatises have been written or in which the reporters' key-systems have been set forth. The practitioner finds, therefore, that he must search out comparatively obscure and recondite source material to deal with intricate situations.

The problem in the international field is largely the converse of what we referred to above in the national picture as "parochialism," where the judge (and lawyer) risked an unawareness of questions of law other than the law with which he was familiar. The initial presence of international legal questions presents to the judge and lawyer an ever-mounting spectre of unknowns which may indicate some easy rationale to escape the spreading darkness. The situation in this respect may be only one of degree when compared to that of any legal problem impinging on a crowded court calendar or case load. But it accentuates the need for preliminary preparation in approaching the court as against the usual more relaxed "learn-as-we-go" practice.

Not all of the problems are strictly legal. Communication with over-

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the ship mortgagee: Does prosecution of a personal action waive right to foreclosure? See 5 *Tiffany*, op. cit. supra note 74, §§ 1554-55. The writer's view is "no," but 41 Stat. 1004 (1920), 46 U.S.C. § 954(a) (1958) does not explicitly negate waiver. Does the mortgagee have a right to possession on default? See 5 *Tiffany*, supra §§ 1414-15; see also note 83 supra. Does an open-end mortgage give preference to advances postdating liens arising after the mortgage but before the advances? For differing state laws see Note, 70 *Yale L.J.* 461, 462 (1961).

86. The full title of Benedict's definitive work is *The Law of American Admiralty*; that of Robinson: *Handbook of Admiralty Law in the United States*. But more recently: Gilmore & Black, *The Law of Admiralty* (1957), mentions the problem of conflict of laws and refers to its various applications in the national and international scene. In a British work more limited in subject, Price, *Law of Maritime Liens* (1940), the maritime lien law of several nations was reviewed in digest form. The scope of the substantive law and the multiplicity of maritime nations is a practical obstacle to a single general treatise, but one may look towards increasing collection of source materials which would facilitate an understanding of the legal situations likely to be encountered abroad.

seas counsel can be both difficult and hazardous. Many American attorneys have at some time had occasion to retain a foreign lawyer to prove some aspect of foreign law at issue in local litigation. Such American attorneys can appreciate the semantic difficulties which crop up in trans-oceanic lawsuits. But knotty as these situations are, the degree of the involvement is likely to be less than that of the lawyer for the American ship lienor. In the usual situation, the American attorney seeks a foreign attorney's expert opinion on a particular point of foreign law upon which attention has been focused. However, the admiralty attorney is frequently in a converse situation when he seeks a foreign lawyer. Action is needed abroad, but it is the American right under American law which the admiralty attorney seeks to enforce on his client's behalf. The American attorney becomes, in effect, his foreign attorney's "expert." But the admiralty attorney's limited expertise does not simplify his communication problem.

At the outset, there may be no "focus" to the problem. The American lawyer may wish to institute an action to foreclose the mortgage or to intervene, but he has little or no idea as to whether the remedy exists, or in what form it exists abroad, much less of the procedure involved. The foreign lawyer, including the maritime expert, may have only the haziest notion of American law, of the rights which inhere in the mortgage and of the procedural and substantive concepts governing American maritime rights. Language barriers increase the problem. In addition to the ordinary difficulties of translation is the fact that lawyers are dealing in different terms of legal reference where words, often artful and archaic, are literally meaningless in another tongue.<sup>87</sup> Worst of all, time is usually "of the essence," or at least mortgagee clients understandably so believe. The ship's stay at ports of call is usually brief, often uncertain. If the ship does remain a convenient length of time, other creditors may be proceeding, and by virtue of process, gain rights and priorities.

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87. The language problems are of significance, often concealing the differences of concept, or obscuring concepts by the use of words no longer meaning what they once did. Thus, a translation of the Italian Maritime Code, art. 575, rendered "privilegio" as "privileged lien," making it sound very like the "preferred lien" of 41 Stat. 1604 (1920), 46 U.S.C. § 953 (1958), in which event it would prime the preferred mortgage. However, "lien" is the appropriate word, in which case it would probably be primed by the mortgage. 2 Ripert, *Droit Maritime* § 1044 (4th ed. 1950) was obviously misled by "give, grant, convey, bargain and sell" in the mortgage. He believed the words meant what they said, something which in real property, except to a limited extent in the "title" states, has not been true in this country since the early nineteenth century. See *Jackson v. Willard*, 4 Johns. R. 41, 42-43 (N.Y. Sup. Ct. 1809). Nor is the rule universal with respect to personalty. See note 80 *supra*. The danger of mistaking form for reality was noted in Lord & Glenn, *The Foreign Ship Mortgage*, 56 *Yale L.J.* 923 (1947).

Attempting to reach the security, *i.e.*, the ship, in a foreign port entails most of the procedural difficulties outlined previously and in addition, the unknowns of the country in which the ship is situated. Notwithstanding the need to invoke the foreign nation's judicial processes, prior institution of legal action at home may, ironically, be necessary. As noted earlier,<sup>88</sup> it may be imperative where some form of bankruptcy or other equitable proceeding has begun in the United States, to (a) commence an admiralty action in the federal court where the bankruptcy proceeding is pending, (b) intervene in the bankruptcy action for permission to go after the security (over which American law may give the referee or trustee some aspect of "jurisdiction"), and (c) commence an action abroad. Ordinarily, however, the real problems begin with the suit abroad, where the ship is.

Procedural refinements of instituting lawsuits or of intervening (since the mortgagee's litigation is often compelled by actions of others), are matters chiefly of local interest. Beyond a minor degree of anticipation in the way of preparation of ownership, mortgage and other related documents, *i.e.*, certification, authentication by consuls and possibly translations, the American attorney has little to do with this phase of foreign litigation. These details, however, may be important in view of the usual need for speed.

The commencement of an action in some countries requires a great deal of formality. The need for service on a personal representative of the owner may make a prompt foreclosure abroad difficult should the ship lie abandoned in a foreign port. In this respect, the American metaphysical legal concept personifying the vessel has a practical result of great simplicity in starting actions in rem. One can libel the ship by filing the "libel and complaint" with the clerk in the federal district court. The clerk then issues process, that is, he gives the attorney a document comparable to a summons, which is delivered to the marshal. The marshal then, if the ship is within the district, literally goes to the ship and serves the ship by affixing a copy of the process to it. Thus, starting an admiralty suit in rem in the United States is, from the suitor's point of view, a minor "modern" triumph founded on a legal archaism developed in the nineteenth century. Granted the practice might be achieved without the fiction; we need not look small gift horses in the mouth.<sup>89</sup>

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88. See text accompanying notes 53-58 *supra*.

89. A corollary is that if the marshal cannot make physical service, the ship is not served. See *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 1961 Am. Mar. Cas. 1927 (E.D. Va.), *aff'd*, 295 F.2d 24, 1961 Am. Mar. Cas. 1952 (4th Cir. 1961), where the United States Coast Guard, at the request of the State Department, physically prevented the marshal from making service on the Cuban vessel.

The procedural distinction between American actions in rem and those of other countries has a deeper significance. The lien concept in the United States distinguishes between rights against the property and rights against the owner. The lien or "privilege" on the continent is less conceptualized than here. In Europe, the "privilege" is essentially one against the owner, but with a right over to his property. The difference even exists in England despite the similarity of the source of law and the identity of terms.<sup>90</sup> This emphasizes the different content given the same legal terms and underscores the greater need of awareness where the legal words of different legal systems approach the appearance of identity.

In our country the lien contains a synthesis of rights which are distinct in other places. Among these are the creditor's right to be satisfied out of a particular piece of the debtor's property, the creditor's preferred rank entitling him to full satisfaction to the extent of the property's value ahead of other creditors and the right to follow the property and make a claim on it after its ownership has been transferred.<sup>91</sup> This poses a problem transcending the substantial semantic difficulties: Does the forum possess a remedy sufficiently similar to the American lien so that the forum may grant relief to the lienor?<sup>92</sup> The answer to this question so far as the preferred ship mortgagee is concerned, is that the foreign courts have not found it difficult to honor the American lien.<sup>93</sup> Non-

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90. For example, the materialman in England has or had a right to proceed in rem against the vessel, i.e., he could attach the vessel at which time a lien would arise. See *The Colorado*, [1923] P. 102 (C.A.); Note, 26 Harv. L. Rev. 356 (1913); see also discussion in *The Oconee*, 280 Fed. 927, 933 (E.D. Va. 1922). For a similar French concept see 2 Ripert, *op. cit. supra* note 87, § 1164. Price characterizes English maritime rights as (1) maritime liens of older nonstatutory origin; (2) statutory-maritime or quasi-maritime liens, which are similar in rights to the first category; (3) statutory liens or statutory rights in rem such as the materialman has; and (4) possessory liens. The first two categories are similar to the American maritime lien in practice, the two latter ones to our nonmaritime liens. Price, *op. cit. supra* note 8, at 90.

91. The "droit de suit" or "right to follow" was the subject of discussion in *The Colorado*, *supra* note 90, where the British court sought to assess French rights. It is significantly added as a special right in one sentence of the Brussels Convention constituting the shortest article of the treaty. Brussels International Convention on Maritime Liens and Mortgages art. 8 in 6 Benedict, Admiralty at 332-87 (Knauth 7th ed. 1958).

92. E.g., *The Colorado*, *supra* note 90, where the several judges differed on the nature of the French rights in their correspondence to the English. Price, *op. cit. supra* note 8, at 206, states that since the lien is an attribute of law, it may be nonexistent in non-recognizing jurisdictions.

93. *The Wang Importer*, Tribunal de Grande Instance, St. Nazaire, May 26, 1961. (unreported French opinion) where American mortgagee on American vessel was granted preference over all but local costs of attachment and actual wages. The matter, now on appeal, is in abeyance pending the appellate court's request for "expertise" on the question

mortgage lienors, however, have encountered numerous difficulties.<sup>94</sup>

Having passed the first remedial hurdle, we come to more complex questions, where, once again, there is little collected case law to serve as a guide. What kind of assimilation will be made by the forum of the American lien?<sup>95</sup> Will it be subjected to liens of the forum in priority?<sup>96</sup>

of American law. *Deuxième chambre civile de la Cour d'Appel de Rennes*, Feb. 6, 1962. See also *The Pacific Challenger* (*Marine Midland Trust Co. v. Pacific Challenger Corp. of Panama*), (High Ct. of Justice, Adm. Div. 1960) (British opinion on Liberian mortgage registered in New York) 1960 Am. Mar. Cas. 2498 (S.D.N.Y. 1960), a case involving American interests, dealing with a statute virtually identical with the American statute, where the court denied a series of technical objections raised against the mortgage. Cf. note 163 supra. See also general outlook of American court on Liberian mortgage under the 1954 amendment to Ship Mortgage Act, 68 Stat. 323, 46 U.S.C. § 951 (1958); *The Aruba* (*Rederiaktierbolaget v. Compañia de Navegacion Anne*), 139 F. Supp. 327, 1955 Am. Mar. Cas. 1143 (D. Canal Zone 1955). Prior to the 1954 amendment, the question of recognition accorded a foreign mortgagee was raised in *The Secundus*, 15 F.2d 711, 1926 Am. Mar. Cas. 1414 (E.D.N.Y. 1926), but curiously denied, 1927 Am. Mar. Cas. 641 (E.D.N.Y. 1927). For American courts' view as to possible European approach, see *The Ozark*, *The Kingston*, and *The Denton*, supra note 4, where the mortgagee was preferred.

94. In the unreported matter of *The Valiant Enterprise*, Application No. 3 of 1960, the Chief Justice of the Colonial Court of Admiralty of Ceylon, Colombo, declined to entertain jurisdiction of an American captain's claim for wages and disbursements on an American vessel, suggesting that questions of foreign law are involved, and, therefore, the captain should seek his remedy in America. However, in another unreported opinion an Israeli court found no difficulty in granting the seamen relief: *The Pacific Wave*, Adm. Case No. 21/60 Haifa, Israel. In *The Denton*, it is suggested that a foreign court would be without jurisdiction to entertain a mortgage claim because of the express limitation in 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958). This dictum does not appear to be justified. Many provisions of Title 46 refer only to the American scene, although the words are not expressly limited. Thus, "any seaman" in the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), is for many purposes "any American seaman." Cf. *Larsen v. Lauritzen*, 345 U.S. 571, 1953 Am. Mar. Cas. 1210 (1953). Obviously the provisions of the Code against ship transfer, 39 Stat. 730 (1916), as amended, 46 U.S.C. § 808 (1958), do not inhibit judicial sale abroad except insofar as a direct government ownership interest may be involved. Note in this regard the more careful language of 41 Stat. 1004 (1920), as amended, 46 U.S.C. § 961(a) (1958), which specifically excepts such foreign sale. Further, the purpose of the 1954 amendment to 68 Stat. 323, as amended, 46 U.S.C. § 951 (1958) of the act was to give reciprocal rights to foreign mortgagees similar to those enjoyed by Americans abroad. See *The Aruba*, supra note 93; *The Tradewind*, supra note 66. A limitation on a mortgagee's rights abroad would be a pointless contradiction of the entire purpose of the statute.

95. See *The Colorado*, [1923] P. 102 (C.A.), for varied approaches of the judges in adapting French rights to English remedies. Price, op. cit. supra note 8, at 215, suggests that the matter of proof may also be included in the subject of conflict of laws, as in France where local requisites must be met for a foreign lien to qualify. The question was raised and denied in *The Aruba* (*Rederiaktierbolaget v. Compañia de Navegacion Anne*), 139 F. Supp. at 336-37, 1955 Am. Mar. Cas. at 1156-57.

96. *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809), a nonmaritime case, is the leading decision for the proposition that the forum determines priorities. It is cited by



Will its priority be altered with respect to liens other than those of the forum?<sup>97</sup> To the extent this is likely, the dilution of the mortgagee's rights will be reflected in the risk factor of his investment. In fact, the mortgagee has also done well here, although the amounts of the claims of other lienors and the particular details of competing claims limit placing great reliance on these decisions.<sup>98</sup> Perhaps a general receptivity on the Continent to the problems of finance capitalism and the emphasis on the creditor<sup>99</sup> as against a favoritism for the repair and supplyman, furnish a measure of reliance for the mortgagees so long as the politico-economic situation is relatively constant.

We have approached the mortgagee's potential difficulties abroad through the procedural aspects because realistically these provide the form through which any forum must deal with legal disputes. There is no question as to a choice of law; no problem of conflict of laws with respect to limitations of available remedies in this sense. It is only after the court has found suitable remedies from among its own forms, to which the foreign claim may be adapted or assimilated, that the forum may proceed to evaluate the matter. Irrespective of later decisions to be made by the forum regarding choice of law and substantive problems, the local legal system will govern those details which are determined to be "procedural." Much may depend on the forum's definition of "procedural," for included in this may be the item of priority<sup>100</sup> and of the lien, itself. Under those circumstances one must always be wary of the familiar expression "*merely* procedural."

Referring to the subject of conflict of laws with respect to maritime liens, Price writes "that this particular sphere of maritime jurisprudence

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Banks, L.J., in *The Colorado*, supra note 95. But see comment in text at note 115 infra and accompanying text. In addition to priorities, the forum may grant liens not recognized by the law of the ship's flag; e.g., *The Tagus*, [1903] P. 44; *The Milford*, Sw. 362, 166 Eng. Rep. 1167 (P. 1858), where the British courts granted a master's wage lien which would rank a mortgage. See Restatement, Conflict of Laws § 50, illustration 1, at 82 (1934). But in *The Wang Importer*, supra note 93, at 39, the French court rejected an attempt by American pension, welfare and vacation plans to pursue remedies in France which did not exist in America.

97. In *The R. C. Rickmers*, 1924 Am. Mar. Cas. 971 (S.D.N.Y. 1924), an Italian supplyman was subordinated to a German vessel on the ground that Italian law adopted the law of the flag. See also *The Woudrichem*, 278 Fed. 568 (E.D.N.Y. 1921); *The Kaiser Wilhelm II*, 230 Fed. 717 (D.N.J. 1916); *The Scotia*, 35 Fed. 907 (S.D.N.Y. 1888). These decisions raise the questions of choice or conflict of laws.

98. See note 93 supra where mortgagees were accorded substantial priority.

99. Price, op. cit. supra note 8, at 221, 230.

100. See note 96 supra. See also Restatement, Conflict of Laws §§ 584-90, 603 (1934), cf. Introductory Note, id. at 699-701.

appears to be in a state of confusion."<sup>101</sup> Having given the proper perspective, he goes on to list three "solutions adopted": *lex fori*, *lex rei sitae*, and the law of the flag.<sup>102</sup> As to being "solutions," they are at best partial; and "adopted" is a matter of interpretation. But they are useful standards of reference to which the courts have repaired in search of explanations for the decisions they have achieved. To these ought to be added the Brussels Convention of 1926<sup>103</sup> which has had a distinct effect on both adjective and substantive law, although its effect with respect to the United States and Britain, both nonsignatories, is only indirect.

The Brussels Convention governing maritime liens has been adopted in eighteen countries.<sup>104</sup> The treaty established a single set of rights for ship mortgagees and lienors of the acceding countries. It set forth both procedural and substantive attributes of maritime liens and rights in vessels. The Convention did not *create* a new type of security in the sense that the Ship Mortgage Act did.<sup>105</sup> The signatory nations each had their own laws with respect to rights in shipowners' property prior to 1926. But the Convention did unify those laws and make the rights reciprocal between the participating nations.

Over the years, the treaty has been adopted in different ways, sometimes appearing first as municipal law.<sup>106</sup> It has been interpreted and applied differently in the various signatory countries. A member country may or may not apply treaty law to a nonsignatory country, in which case the local municipal law (if different from treaty law) or local conflict of laws rule may apply.<sup>107</sup> This is of particular importance to the American mortgagee since the United States (as well as Great Britain) is not a signatory to the Brussels Convention. There may, of course, be other treaties, and these may imply some effect upon the vessel of the Brussels Convention, notwithstanding the fact that one country is a nonsignatory.<sup>108</sup>

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101. Price, *op. cit.* supra note 8, at 206.

102. *Ibid.* Compare Restatement, Conflict of Laws § 45, at 75 (1934) which states "a state has jurisdiction over all vessels flying its flag. . ." However, the comment says that, in addition to treaty and constitution, the jurisdiction is limited in foreign territorial waters. But see Restatement, supra § 49: chattel subject to the state of its location; § 98: a ship may be sold so as to give good title (illustration 1, at 151), but a real mortgage on foreclosure may not cut off third party rights (illustration 2, at 151); see also §§ 103, 105.

103. Brussels International Convention on Maritime Liens and Mortgages, in 6 Benedict, *op. cit.* supra note 91, at 382-87.

104. *Ibid.*

105. See text accompanying note 18 supra.

106. Price, *op. cit.* supra note 8, at 214-16, 235-36.

107. *Id.* at 215-16.

108. Cf. *Meridian Trading Co. v. The Denton*, 1960 Am. Mar. Cas. 2264 (S.D. Tex.

The question of public policy may by statute or case law prefer the local lienor, or it may entirely reject the lien claim.<sup>109</sup> Conversely, it may grant a lien for services rendered in a country where no such lien would have arisen.<sup>110</sup> Certain subject areas receive special treatment in the application of broad legal principles. Thus, the "law of the flag" is frequently applied to and modified by labor and wage questions, and distinctions made with respect to seamen's claims are not necessarily a guide to other types of claims.<sup>111</sup>

The treatise writers are often vague in their statements; understandably, in view of the law itself. For instance, one writer states that "French law distinguishes clearly between foreign ships and ships carrying the French flag."<sup>112</sup> Unfortunately, the substance of the distinctions is not clear. Ripert claims that the nationality of the ship is decisive in wage matters,<sup>113</sup> but elsewhere indicates the law of the place where the ship is libelled governs, since it is also "the *lex rei sitae* at the time of the birth of the lien."<sup>114</sup>

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1960), aff'd sub nom. *Brandon v. S.S. Denton*, 302 F.2d 404, 1962 Am. Mar. Cas. 1730 (5th Cir. 1962).

109. That the general maritime law of liens and foreign liens are subject to local policy has frequently been stated by American courts. See *The Elfrida*, 172 U.S. 186, 203 (1898); *The Lottawanna*, 88 U.S. (21 Wall.) 553, 571-72 (1874); *The Oceana*, 280 Fed. 927 (E.D. Va. 1922); *The Snetind*, 276 Fed. 139, 143 (D. Me. 1921); *The Kong-li*, 252 Fed. 267, 271 (D. Me. 1918).

110. See *The Colorado*, [1923] P. 102 (C.A.) (opinion of Scrutton, L.J.). Compare Restatement, Conflict of Laws § 50, illustration 1, at 82 (1934) where valid attachment in New York on bill of lading (giving title under English law) is held to subject English cargo to New York lien, although no attachment is available in England.

111. The United States, for example, by statute applies its wage laws to all ships in its ports (without regard to lien theory). See Rev. Stat. § 4529 (1898), as amended, 46 U.S.C. § 596 (1958); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920). However, compare the limited application of statutory (nonlien) tort law in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 Am. Mar. Cas. 1210 (1953). Compare *The Colorado*, [1923] P. 102 (C.A.). Generally speaking, other continental countries give high priority to wage matters. E.g., French Code of Maritime Workers art. 130; French Civil Code art. 2272 (rev. ed. 1930). The question of locally owned foreign flagships poses its own special problems which in the past have only been the subject of an occasional American opinion relating to liens. However, with the increased use of alien registry by American investors and particularly with the 1954 amendment to the Ship Mortgage Act, 68 Stat. 323, 46 U.S.C. § 951 (1958), these questions may be expected to increase both in number and complexity.

112. Price, op. cit. supra note 8, at 215.

113. 1 Ripert, op. cit. supra note 87, § 661. The remark is on the proposition that the ship, the contract and the seaman are all of the same nationality.

114. 2 Ripert, op. cit. supra note 87, § 1164 reads "Les tribunaux français admettent sans hésitation la loi du lieu où la navire est saisi et vendue; ils l'appliquent parce que cette loi est en même temps la *lex rei sitae* au moment de la naissance du privilège." The translation is: "The French tribunals acknowledge the law of the place where the vessel

Contrasted to the indefinite situation in France, Italy (another Brussels Convention signatory) eschews the application of its own law to foreign ships to the detriment of its own suppliers and repairmen. The Italian courts have declared that priorities are not "procedural," and have held that they are determined by the law of the flag. This seems to be further than most countries are willing to go.<sup>115</sup>

Although we have noted some disharmonies arising out of the Brussels Convention, it would be both unfair and improper to leave the impression that the treaty has had the net effect of increasing problems in the lien field. On the contrary, the treaty has produced a single frame of reference to which lawyers and judges of many countries may look without the intermediary of a foreign legal expert. If it leaves some vexing problems unresolved, it has on the positive side achieved a standardization of rights that is of itself valuable in assessing financial interests, and in furnishing a ready source of comparison to those countries whose law in this field is less precise. It is, on a less general level, a simple source of defining lienors' rights as they may affect the American mortgagee, which definition does not exist in our own law.<sup>116</sup>

In assessing the diversity, it is well to keep in mind that "internationalism" is in fashion and that, as a practical matter, judges in most maritime nations—including ours—appear to seek and make themselves receptive to guidance in a fair application of rules. This passing note of optimism

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is attached and sold, without hesitation; they apply it because it is this law which is at the same time the *lex rei sitae* at the time of the privilege." Ripert, however, did not subscribe to the French rule, and his view bore fruit in *The Wang Importer*, supra note 93, when the court distinguished an earlier French case as affecting French interests. Similar language is found by Bankes, L.J., in *The Colorado*, [1923] P. 102, 106 (C.A.), but his approach differed from the other judges who reached the same result.

115. For recent American discussion of Italian law see *Meridian Trading Co. v. The Denton*, supra note 108. The *R. C. Rickmers*, supra note 97, is an American view predating the Brussels Convention. See also Price, op. cit. supra note 8, at 216-17. The American courts differed greatly. See *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809); *The Scotia*, 35 Fed. 907, 911 (S.D.N.Y. 1888); *The Selah*, 21 Fed. Cas. 1025 (No. 12636) (D. Cal. 1876). British courts appear to be in accord with the American view. The recent French case, *The Wang Importer*, supra note 93, appears to accept priorities of the flag, although Ripert unhappily felt the law to be contra. 2 Ripert, op. cit. supra note 87, §§ 1163, 1292-93. Times appear to have changed since the comment was made: "Undoubtedly a foreign court would not prefer an American mortgagee to a native repairman." Comment, 33 Yale L.J. 646, 651 n.25 (1924). See also Robinson, op. cit. supra note 42, § 66.

116. For example, it offers American courts a comparative source for interpreting laches. If one cause is pre-eminent in the protracted mortgage litigation of the past few years, it is the highly indefinite status of liens due to the aging process. The doctrine furnishes a ready-made inducement to legal argument, and attorneys have been apt to take it. The simplicity of the Brussels rule in this regard has much to commend it.

may provide little consolation to the American attorney at the inception of an action in the nature of a foreclosure abroad, but it does give a more realistic appraisal of the probabilities attending the maritime mortgagees' rights on foreign shores.<sup>117</sup>

#### V. NONJURISDICTIONAL PROBLEMS

Struggles over priorities between competing lienors and the preferred ship mortgagee account for the bulk of decisions under the Ship Mortgage Act.<sup>118</sup> Contests by the owner are rare,<sup>119</sup> and probably where he appears it is only in name for purposes of the unsecured creditors attempting to garner assets to salvage some portion of their loan or other services.

The act sought to carry forward the then extant lien law largely in outline rather than detailed codification. The attempt at integrating the older lien law with the new mortgage scheme was something less than a complete success. In certain respects, however, the law was explicit, namely "preferred liens."

Certain types of liens are expressly preferred by section 953(a)(2): seamen's wages, stevedores' wages, salvage, general average and torts.<sup>120</sup> These claims come ahead of the mortgage<sup>121</sup> and all other types of liens

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117. The problems continue through the proceedings and thereafter. Thus, the judgment may be challenged, but will be sustained if a court of general jurisdiction is involved, *The Trenton*, 4 Fed. 657 (E.D. Mich. 1880), even if the procedure differs markedly from that of the forum in which the attack is made *The Totila, ex Harald* (*Zimmern Coal Co. v. Coal Trading Ass'n*), 30 F.2d 933, 1929 Am. Mar. Cas. 334 (5th Cir. 1929). But in a British case where the court approving the sale was not deemed to be one of general jurisdiction, such as a bankruptcy court, liens were held not to be extinguished (although even here the judgment was not attacked). *The Goulandris*, [1927] P. 182. See Restatement, Conflict of Laws § 260, illustrations 4 & 5, at 344 (1934), which indicate foreign judgments will be recognized if rendered when the chattel is physically within the jurisdiction.

118. E.g., "We deal again with the race for priority. . . ." *Barnouw v. The Ozark*, 304 F.2d 717, 719, 1962 Am. Har. Cas. 1675, 1676 (5th Cir. 1962); contra, *Gilmore & Black*, op. cit. supra note 20, § 9-60. Note, however, this book predates the recent wave of litigation.

119. *The Thomas Barlum*, 293 U.S. 21, 1934 Am. Mar. Cas. 1415 (1934) is a notable exception.

120. The Brussels Convention, 1926, art. 2, prefers (1) attachment expenses, taxes and fees, (2) master's and crew's wages, (3) salvage and general average, (4) collision and injury to person and property, (5) master's contract for necessaries away from the home port. 6 Benedict, op. cit. supra note 91, at 383. The last category constitutes the major difference between the European and the American system, but it is interesting to note that the last item was strictly construed in *The Wang Importer*, supra note 93.

121. The act did not actually state that the mortgage lien was maritime. See *Texas Co. v. Hauptman*, 91 F.2d 449, 450, 1937 Am. Mar. Cas. 1217, 1220 (9th Cir. 1937), but the court "assumed" it was "substantially the same." The Brussels Convention, 1926, appears to distinguish "liens," arts. 2-11 from "mortgages" and "hypothecations," arts. 1, 3, 12.

irrespective of time of accrual, and therefore, are of considerable significance to any mortgagee who contemplates operation or possession of the vessel, or extending the period of credit, or increasing its amount for operational purposes.<sup>122</sup> Only in the category of seamen's wages has there been a significant amount of case law, which is readily understandable in view of the substantial amounts involved and the immediacy of their need to the seamen. Despite their virtual incontestability, it is an oddity that the monies are rarely paid out at an early phase of foreclosure litigation, thus effectively thwarting the general intent of the law that mariners be paid promptly.<sup>123</sup>

Aside from the special categories of liens listed above, all *maritime* liens prior in time to the mortgage are preferred, approximating the usual shore-side situation: "First in time, first in right."<sup>124</sup> But in sea law this expression did *not* state the general, although much excepted, rule: "Last in time, first in right."<sup>125</sup> This principle is based on the general theory that, "the vessel must get on";<sup>126</sup> and it is the last repairman or supplyman who helped keep the ship on her venture and earning freight, thereby protecting everyone's interest in her, whose rights must be protected.

Apparently little or no thought was given to the circularity of rights created when the position of preferred lien was given to rights antedating the mortgage. The earlier liens, now preferred vis-à-vis the mortgage,

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122. The maritime situation is not completely anomalous in this aspect of lien law. Although most American states prefer only taxes to other recordable liens on real property, several add mechanics', supplymen's and others to the preferred list, irrespective of time (e.g., Alabama, Alaska, Montana, New York and Oregon); see also Million, Lesar & Martz, *Real and Personal Property*, 35 N.Y.U.L. Rev. 427, 429, 449 (1960). Note there is no limitation on the amount of the wage preference in admiralty, as is the case in bankruptcy.

123. Not only the mortgage statute, but the entire scheme of law respecting seamen's wages bespeaks prompt, almost forthwith payment: See Rev. Stat. §§ 4529-30 (1898), §§ 4546-47 (1896), as amended, 46 U.S.C. §§ 596-97, 603-04 (1958). Nevertheless, time and inflation have eroded the ability for prompt enforcement. Thus, Rev. Stat. § 4547 (1896), as amended, 46 U.S.C. § 604 (1958) gave the seaman the right to immediate relief for amounts up to \$100, which at that time ordinarily would have more than covered the bulk of ordinary wage claims. Today, this represents about a week's wages (with overtime) for the able-bodied seaman, who therefore cannot invoke the remedy without danger of splitting his cause of action. The frequently expressed attitude in the lower courts that the seamen's unions can take care of the men seems to be an effective psychological counterweight to the written law holding that they are wards of admiralty. *Vaughan v. Atkinson*, 369 U.S. 527, 1962 Am. Mar. Cas. 1131 (1962); cf. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 Am. Mar. Cas. 1503 (1960).

124. E.g., *United States v. City of New Britain*, 347 U.S. 81, 85 (1954).

125. 1 *Benedict*, Admiralty § 14 (Knauth 6th ed. 1940). This referred to liens "of equal class."

126. *The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409, 416 (1824).

ordinarily are inferior to later liens, *i.e.*, those postdating the mortgage. The latter, however, are not preferred and are, therefore, below the mortgage lien. This poses a challenge to a court's ability to rank priorities of various classes of liens. The resulting puzzle is not unlike the children's game which some of us knew as "hands,"<sup>127</sup> where one object is always superior to another, but inferior to a third choice.

Although the preferred ship mortgagee's interest is not directly involved in these circularity difficulties, there is the possibility of his realizing something of a priority over liens which would otherwise be preferred to the mortgage by virtue of events occurring subsequent to the execution and recording of this document.<sup>128</sup> It is, however, an area to which little case law has been devoted,<sup>129</sup> despite the warnings of early law review notes.<sup>130</sup> It will probably be the subject of legal briefs for a time to come in maritime law, as it will in the nonmaritime area.<sup>131</sup>

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127. This game is played by two children, each of whom throws out his hand in one of three positions: paper (hand extended) wraps, or defeats, rock (fist); rock, however, breaks, or defeats, scissors (two fingers extended); scissors cuts, or overcomes, paper. Thus, one is always superior to another, but inferior to a third choice. This is a good game for children, and even for logicians, but not especially helpful to businessmen or lawyers.

128. See *Gulf Coast Marine Ways v. The J. R. Hardee*, 107 F. Supp. 379, 1952 Am. Mar. Cas. 1124 (S.D. Tex. 1952).

129. *Ibid*; see also *National Shawmut Bank v. The Winthrop*, 129 F. Supp. 661, 1955 Am. Mar. Cas. 1288 (D. Mass. 1955), later proceedings, 134 F. Supp. 370, 1955 Am. Mar. Cas. 2089 (D. Mass. 1955).

130. Kellogg, *Priorities Puzzle Under the Ship Mortgage Act*, 2 Wash. L. Rev. 117 (1927).

131. See *United States v. City of New Britain*, 347 U.S. 81, 85 (1954), where the federal tax was held above the local tax as "first in time"; *Aquilino v. United States*, 363 U.S. 509 (1960) which indicated the Government's superiority is not automatic, but depends on attributes given by local law to other rights. In *Kronenberg v. Ellenville Nurseries & Greenhouses, Inc.*, 22 Misc. 2d 247, 196 N.Y.S.2d 106 (Sup. Ct. 1960) the court referred to the anomalous situation if local taxes, which always prime the mortgage, were held inferior to federal taxes, which are inferior to the mortgage. The court noted the argument that, "state and local taxes paid by a mortgagee become part of the mortgage debt" under § 254(3) of the N.Y. Real Prop. Law and the usual mortgage clause. *Id.* at 250, 196 N.Y.S.2d at 111. The mortgagee's payment of taxes locally was held distinct from the New Britain and Aquilino situations. In the maritime sphere, security problems have been avoided by holding the federal tax liens nonmaritime, thus preferring the mortgagee. See *The Abram H. (United States v. Flood)*, 247 F.2d 209, 1957 Am. Mar. Cas. 1718 (1st Cir. 1957) where Judge Magruder remarked, "the government's lien for taxes can reach only the taxpayer's interest in the specific property at the time the lien attaches. . . ." *Id.* at 211, 1957 Am. Mar. Cas. at 1721. This rationale and standard language, however, was not necessary to the decision which was based on the maritime lien proposition. Nor would it be helpful in situations where, for example, nonmaritime rights such as chattel mortgages or conditional sales affect parts of the vessel. See *First Suffolk Nat'l Bank v. The Air Brant*, 125 F. Supp. 709, 1955 Am. Mar. Cas. 2130 (E.D.N.Y. 1954). For results dealing with the federal tax liens and maritime liens, see *The Jane B. (United States v. Jane B. Corp.)*, 167 F. Supp. 352 (D.

The ship mortgage statute is riddled with many details obscure in purpose and puzzling in effect. The greater part will probably never cause significant legal battles, but may well cause niggling doubts to attorneys whose worries might have been left by the legislators to more obvious and important problems. The provisions for sale in foreclosure proceedings illustrate some of the ambiguities which may affect the liens of various creditors and that of the mortgagee.<sup>132</sup> Whatever ultimately is sold at a judicial preferred mortgage foreclosure sale determines in large measure the nature of the mortgagee's security.

More often than not, and perhaps almost without exception, the marshal's auction results in a sale price insufficient to cover the mortgage, or barely sufficient, if the mortgagee bids. The question of the nature of the title which the marshal gives may make a substantial difference in the bids for the vessel. This is of prime importance to the mortgagee, not only from the aspect of its covering the extent of his debt, but also in his frequent (forced) position as purchaser of the foreclosed ship.<sup>133</sup>

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Mass. 1958); *Gulf Coast Marine Ways v. The J. R. Hardee*, 107 F. Supp. 379, 1952 Am. Mar. Cas. 1124 (S.D. Tex. 1952); *United States v. The Pomare*, 92 F. Supp. 185 (D. Hawaii 1950).

132. 41 Stat. 1004 (1920), 46 U.S.C. § 953(b) (1958) states "preexisting claims in the vessel" are terminated in the vessel upon sale in admiralty in a suit to foreclose the mortgage lien. This leaves a possible inference that posterior liens survive, which would lessen the sales price and, hence, reduce the mortgage security. A contrary interpretation would hold that the dicta of "scraping the vessel clean" forms a basis for the statutory provisions, but conversely it might be said that the language of the act amends the general law. 41 Stat. 1003 (1920), as amended, 46 U.S.C. § 951 (1958) provides notice to recorded liens, which indicates some posterior lienors would expressly be bound, and provides penalties on the mortgagee in the event he fails to so notify, perhaps inferring a cutting off of such lienor's rights. 41 Stat. 1005 (1920), as amended, 46 U.S.C. § 961(c) (1958) states the vessel will be sold free from "pre-existing claims" in a nonpreferred maritime lien foreclosure thus raising even more possible inferences. Hence, not only posterior maritime liens, but nonmaritime lien claims might theoretically survive, giving them a higher right than accorded preferred liens. And "preexisting" might refer to the date of foreclosure, or to the date of the inception of the lien being foreclosed. This section specifies that the court may insist upon a new mortgage being issued to the mortgagee. The general intent appears to be to give equitable scope to the court's disposal of intricate situations, and with this in mind, the broadest interpretation of "preexisting" (as referring to the date of sale) might be the most appropriate. See also note 83 *supra* and accompanying text with respect to alternative possibilities of foreclosure.

133. The mortgagee will also give his attention to the nonmaritime factor of tax consequences. Thus, the question of capital loss or gain, or of bad debt loss will be governed by the applicable provisions of the Internal Revenue Code and the Regulations. See Int. Rev. Code of 1954, § 166, 26 C.F.R. §§ 1.166-3, 1.166-6 (1961). These may decide whether a voluntary transfer, if possible, or a foreclosure is desirable, and perhaps affect timing. Capital loss treatment will also depend on corporate status and form of bond, Int. Rev. Code of 1954, § 165(g) 1, 2(C). Since there is no period of redemption in a preferred ship mortgage, the loss will be the year of the foreclosure sale. 26 C.F.R. § 1.166-3 (1961).



As indicated, the act is something less than precise in describing not only the formalities of the judicial sale in admiralty, but also in setting forth its substantive legal attributes. Prior to the act of 1920, admiralty case law had surprisingly little to offer on the quality of title given at a judicial sale. Certain nonjudicial sales could cancel all liens.<sup>134</sup> Plainly, nonadmiralty courts could foreclose nonadmiralty liens, but no maritime interest of lien status was touched by such action.<sup>135</sup> It did not necessarily follow that all admiralty liens would be affected or cancelled by an admiralty judicial sale, but a few cases and several writers said they would (and have continued to say it emphatically).<sup>136</sup> A favored

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134. E.g., the master's sale under certain compelling circumstances. *The Amelie*, 73 U.S. (6 Wall.) 18 (1868); *The Raleigh*, 32 Fed. 633 (S.D.N.Y. 1887), *aff'd*, 37 Fed. 125 (2d Cir. 1888).

135. *Moran v. Sturges*, 154 U.S. 256 (1894). See also *The Goulandris*, [1927] P. 182.

136. "That the sale of a vessel, made pursuant to the decree of a foreign court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. *Story on Conflict of Laws*, § 592. . . ." *The Trenton*, 4 Fed. 657, 659 (E.D. Mich. 1880). See also *The Garland*, 16 Fed. 283 (E.D. Mich. 1883). There are several cases which are in accord in dicta. See *The Mary*, 13 U.S. (9 Cranch) 126 (1815), where it was stated that an admiralty court decree would bind all who have notice. Somewhat ambiguously, Chief Justice Marshall said service on a vessel binds those "who have any interest," but later he indicated that it binds those "who could assert any title." *Id.* at 144. See also *The Syracuse*, 23 Fed. Cas. 592 (No. 13716) (E.D.N.Y. 1878) (Benedict, J.); *The Granite State*, 10 Fed. Cas. 964 (No. 5637) (D. Mass. 1855), where a distinction was drawn between a possessory decree and a sale. *Restatement, Conflict of Laws* § 98, illustration 1, at 151 (1934) states: "A ship belonging to A is in port of state X. The ship may be condemned and sold by a court of X, so as to give the purchaser a title good against all claimants." Note, however, the broad remark on real mortgage foreclosure in illustration 2. *Id.* at 151. In *United States v. The Zarco*, 187 F. Supp. 371, 374, 1961 Am. Mar. Cas. 78, 82 (S.D. Cal. 1960) the court stated: "It is horn-book law that a sale of a vessel in rem passes title thereto free of all liens." Similar comments are made in *Crabtree v. The Julia*, 290 F.2d 478, 482 (5th Cir. 1961); A Netherlands decree of foreclosure of a German ship mortgage was held to cancel an earlier American supply lien, in *The Totila, ex Harald (Zimmern Coal Co. v. Coal Trading Ass'n)*, 30 F.2d 933, 1929 Am. Mar. Cas. 334 (5th Cir. 1929). Inferentially assuming the doctrine, but holding confirmation of a judicial sale incomplete, was *The Admiral (Scrofani v. Miami Rare Bird Farm, Inc.)*, 203 F.2d 461, 1954 Am. Mar. Cas. 92 (5th Cir. 1953). In *The Carib Queen (Ocean Mach. Corp. v. United States)*, 175 F. Supp. 283, 1959 Am. Mar. Cas. 734 (S.D.N.Y. 1959) Judge Bryan held that foreclosure proceedings, valid on their face, vested title to the ship in the purchaser, including all appurtenances, and no rights in the later proceedings could be pursued. Conversely, it was held in *Callway Ice & Fuel Co. v. The Rutheline*, 131 F. Supp. 615, 1955 Am. Mar. Cas. 1335 (S.D. Tex. 1955) that items not on the vessel at the time of judicial sale were not included in the sale "as is." In *The Zarco*, *supra*, items removed from the vessel for repair were deemed to remain a part of it. The repairman was denied a possessory lien under the state law, but accorded a maritime lien on the whole vessel. Compare *The Northern Star*, 1923 Am. Mar. Cas. 1231 (E.D.N.Y. 1923) where apparently the court felt the purchaser on an "unadjudicated mortgage" must be prepared to defend subsequent claims, although in *The Secundus*, 15 F.2d 713, 1926 Am. Mar. Cas.

phrase is that the sale in admiralty scrapes the vessel clean.<sup>137</sup>

The 1920 legislation offered an excellent opportunity to confirm the general statements with respect to the effect of a judicial sale in admiralty, but neither in the broader area of maritime liens, nor in the narrower one of the preferred ship mortgage, was a new definition supplied. Presumably, the legislators believed that the general maritime law, in this respect, was sufficient and, thus, they satisfied themselves with some oddly ambiguous phrases which scarcely clarify the nature of the title at a marshal's sale.

Despite the ambiguities of the Ship Mortgage Act, no significant doubt on the proposition that such a sale scrapes the vessel clean has been presented in the many cases where the sales took place. Indeed, the issue, if raised, does not appear to have merited reported court comment, except as dicta, where the divestiture of all liens was assumed as a matter of course.<sup>138</sup> The marshal characteristically gives a broad general grant in the bill of sale.<sup>139</sup> The mortgagee will undoubtedly find a large measure of comfort in the absence of litigation with respect to these legislative ambiguities, as well as in the general implicit acceptance of the proposition that a sale in admiralty cancels liens not expressly carried forward. Argumentative possibilities aside, the construction of forty years weighs heavily in favor of the simple approach. The theory that there is a total divestiture of prior liens avoids esoteric and endless distinctions. Any

1414, 1415 (E.D.N.Y. 1926) the same court specified the ship would be sold free of a claimed foreign mortgage lien. In *The Angelique* (*Schuchardt v. Babbidge*), 60 U.S. (19 How.) 239 (1856), counsel apparently picking up the thread from *The Mary*, supra, made the argument that since a ship mortgage at that time was nonmaritime, a judicial sale in rem could not foreclose such an interest. The court, however, ignored the argument and said the petitioners should have intervened in the foreclosure proceedings or against the proceeds. Thus, it inferentially sustained the position that all rights were cancelled. See also *Gilmore & Black, Admiralty* §§ 9-85 to -86 (1957): "Here we touch the central point of our system of admiralty law. . . . There are no cases—or almost none. . . . There is only doctrine. . . ." 1 *Benedict, Admiralty* § 11, at 21 (Knauth 6th ed. 1940). "A sale under decree in rem is a complete divestiture of prior liens and conveys to the purchaser a free and unencumbered title to the property. . . ." 2 *Benedict, supra* § 231; *Robinson, Admiralty* § 59 (1939). By way of comparison, in ordinary real estate foreclosure, the purchaser takes the mortgagee's and mortgagor's interest and cuts off all parties to the action with inferior rights. 2 *Wiltsie, Mortgage Foreclosure* § 778, at 1261-64 (3d ed. 1939). However, even as to superior lienors, prima facie this establishes the amount of the debt and the propriety of the decree. 5 *Tiffany, Real Property* § 1523, at 596 (3d ed. 1939).

137. *Robinson, op. cit. supra* note 136, § 59, at 414.

138. See *The Admiral and The Zarco, supra* note 136.

139. Customs Form 1356, Treas. Dep't, 3:32-:34, C.R., March 1955, Form approved: Budget Bureau No. 48-R202.3 entitled "United States Marshall's Bill of Sale of Vessel" provides in part: "This vessel is sold free from all mortgages and other encumbrances." There appears a footnote related to the remark: "This line may be crossed off if not compatible with facts."

alternative would cast clouds on the title given, and correspondingly would encourage prolonged litigation as well as indefinite periods of unknown rights.<sup>140</sup> Clearly, however, such an approach would be more favored by the mortgagee than other lienors.

To the extent that questions of title on a marshal's sale have arisen, they have been in a restricted setting and are of limited value for analogizing to other situations. These cases have dealt with the inclusion or exclusion of equipment and appurtenances at judicial sales. This subject is frequently classified as "accession" under the ordinary mortgage or lien law where divers answers have been provided in real and chattel properties.<sup>141</sup>

Variations in the common-law and statutory mortgage occur in different jurisdictions with respect to different types of subject matter where "accession" is involved. A notable distinction is made with respect to railroads, where substitution of the elements of the security is permitted without disturbing the lien.<sup>142</sup> The language of the Ship Mortgage Act points to the same result for appurtenances of a ship. It specifies that the mortgage must cover "the whole of the vessel."<sup>143</sup> Courts have treated this provision as unambiguously covering equipment and appurtenances, but they have not gone deeply into the problem. Such items have characteristics akin to the railroad situation. While the analogy has not been expressly drawn, quite apart from the language of the Ship Mortgage Act, the reasoning in the ship mortgage cases was similar to that in the railroad matters.

In *The Huntington Sanford*,<sup>144</sup> the mortgagor removed several pieces of equipment prior to the institution of process. The mortgagee went to court and obtained the judge's order for restoration of all the items, both on the ground that the mortgage expressly covered the equipment, and on the basis of the statutory language. The court noted that some of the

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140. The secret aspect of the maritime lien adds in this respect a peculiar difficulty. Mr. Justice Clifford (Field, C.J., concurring) felt that for this reason alone a mortgage statute should be adopted. *The Lottawanna*, 88 U.S. (20 Wall.) 558 (1874).

141. See Osborne, *Mortgages* § 38, at 91 (1951). The question is similar to that of after-acquired property, but not the same. For discussion of the latter and its application on different elements of property in a preferred ship mortgage, see *The Fort Orange*, 5 F. Supp. 833, 1934 Am. Mar. Cas. 240 (S.D.N.Y. 1933). A mortgage clause may be helpful in either case to express intent, but for personalty, a clause would be of no help in Massachusetts for after-acquired property, whereas it generally is not needed in matters of accession. See note 74 supra.

142. See Osborne, *Mortgages* § 39, at 96 (1951).

143. 41 Stat. 1000 (1920), 46 U.S.C. § 921 (1958). This problem as it is affected potentially by varying local law is previously noted. See notes 73-77 supra.

144. 73 F. Supp. 67, 1948 Am. Mar. Cas. 960 (D. Mass. 1947).

equipment was in aid of navigation, and, as such, became "a part of the vessel, subject to the mortgage."<sup>145</sup>

In *The Air Brant*,<sup>146</sup> Judge Inch, without referring to the earlier matter of *The Huntington Sanford*, held that pumps aboard the vessel pursuant to a conditional sale<sup>147</sup> were included in the marshal's sale following foreclosure of a preferred mortgage. He referred to the pumps as necessary for the ship's operation; as to other equipment, the court appeared to rely on "installation." Judge Inch also cited maritime tort cases.<sup>148</sup> He added that since the disputed items had become an essential part of the res, they became subject to the lien regardless of title. This remark does not appear particularly helpful, but if the language leaves something to be desired, the result of Judge Inch's holding was clear. The preferred ship mortgage primed the conditional vendor.

"Installation," in a negative sense, may be an obvious rule to follow, but it does not go far to help the solution of the more difficult and numerous situations. Thus, objects which have never reached the ship, and are in no way, except contractually, identified with it, constitute a limited and easily distinguishable case from that where the objects have been placed aboard.<sup>149</sup> "Installation" and "necessary" are variable terms.

145. *Id.* at 68, 1948 Am. Mar. Cas. at 962.

146. *First Suffolk Nat'l Bank v. The Air Brant*, 125 F. Supp. 709 (E.D.N.Y. 1954).

147. The conditional sale and chattel mortgage have been recognized in maritime objects, but their scope, although definitely subsidiary to the preferred mortgage and maritime lienors, remains largely undefined. Cf. *Rivara v. James Stewart & Co.*, 274 U.S. 614, 1927 Am. Mar. Cas. 939 (1927), affirming 241 N.Y. 259, 149 N.E. 851, 1926 Am. Mar. Cas. 39 (1926) (conditional sale). See also *North River Coal & Wharf Co. v. McWilliam Bros.*, 37 F.2d 22, 1930 Am. Mar. Cas. 204 (2d Cir. 1930), affirming 32 F.2d 355, 1929 Am. Mar. Cas. 716 (S.D.N.Y. 1929) where New York law was held to place title in the chattel mortgagees who were, therefore, prior to state taxes. Other proceedings in the same matter, 28 F.2d 513 (S.D.N.Y. 1928), held the custom house record irrelevant, and failure to record with the county clerk voided the mortgagee's rights. Nonpreferred mortgages are also recognized by the Ship Mortgage Act of 1920. See *The Mariam*, 66 F.2d 899, 1933 Am. Mar. Cas. 1450 (9th Cir. 1933); *Brook v. Angeron*, 16 So. 2d 93 (La. Ct. App. 1943). Until a newly constructed ship is completed and registered, a chattel mortgage may be the only security available to the lender. See *Rodgers*, *Ship Construction Financing*, 12 Bus. Law. 140, 142, 149 (1957); Note, 71 Harv. L. Rev. 1516 (1958). For most pleasure craft, the simplicity of local state registration makes a chattel mortgage under state law a simpler, if less effective, security device. However, if the craft is five tons or over, it may be registered at the customs house nearest the owner's residence, and a preferred mortgage may be had.

148. 125 F. Supp. at 710.

149. Cf. *First Safe Deposit Nat'l Bank v. The North Star*, 185 F. Supp. 815 (D. Mass. 1960) where a new pilot house was completed, but remained in the builder's possession. Citing *The Air Brant*, supra note 146, Judge Julian held the house was not an appurtenance, and, therefore, was not covered by a lien subordination agreement or a ship mortgage. In *The Rutheline*, supra note 136, Judge Allred held articles not on the vessel at the time of the judicial sale were not part of the sale, but the lienors were entitled to an order for their

In *The Air Brant*, it does not appear whether the pumps were movable or stationary, nor would that be likely to furnish a firm guide. In a rather amorphous factual situation,<sup>150</sup> Judge Bryan, citing both *The Air Brant* and *The Huntington Sanford*, felt that neither of these cases furnished a rationale which was dispositive.

Words such as "necessary," "installed," "fixed," "movable," "structural," "appurtenance," "equipment," and even "supplies," tend to blur with increasing standardization and interchangeability of parts and sections of vessels. Chairs may be hooked to bulkheads, but heavy hatchbeams may be moved in every port. Large segments of a ship may be incorporated into other vessels. Technical advances and changing designs make physical details a poor basis for metaphysical distinctions.

Hand in hand with industrial standardization, new financial methods create new situations requiring accommodation of the old forms. Adapting credit devices to take the form of title transfers is as old as the mortgage itself, indeed, it helped create the mortgage.<sup>151</sup> The use of a lease may likewise mask an extension of credit, although certain equipment such as wireless senders and "Butterworth" pumps for tankers are uniformly leased.<sup>152</sup> To give the purchaser at a foreclosure sale such equipment would be a donation of something no one in the trade would expect. But drawing the mark as to what shall or shall not be included in the sale or subject to the mortgage lien becomes increasingly difficult with technological changes. Whatever else its defect, Judge Inch's solution in *The Air Brant* has the virtue of simplicity. Notwithstanding his expressed reasons, the result of his opinion gives a warning to potential creditors that regardless of legal

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return. In other words, the items were subject to a lien which was not divested since they were not included in the sale. In *The Liberator-The Cape Henry* (Atlantic, Gulf & Pac. S.S. Corp. v. United States), 287 Fed. 714, 716, 1923 Am. Mar. Cas. 330 (D. Md. 1923) the bankruptcy court indicated "usage would have much effect" in deciding whether stores passed to the trustee as part of the vessel. It then held the mortgagee could not claim stores on repossession of the ship, which were not part of the sale at the earlier date.

150. *The Carib Queen* (Ocean Mach. Corp. v. United States), 175 F. Supp. 288, 1959 Am. Mar. Cas. 92 (S.D.N.Y. 1959).

151. 3 Holdsworth, *History of English Law* 128 (4th ed. 1935); see also 2 Holdsworth, *supra* at 579 (3d ed. 1923).

152. In *The John T.*, 1947 Am. Mar. Cas. 328 (W.D. Wash. 1947) a ship chattel mortgage was held not to cover leased submarine equipment which was not essential to operation of a fishing vessel. See also *The Liberator-The Cape Henry*, *supra* note 149. The non-mortgage cases scarcely contribute to a harmonious rationale. In *The Hironnelle*, 21 F. Supp. 223, 1937 Am. Mar. Cas. 1597 (S.D. Ala. 1937), the Radio Corporation of America was allowed to repossess radio equipment deemed both necessary to and a part of the ship, but not used in navigation of the vessel. In *The Showboat*, 47 F.2d 286 (D. Mass. 1930) movables were returned to the conditional seller where there was "no [structural] harm to the ship." See also Robinson, *Admiralty* § 51, at 382-85 (1939).

terminology, the supplies or services rendered to a ship may become a part of the whole of the vessel. This dispenses with the need to make fine and difficult lines of distinction.

To the extent that the "accession" cases involve title, they point toward a preference for the mortgagee, and to a lesser extent, other lienors. Whether these cases are authoritative for other problems arising in different settings is questionable. At least, they furnish a clue and a possible guide to which contrary results have not appeared under the Ship Mortgage Act.

The Ship Mortgage Act does provide some latitude for the imposition of conditions at the marshal's sale.<sup>153</sup> If the situation has not risen under the Ship Mortgage statute, it may nevertheless be instructive to note that the courts have, on occasion, imposed conditions on sales of vessels. One such case, *The Abaco Queen*,<sup>154</sup> is indicative of the problems which are not necessarily different, whether the mortgage in question be preferred or nonpreferred. In that case, the mortgagee sought to foreclose and the owner-mortgagor interposed no defense. However, the mortgagor's grantor intervened and sought to maintain a contractual restriction on the ship's use. The restriction which the intervenor had inserted in the bill of sale purported to prevent the ship from sailing competing "runs" against a prior owner, and the grantor had in turn received the ship from that prior owner with a similar restriction (and a healthy liquidated damages clause to back it up). The mortgagee who had financed the most recent purchase of the vessel from the intervenor knew of the restriction, but no mention of the covenant appeared in the mortgage. The district judge held that since the grantor would not have sold the vessel except with the restrictive condition, the mortgagee who knew of the provision was bound by the equitable servitude.

The decision was sustained on appeal,<sup>155</sup> heavy reliance being placed on equitable principles. The court stated that it would prevent "unconscionable" conduct by the mortgagee.<sup>156</sup> Dissenting, Judge Tuttle doubted that an inequitable situation had been presented and noted that the mortgagee was not a party to the restrictive agreement.<sup>157</sup> He added that no limitation was placed in the mortgage of which the intervenor was aware. He referred to the substantial liquidated damage clause

153. See Ship Mortgage Act of 1920, 41 Stat. 1005, as amended, 46 U.S.C. § 961(c) (1958); see also note 132 supra.

154. *Tri-Continental Financial Corp. v. Tropical Marine Enterprises*, 164 F. Supp. 1, 1958 Am. Mar. Cas. 2507 (S.D. Fla. 1958), aff'd, 265 F.2d 619, 1959 Am. Mar. Cas. 1408 (5th Cir. 1959).

155. 265 F.2d 619, 1959 Am. Mar. Cas. 1408 (5th Cir. 1959).

156. *Id.* at 626, 1959 Am. Mar. Cas. at 1417.

157. *Ibid.*

which inferentially indicated the remedy he felt was appropriate. Judge Tuttle reversed the phrases of the majority contending that the mortgagee might have withdrawn from the transaction had the intervenor insisted on the restrictive agreement in the mortgage. Indicating fundamental disagreement, he referred to the traditional distinctions between restrictions in realty and those in personalty.<sup>158</sup> He said that the courts tended to leave chattels unencumbered, adding that even in real estate the law now favors unclogged titles. Thus, the dissent did not deny that equitable principles might be applied in admiralty, but rather differed on their possible application.

*The Abaco Queen* was not an instance of a judicially undefined title having been given at a marshal's sale, but one where, at the behest of a suitor, the court limited the title to be given. It described a situation which could occur with respect to preferred ship mortgages. If so, it is suggested that Judge Tuttle's language appears to lie closer to the earlier interpretations placed upon the act. This suggestion is reinforced by the public offering aspect which was basic to Chief Justice Hughes' reasoning in *The Thomas Barlum*.<sup>159</sup> Investors would not be likely to know or to assess such restrictions as the owner may place by unrecorded contractual arrangements upon his vessel, and the mortgage documents would offer no clue.<sup>160</sup>

## VI. THE INVESTORS' GUIDE

### A. *The Test of Time*

What appraisal can be made of the security afforded by the American preferred ship mortgage? What is the comparative risk in this investment as measured against that in other fields? Has the statute served its purpose and achieved for the Merchant Marine a form of investment on a par with other sectors of industry?

Empirically, one may note the few amendments to the Ship Mortgage

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158. *Id.* at 627, 1959 Am. Mar. Cas. at 1418.

159. See note 29 *supra*.

160. The indexing of *The Abaco Queen*, *supra* note 154, for the "key-system" points out some of the problems which attorneys face when researching preferred ship mortgage matters. *The Abaco Queen* is listed, among other titles, under "estoppel" and "contract." Such nonmaritime appellations are rare in ship mortgage categories. Apparently, this was possible in *The Abaco Queen* chiefly because the word "preferred" did not appear before "mortgage." Ordinarily, once that happens, a short circuit develops where the most that can be gleaned from any cross-indexing is "maritime liens." The unspecific description of "shipping," all too frequently, disposes of the reporter's gloss, e.g., *The Shipper III* (In re Suttmeier), 112 F. Supp. 196, 1953 Am. Mar. Cas. 371 (S.D.N.Y. 1952) which also involved a preferred ship mortgage, foreclosure, liens (maritime and otherwise), recording, vendee, specific performance, satisfaction, and so forth.

Act, only one of which was corrective.<sup>161</sup> This is an indicia of stability, and one may suppose, an expression of satisfaction in the trade. The act has rarely been the subject of pressure for modification, and judicial criticism has been sparse.<sup>162</sup>

Some measure of the industry's contentment may be gleaned from the Liberian Code<sup>163</sup> where the greater part of the American Ship Mortgage Act dealing with preferred ship mortgages was almost identically reproduced for the apparent benefit of American investors using foreign registry under the so-called "flags of convenience" or "runaway ships."

More pragmatically, the financial community has a substantial commitment<sup>164</sup> to, and foresees an increasing area of financing in, ship mort-

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161. Compare 43 Stat. 948 (1925), 46 U.S.C. §§ 1011-14 (1958), with 41 Stat. 1000 (1920), as amended, 46 U.S.C. § 921 (1958). For a good account of the confusing history of these provisions, see Gilmore & Black, Admiralty § 9-54 (1957). 49 Stat. 424 (1935), as amended, 46 U.S.C. § 922(a) (1958) (Supp. III, 1959-1961) extended coverage of the act, with exceptions, to vessels under 200 tons to aid fishermen during the depression; Gilmore & Black, *supra* § 9-50, at 575. For background of the amendment of June 29, 1954, 68 Stat. 323, 46 U.S.C. § 951 (1958) see *The Tradewind*, 153 F. Supp. 354, 1957 Am. Mar. Cas. 2196 (D. Md. 1957). The most recent amendment is 75 Stat. 661 (1961), 46 U.S.C. §§ 922, 1161 (Supp. III, 1959-1961) revising the 200 ton minimum to twenty-five tons, except in so far as Title XI insurance offered by the Government is concerned. See 1961 Am. Mar. Cas. 2493. The insurance provisions of Title XI represent an extension of the mortgage. 52 Stat. 969 (1938), as amended, 46 U.S.C. § 1271(a) (1958) (Supp. III, 1959-1961). See notes 166-72 & 175 *infra* and accompanying text.

162. The documentation and home port provisions of the Ship Mortgage Act were mildly criticized by Judge Inch in *The Underwriter*, 3 F.2d 483, 1925 Am. Mar. Cas. 803 (E.D.N.Y. 1925). One nonjudicial criticism indicated a need for protecting construction financing. See Note, 71 Harv. L. Rev. 1516, 1521 (1958); see also Rodgers, *supra* note 147. An American oil company which has invested heavily in a new tanker presently being built in Germany is reported as being subordinated to creditors of the bankrupt shipyard. N.Y. Times, Sept. 14, 1962, p. 62, cols. 6-7.

163. The Liberian Maritime Law ch. 3, §§ 100-13, 2 Liberian Code of Laws 809 (1956) (ch. 3 also includes lien law, §§ 114-15). The provisions appear in different order than in the United States statute. The statute was predominately owner and finance-oriented. The meticulous transposition of the American mortgage and cargo statutes into Liberian law contrasts sharply to provisions dealing with seamen. The entire Liberian Act for seamen consists of four brief paragraphs vaguely suggesting that ships should sail with proper officers and crew, and a brief indication that there should be shipping articles covering seamen.

164. Comprehensive statistics such as compiled by institutional investors for real mortgages are not available for preferred ship mortgages. The Title XI insurance program furnishes some indication of current activity, although it probably represents but a fraction of investments in preferred ship mortgages at the present time. The Department of Commerce reported 358 government-held mortgages amounting to \$150 million as of May 31, 1961, of which possibly only one mortgage (amounting to less than \$2½ million) was given in the last one and a half years. However, the Department held insurance on mortgages covering forty vessels with a balance of \$282 million of which twenty-four vessels, or over



gages.<sup>165</sup> The investment of others is a gauge of sorts. It indicates not only the considered judgment of informed investors noted for probity, but adds the practical reassurance of the presence of a market in the maintenance of values in this type of security.

For a significant part of the outstanding ship mortgage debt, insurance under Title XI of the Merchant Marine Act of 1936<sup>166</sup> has virtually removed any risk factor. This insurance is available to qualifying mortgagors and mortgagees for government approved ship construction programs. In regard to private investors with such government guaranties, most of the discussion in this article becomes in large measure

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\$223 million were covered during the past one and a half years. Letter From Elmer E. Metz, Chief, Office of Government Aid, Department of Commerce, Maritime Administration, to Mr. Richard Gyory, June 26, 1961. Further reflecting the rapid expansion of the program was the Administration's announcement that \$468 million on over sixty vessels were either insured or committed to be insured as of June 30, 1961, with an additional \$127 million pending (for over 100 ships). Maritime Administration Press Release, No. 61-64, July 28, 1961. However, as of June 30, 1962, the figure was \$455,808,985 according to Donald W. Alexander, Maritime Administrator. N.Y. Times, July 29, 1962, § 5, p. 165, col. 6. On a smaller scale, the Department of the Interior, through the Fish and Wild Life Service, Bureau of Commercial Fisheries, is active in loans secured by mortgages on fishing vessels, issuing just under 200 for the year and a half ending June 30, 1961. The program has been in progress since late 1956, with a total of 440 loans at 5% interest up to June 30, 1961, totaling \$10,125,000 of which \$3,000,000 have been repaid. Letter From C. E. Peterson, Chief, Branch of Loans and Grants, Department of Interior, Fish and Wild Life Service, Bureau of Commercial Fisheries, to Mr. Richard Gyory, July 13, 1961. The Small Business Administration also issues some loans secured by ship mortgages.

165. See Report, Shields & Co., *Financing the U.S. Merchant Marine*, May 1958, p. 2, which foresaw a \$1 billion investment to be raised from private sources and guaranteed under the Title XI program of the federal government. In June 1957, contracts were in effect to replace, between 1956 and 1957, 175 ships of subsidized operators at an estimated cost of \$1.9 billion, of which subsidies would account for 45 to 50%. *Id.* at 5, 8-9. Guaranteed mortgages were estimated as running to \$¾ billion, which was referred to as "a major new source of high-grade investment." *Id.* at 5. By the end of June 1957, negotiations were under way for the replacement of an additional figure, 103 vessels, at an estimated \$1.1 billion, not including other arrangements for nonsubsidized ship construction. *Id.* at 9. Beginning in 1954, Grace Lines (\$21 million) and Moore-McCormack (\$24 million) initiated public offerings of their preferred ship mortgage bonds through underwriters. *Id.* at 20-21. The most recent offering is American Export Lines on four new ships for \$18 million, listing sixteen underwriters. Circular, First Boston Corp., Childs Securities Corp., June 12, 1961.

166. 52 Stat. 969 (1938), as amended, 46 U.S.C. §§ 1271-80 (1958) (Supp. III, 1959-1961). The Government, in turn, has, in effect, re-insured some of its own risk on non-subsidized vessels with commercial underwriters. N.Y. Times, April 5, 1961, § 2, p. 73, col. 8; N.Y. Herald Tribune, April 5, 1961, § 2, p. 38, col. 1. Thomas E. Stakem, then Maritime Administrator, in making the announcement, observed the mortgagee would obtain new types of protection against the mortgagor's failure or neglect with respect to physical aspects of the property and that it gave protection against later liens that would outrank the mortgage.

academic.<sup>167</sup> Of course, the dislocation of investment by foreshortened investment periods is a risk consideration. Unexpected returns of capital bring with them the need to re-invest, perhaps on short notice and unfavorable terms, with attendant additional expenses. These are, if lesser problems than outright loss, risks which insurance does not cover.

The cost of the Title XI coverage is comparable to the Government's charges in guaranteed real estate mortgages.<sup>168</sup> However, no secondary market has been created for maritime mortgages,<sup>169</sup> thereby leaving them in a less liquid condition than their dry-land counterparts. This indicates a greater interest on the part of the institutional, rather than the individual, investor.<sup>170</sup> The insured mortgage is limited to government-related programs for building and replacement.<sup>171</sup> Its scope will vary with administration policy, but there is no present indication that it will be generally available in the industry.<sup>172</sup> Hence, the considerations of this article will continue to have practical as well as theoretic interest to most ship mortgagees.<sup>173</sup>

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167. 70 Stat. 1087 (1956), 46 U.S.C. § 1273(d) (1958) states: "The faith of the United States is solemnly pledged to the payment of interest on and the unpaid balance of the principal amount of each mortgage and loan insured under this subchapter." The foreclosure procedure under Title XI is more favorable to the mortgagee than is usually the case in the Federal Housing Administration programs where the mortgagee ordinarily must first go through foreclosure proceedings. Under Title XI the mortgagee may demand payment by the Secretary of Commerce after establishing default. 52 Stat. 971 (1938), as amended, 46 U.S.C. § 1275(a)(1) (1958).

168. Premiums are payable with the first advance and annually thereafter. 52 Stat. 970 (1938), as amended, 46 U.S.C. § 1274(d) (1958) (Supp. III, 1959-1961). The mortgagee receives the premium amounts from the mortgagor at least sixty days in advance of the due date. 68 Stat. 1270 (1954), 46 U.S.C. § 1274(a)(9) (1958). Premiums run from  $\frac{1}{4}\%$  to 1% annually of the outstanding balance. 52 Stat. 970 (1938), as amended, 46 U.S.C. § 1274(d) (1958) (Supp. III, 1959-1961). Application charges are not to aggregate over  $\frac{1}{2}\%$ . 52 Stat. 970 (1938), as amended, 46 U.S.C. § 1274(e) (1958) (Supp. III, 1959-1961).

169. The Government, through its "Fanny May" operation, allows a secondary market in Federal Housing Administration and in Veterans Administration mortgages, but for two-thirds of the outstanding home realty mortgages, i.e., the "conventionals," no such market exists, although it is currently the subject of discussion in the real estate and housing field. See N.Y. Times, June 25, 1961, § 1, p. 38, col. 1.

170. Formal legal opinions for underwriters have held Title XI guaranteed bonds to be legal investment for most banks, insurance companies and fiduciaries in the United States. See, e.g., Circular, note 165 *supra*.

171. 52 Stat. 970 (1938), as amended, 46 U.S.C. § 1274 (1958) (Supp. III, 1959-1961) sets forth eligibility requirements.

172. 68 Stat. 1269 (1954), 46 U.S.C. § 1273(e) (1958) limits the amount insured at any one time to a maximum of \$1 billion.

173. A brief canvass by the writer of marine insurance offices in New York City disclosed no current or recent practice of insuring ship mortgages for the mortgagees outside

Both commercial and savings banks have been active in preferred ship mortgages, including foreign<sup>174</sup> as well as American. The former have probably brought a slightly higher return, running nevertheless at or under six per cent. Individual investors, by comparison, have frequently received in excess of twenty per cent, but they have also had their problems. This is completely lawful, for the act expressly provides that there is no limit on the interest to be charged,<sup>175</sup> although it frequently comes as a surprise to those in jurisdictions where usury laws provide various ceilings.<sup>176</sup>

Probably most reassuring to the potential investor in public offerings is the small amount of litigation affecting vessels, especially with respect to the large operators. The major shipping companies have a substantial debt structure, much of which is secured by preferred ship mortgages.<sup>177</sup> Notwithstanding these long standing, long term obligations, the law books are singularly devoid of extensive litigation involving the major com-

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the new government program, although one person recalled it had existed, to a small extent, before the 1929 Depression. An instance of it by way of a surety bond is found in *The Monhegan*, 38 F.2d 674, 1930 Am. Mar. Cas. 419 (D. Mass. 1930). Occasionally, a guaranty may be available from an interested party. See, e.g., *The Dolomite No. 2* (In re Rochester Shipbuilding Corp.), 32 F. Supp. 98, 1940 Am. Mar. Cas. 978 (W.D.N.Y. 1940).

174. E.g., American investments under foreign flag. In the tank ship category, it was estimated in 1960 that two-thirds of the United States' privately controlled vessels were registered under foreign flags. Sun Oil Co., *Analysis of World Tank Ship Fleet*, December 31, 1960, p. 17 (Aug. 1961); this was true of 1961 also. Sun Oil Co., *Analysis of World Tank Ship Fleet*, December 31, 1961, p. 19 (Aug. 1962).

175. 41 Stat. 1002 (1920), 46 U.S.C. § 926(d) (1958).

176. 6 Williston, *Contracts* § 1682 (1938) notes that where no statutory limit is supplied, equity might nevertheless refuse to enforce an excessive rate. However, the affirmative language of 41 Stat. 1002 (1920), 46 U.S.C. § 926 (1958) appears to explicitly negate such a holding for a preferred ship mortgage. But suppose it is used to camouflage a questionable loan, e.g., a \$100,000 loan at 40% interest with a preferred ship mortgage on a yacht worth \$25,000. Title XI provisions limit the rate on insured obligations to 5% (and 6% in special circumstances), 52 Stat. 970 (1938), as amended, 46 U.S.C. § 1274(a)(5) (1958). Note, however, the usury laws generally exempt corporate obligees and their sureties from their protection. 6 Williston, *supra*, § 1683, at 4759-61, § 1682A, at 4756-57.

177. The largest American operator, United States Lines, has an outstanding balance of just under \$43 million in 3½% preferred mortgage notes against a net value in ships of \$70 million. American President Lines has \$45 million (\$14 million of which are government insured at 5%) with a total value in ships of less than \$59 million. Pacific Far East Lines has close to \$35 million (\$23 million held by the Government, the remainder insured) against a net value in ships of only slightly more than the outstanding mortgages; American Export Lines has close to \$37 million in ship mortgages, about \$22.05 million government insured, out of a total debt structure, both current and long term, of less than \$45 million. Moore-McCormack Lines is listed at \$10¾ million in ship mortgage debt, \$3¾ million in other forms. Moody's Transportation Manual, 1390-1414 (1961).

panies.<sup>178</sup> Few large vessels were the subject of foreclosure at any point up to the last few years.

The early litigational history reflected the economic crises of the early 1920's and the 1930's. Following the 1937 recession, a small number of cases appeared. Thereafter, the reported opinions gradually disappeared. Only a few cases appeared during World War II. A slow trickle of reported opinions started after the war, increasing during the last decade reaching a peak in 1961. However, the current increase in reported opinions is largely attributable to a few operators whose fleets, assembled for the most part following the Suez crisis, were probably overcapitalized at inflated values, and as such, unduly susceptible to slight variations in economic conditions in the trade. Fixed by a heavy and unresponsive debt and having a comparatively small equity, the operators were not representative of the greater part of the Merchant Marine in which they performed but a small and fairly specialized function. The speculative nature of their investment sets off the recent wave of cases as a special situation, not necessarily indicative of the usual security afforded by the preferred ship mortgage. Whatever else the problems of the industry may be, the general absence of litigation in the major areas of financing is one measure of the success of the Ship Mortgage Act in achieving a stable investment.

Aside from the special factors with which this article has dealt, the ship mortgage litigation has not been notably different from real estate and chattel mortgage litigation. There is a continuous stream of reported general mortgage litigation, which indicates that neither the antiquity of the concept nor the meticulous nature of the statutes of the many states dealing with both real and chattel mortgages is a guarantee of litigational safety. Either directly or tangentially, mortgage matters *in toto* account for a substantial, if not the largest part, of reported real estate disputes.<sup>179</sup> Yet, the pace of issuance and renewal of this type of debt appears to be in no way inhibited by the legal risks, but rather directly controlled by economic conditions and market values. The investor in mortgages is likely to encounter comparable situations in either maritime or land-based

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178. The Munson Line bankruptcy and related proceedings provided the only significant exception to the statement. See notes 52 & 70 *supra*.

179. Title Guarantee Company of New York culls real property and related matters from the New York Law Journal and issues a bimonthly summary. Out of some thirty categories listed, those under "mortgage," and its subdivisions, led in the number of cases for the first four installments of 1961. Mortgage questions were present in several matters listed for other points. 25 Summary of Recent Decisions, Law of Real Property, Title Guar. & Trust Co., Nos. 1-4.

ventures.<sup>180</sup> Such differences as may exist appear to be of small degree, easily discountable in the projected interest rate.

### B. *Alternates*

An indicator of the mortgage's adequacy as a security device is the use of alternative measures for the lender's protection. These have greatly expanded in use and variation in the business world, especially in real estate during the past decade, although other factors, principally taxes,<sup>181</sup> have played a considerable role in some of these developments. The extra-mortgage solutions which are designed to answer the need for security in the maritime field do not vary greatly from those in other areas, but in practice are less used.

The popular sale-and-lease-back has its counterpart in shipping. The investor takes title to the vessel, then by "bare-boat" or "demise" charter returns it to the "operator."<sup>182</sup> The operator employs the vessel under its "flag," using a name identifying it with the operator, and exercises complete control. The virtue to the operator is free use of the vessel without tying up its capital. The lender has title to the vessel and need not fear the frustration experienced by mortgagees when the mortgagor or other creditors seek the protection of bankruptcy or other courts to avoid foreclosure. Various agreements together with insurance go a long way to minimize the owner's risk. The risks vary in quality from petty lien libels to disasters. Not all such situations can be satisfactorily insured. The owner must depend largely on the integrity, fiscal and other-

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180. Cf. Sherman, "Peculiarities and Conflicts in Various State Laws Affecting Purchase of Mortgages by Investors," 21 *Mortgage Banker* (No. 11) 18 (Aug. 1961). "There are many peculiarities and conflicts in the laws of certain states with concomitant expenses, risks or uncertainties." The article notes the disproportionately high cost of foreclosing in various states due to legal fees and costs, as well as unduly lengthy proceedings, especially where long redemption periods favor the mortgagor. There is no "equity of redemption," nor any right to redeem under the Ship Mortgage Act.

181. Of course, income taxes will be of consequence to the shipping field and the mortgagee, especially if there is a possibility of taking possession or foreclosure, where the tax effect may vary. Any arrangement between the parties need not preclude the Bureau of Internal Revenue, which may hold a loan converted to ownership, *John Wanamaker v. Commissioner*, 139 F.2d 644 (3d Cir. 1943), or that an "owner or lessor" is in truth a mortgagee, *Hilpert v. Commissioner*, 151 F.2d 929 (5th Cir. 1945), possibly disrupting the plans of the participants and causing important changes in result. For example, will depreciation be denied the "owner," changing the projected income? See note 183 *infra*. The public aspects will involve the Securities and Exchange Act, particularly the Trust Indenture Act which applies to public offerings. However, where a federal administrative agency is involved, e.g., Title XI insured loans, exemptions are available.

182. Statistics and some details for tankers are supplied in *Sun Oil Co., Analysis of World Tank Ship Fleet*, December 31, 1960, pp. 2-3, 15-17 (Aug. 1961); *Sun Oil Co., Analysis of World Tank Ship Fleet*, December 31, 1961, p. 2, 15-17 (Aug. 1962).

wise, of the operator to protect the vessel from both physical and legal hazards. Only the large lines or large industrial users of raw materials who maintain substantial fleets are in such a position. The small operators are not likely to afford sufficient assurance or stability to creditors to justify the creditors taking on the risks of ownership. Nor is it likely that many of the smaller operators would be willing to part with ownership. To them the vessel under current market conditions probably represents a speculative venture in which the limited equity of the so-called small operator gives considerable leverage. In these circumstances mortgage credit is a far more desirable way to raise money from the small operator's point of view.<sup>183</sup>

Pledges of corporate stock may reinforce the lien property, adding the possibility of direct control over the debtor. Whether this is a substantial improvement in safeguarding a loan may depend upon the degree to which the corporate debtor has deteriorated. At the point of permissible action under a stock-transfer arrangement, the additional rights may be illusory. In practice, the ship will very likely be the only asset where the small operator is concerned. Control of the corporation could conceivably lead the active creditor into realms of responsibility he would do better to avoid.<sup>184</sup> But it may be a useful additional threat in the creditor's hands, if it can be obtained.

The lender may make arrangements to assure the application of income to interest and debt retirement and to assignments of charter hire.<sup>185</sup> It is

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183. However, a sale-and-lease-back may be deemed a mortgage for tax purposes. *Helvering v. F. & R. Lazarus & Co.*, 308 U.S. 252 (1939). If the holding were extended beyond this purpose, the ship mortgagee might be in difficulty in not having preferred status. In *The Josephine Lanasa (Findley v. Herd)*, 250 F.2d 77, 1958 Am. Mar. Cas. 317 (5th Cir. 1958), the security title holder was subordinated to later supply liens.

184. There is no reason to believe the mortgagee in possession would be immune to the risks of an operator *pro hac vice*, i.e., as an owner. Thus, he would probably be subordinated to later lien claims and, if the ship operates, to wage and penalty claims. In *The Challenger*, 227 F.2d 918, 1956 Am. Mar. Cas. 111 (5th Cir. 1956), Judge Brown held the operator not entrusted with management under 41 Stat. 1005 (1920), as amended, 46 U.S.C. § 972 (1958). He disallowed claims based on preservation of the res and held the mortgagee had waived rights to foreclosure. In *the Moon Eng'r Co. v. The Valiant Power*, 193 F. Supp. 460, 1961 Am. Mar. Cas. 226 (E.D. Va. 1960), insurance premiums paid by the mortgagee and not approved by the court were denied as charges against the fund. More recently in the unreported matter of *The Wang Hunter*, Adm. 1815, D.R.I., Sept. 6, 1961 the Commissioner held the mortgagees who advanced funds pursuant to certificates of indebtedness issued under bankruptcy referee's Chapter XI order at fault for permitting a voyage where ability to pay the crew was dubious. See note 53 *supra*. He preferred the seamen to the mortgagees to the extent of actual travel expenses and subsistence. However, he did not hold the mortgagee liable for penalty wages.

185. See *In re Atlantic, Gulf & Pac. S.S. Co.*, 289 Fed. 145, 151-56, 1923 Am. Mar. Cas. 566 (D. Md. 1923), referred to again but in another context at later stage of same pro-

possible to take charters and grant subcharters. But, as in any business, arrangements for income as well as use of the property decline in benefits as the slack in the industry extends.

While the suggested schemes offer a degree of additional flexibility and some extra safeguards, they clearly do not suggest effective alternatives to replace the use of the ship mortgage. On the contrary, the preferred ship mortgage will be the basic part of the security for a loan to ship operators and owners.

## VII. CONCLUSION

The Preferred Ship Mortgage Act of 1920 did not solve the basic economic problems of the American Merchant Marine. These have to do with a high national price structure in conflict with a low international price structure, with economic and military needs and with adjustments and accommodations, political and otherwise. But the act has supplied the industry with a viable, indeed a necessary legal form, without which its present existence could not continue in the absence of drastic changes that would be needed to replace the ship mortgage. A major part of the capital in the maritime industry depends on preferred ship mortgages, and they form an accepted part of the financial securities available to the public. The investor may have a somewhat different type of risk with possibly a slightly greater litigation factor. But four decades of lawbook history indicate no substantial variance between this and the more familiar type of real estate or chattel mortgage.

Very likely the greater number of disputes and problems in maritime mortgages, as elsewhere, does not reach the reporter system; possibly not even the courts. The chief virtue of legal framework ordinarily is that it provides a reference which enables parties to work out problems without going to court. Foreclosure procedure under the act may result in more lengthy litigation than in other types of mortgages in many jurisdictions. But ultimately the mortgagee's real power, whether at sea or ashore, lies more in the psychological factor of potential foreclosure than in the

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ceeding 3 F.2d 309, 311-12, 1924 Am. Mar. Cas. 131 (D. Md. 1923), aff'd, 3 F.2d 433 (4th Cir. 1925). For earlier authority see *Merchants' Banking Co. v. Cargo of The Afton*, 134 Fed. 727 (2d Cir. 1904), reversing 125 Fed. 258 (S.D.N.Y. 1903). In *The Dolomite No. 2* (In re Rochester Shipbuilding Corp.), 32 F. Supp. 98, 1940 Am. Mar. Cas. 978 (W.D.N.Y. 1940), a request by the mortgagee to continue a charter, the mortgagee being entitled to the hire money, was denied. The charterer there had guaranteed the mortgage payments. A guaranty may be pursued under ordinary common-law principles, outside admiralty. *Wall St. Traders, Inc. v. Wang*, 1961 Am. Mar. Cas. 986 (N.Y. Sup. Ct.), aff'd mem., 13 App. Div. 2d 767, 217 N.Y.S.2d 501, 1961 Am. Mar. Cas. 2214 (1st Dep't 1961). Several practical suggestions for coupling assignments and loans are made in *Rodgers, Ship Construction Financing*, 12 Bus. Law. 142 (1957).

actuality of its use. So long as the mortgagor operates, he must show, of record, his obligation to the mortgagee. This affects his operation and his all-important ability, if any, to generate further credit. He must perform his covenants, always with the knowledge that default can lead to loss of his major asset, the ship. As the psychological factor is reduced, the mortgagee's power is reduced. With the disappearance of equity, the mortgagor's risk evaporates, leaving his creditor to grapple with other lienors.

The preferred ship mortgagee must, as in any venture, direct his questions as to the safety or risk of his loan to the economic outlook, to the appraised value of the security and to the margin of equity remaining against the possibility of forced sale. This is, after all, the same question any mortgagee must ask.