

## THE FOREIGN SHIP MORTGAGE

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OF the sixty million deadweight tons of merchant shipping the United States had on hand at the end of World War II, the maximum likely to find employment under our flag is eleven million tons. From this war-built reserve of 5,800 ships, representing an aggregate investment by our government of some fifteen billion dollars, or from foreign shipyards, must come the twenty-five million tons to be placed under foreign flags to restore the pre-war ratios among the merchant fleets of our allies.<sup>1</sup> A satisfactory form of security for private financing of the transfer of this huge reserve from the United States Government to private ownership, whether domestic or foreign, would afford a very large field of investment and prove a boon to the American taxpayer.

The obvious form for an advance of capital to implement the purchase or operation of a ship is a loan secured by a mortgage on the ship itself. The rights of the mortgagee arise and are primarily governed by the law of the vessel's flag but, due to the nature of the business of a ship and the perils of the sea, are subject to adjudication under the laws of any one of the nations which border on the waters through which the vessel passes in her regular trade. Such foreign adjudication will almost surely involve the rights of third parties who hold maritime liens arising from the operation of the ship which may be superior to the lien of any mortgage.<sup>2</sup> Similarly, American creditors, whether general credi-

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1. UNITED STATES MARITIME COMMISSION, *THE POSTWAR OUTLOOK FOR AMERICAN SHIPPING* 95, 107-8 (1946).

Up to the end of 1946, 818 war-built merchant ships had been sold by the Maritime Commission and 3,326 such vessels remain to be disposed of. Of the vessels sold, 296 went to American operators (though not necessarily to be operated under the American flag), 229 went to foreign governments and 293 to foreign citizens. The Commission had on hand 659 applications for purchase, 119 by American operators, 229 by foreign governments and 311 by foreign citizens. *N.Y. Times*, Jan. 17, 1947, p. 45, col. 8.

2. "The maritime lien has been described as one of the most striking peculiarities of Admiralty law, constituting a charge upon ships of a nature unknown alike to common law and equity. It arises by operation of law and exists as a claim upon the property, secret and invisible." PRICE, *LAW OF MARITIME LIENS* 1 (London, 1940). ROBINSON, *ADMIRALTY* 357-465 (1939). Hebert, *Origin and Nature of Maritime Liens*, 4 *TULANE L. REV.* 381 (1930). Classes of specific maritime liens are discussed *infra* pp. 926-8. It suffices to say

tors or maritime lienors, may at any time find their rights conflicting with those of the mortgagee of a foreign ship. The extent of investment of American capital in shipping under foreign flags is, therefore, directly influenced by the eventual answer to the question of the legal status of the foreign ship mortgage.

The status of the foreign ship mortgage has been settled by decision in England; by international, supplemented by municipal, legislation among those nations which are parties to the Brussels Convention of 1926;<sup>3</sup> but by neither statute nor sound decision in the United States. The failure of our courts to recognize the mortgage on a ship (whether of domestic or foreign flag) as a maritime contract enforceable in admiralty by a libel *in rem* unquestionably accounts in large part for the long-standing aversion of American capital to investment in domestic ship mortgages. Under the Federal Ship Mortgage Act of 1920<sup>4</sup> certain mortgages on United States registered vessels were specifically, and for the first time, granted the character of maritime liens enforceable in admiralty and assigned a "preferred" ranking in the ancient hierarchy of maritime liens. But the Ship Mortgage Act does not in terms purport similarly to define the nature of the lien of a mortgage on a vessel of United States registry which does not comply with the ritual prescribed in the Ship Mortgage Act or a mortgage on a ship of foreign flag, even though under the laws of the ship's flag such a mortgage may be vested with rights similar to those accorded to preferred mortgages by our statute.

Any progress in affording well-recognized protection for capital invested in foreign ships may not only facilitate the disposition of our tremendous war-built reserve but serve in addition as an index to our progress in facilitating and rationalizing general private international trade and investment among those nations which do not, as yet, require all investment to be made through the State.

In this latter connection the solution of the problems of investment in foreign shipping may not be without relation to investment in air

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here that, in general, maritime liens for supplies, necessities and advances, unlike common law liens, rank in inverse order of their creation. The courts have adopted this order of priority both on what might be called the "benefit theory" and the "property theory" of liens. The first theory assumes that the last lienor helps the ship on its way so that it may earn freights which will enable it to discharge its liabilities. As stated in *The St. Jago de Cuba*, 9 Wheat. 409 (U.S. 1824), at p. 416: "The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage." The second theory assumes that the first lienor acquires an interest in the vessel, which interest itself becomes subject to the later liens. See *The John G. Stevens*, 170 U.S. 113 (1898); *The America*, 168 Fed. 424 (D.N.J. 1909).

3. L.N.T.S. No. 2765, reprinted in English in 6 BENEDICT, ADMIRALTY 78 (6th ed. 1941).

4. 41 STAT. 1000-6 (1920), 46 U.S.C. §§ 911-84 (1940).

transportation equipment.<sup>5</sup> The Provisional International Civil Aviation Organization has recently grappled with the problem of mortgages on aircraft engaged in international commerce. The Draft Convention on Recordation of Title to Aircraft and Aircraft Mortgages reported June 17, 1946 by Commission No. 4 of the First Interim Assembly of the PICAQ provides for the recordation, in a record to be maintained by a competent authority of each contracting state, of title to and property interests in all aircraft engaged in international air navigation. Mortgages are valid as to third parties only upon recordation, after which they have priority over all claims except those arising from (1) salvage of the aircraft, including life salvage, (2) fees for the use of airports or air navigation facilities during the last trip of the aircraft, and (3) repairs authorized by the aircraft commander during the last trip of the aircraft and actually needed for the preservation of the aircraft or the continuation of the trip. These provisions for the ranking of priority of air liens are strikingly similar to the provisions touched upon later in this article for the relative priority of maritime liens and mortgages. Also apparently derived from admiralty, rather than the common law, is a provision that liens within each of the three classes shall rank in *inverse* order of their creation. The Draft Convention provides, however, that judicial sale of the aircraft shall not divest encumbrances which rank prior to the claims of the creditor in whose interest the sale is made, a concept foreign to the ancient admiralty doctrine that sales by an admiralty court pass title to the vessel free and clear of all liens and encumbrances and may disregard any statutory prohibitions against transfers to aliens contained in the law of the vessel's flag.<sup>6</sup> The Draft Convention further provides for the extraterritorial validity of recordation of a mortgage in one Contracting State and for the binding effect in the courts of each Contracting State of the priorities of claims provided in the Draft Convention.

The question of the relative priority of the lien of a ship mortgage as against all the other claims which might possibly be arrayed against it under the legal systems of all the various maritime nations would be of inordinate length if fully explored, and many of the conclusions would be tentative in the extreme. It is, therefore, the purpose of this article

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5. The approach by many American lawyers to the financing of large aircraft has, in the past, been guided by experience in the financing of rail and motor-haulage equipment, apparently regarded as the only available precedents. But the parallel between a large trans-oceanic passenger or cargo aircraft and an ocean-going ship is, in many respects, closer than the parallel between such an aircraft and a locomotive, a freight-car, or a truck. Aircraft and ships are transitory between continents; locomotives, freight-cars and trucks, for the most part, are not. The cost of large aircraft and ships are within the same range: a new Republic "Rainbow" passenger aircraft will cost the buyer approximately \$1,250,000; the purchase price of a new Victory Ship from the Maritime Commission is in the neighborhood of \$1,000,000.

6. The *Chiquita*, 19 F.2d 417 (C.C.A. 5th 1927).

simply to survey the general question of the security of a foreign ship mortgage and to make certain recommendations with respect thereto.

#### SHIP MORTGAGES AND MARITIME LIENS

Although the problems involved in the mortgage of a ship may enter the life of any lawyer in the twenty-eight states bordering on blue water, familiarity with mortgages of realty and chattels, or conditional sales, will prove of little practical value.<sup>7</sup> The problems increase in difficulty where the mortgage is on a ship of foreign flag.

The recorded ship mortgage, as distinct from the ancient bottomry bond,<sup>8</sup> is of relatively recent statutory origin, not only in Anglo-American jurisprudence, but in the laws of the other seafaring jurisdictions. In the case of a vessel registered under the flag of one of these nations, statutes<sup>9</sup> provide for the manner of execution of a ship mortgage, often for the form of the mortgage, and for recordation of the mortgage in the port of registry where title to the ship is registered. The statutes further cover the relationship between the mortgagee and the mortgagor (and those persons taking from the mortgagor, such as the representative of his creditors in bankruptcy or purchasers from him of the ship) and the rights of foreclosure and sale of the ship in the event of default. No American lawyer will be surprised by the recordation provisions of these statutes which are remarkably similar to our own state statutes for the recordation and enforcement of chattel mortgages. But while the Anglo-American lawyer is familiar with a form of chattel mortgage which contains words indicating a transfer of title to the mortgagee, such as "bargain, sell and convey," there is a risk that under the laws of some foreign countries such words might be taken literally and result in the exposure of the mortgagee to liability for contracts or torts of the ship, or, where the foreign law requires the ship to be majority-owned by nationals, to the loss of registry of the ship under the laws of her foreign flag.

Substantial variances among the statutes arise, however, concerning the rights of third parties against the ship herself. Maritime liens, having their origin both in the ancient laws of the sea and in more recent statutory provisions, are of material importance to the mortgagee, and are not wholly determinable under the law of the vessel's flag, for they

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7. Ship mortgages are not treated in the standard texts on real or chattel mortgages. There is no English language text or treatise on ship mortgages except CONSTANT, *THE LAW RELATING TO THE MORTGAGE OF SHIPS* (1920), which is primarily concerned with the British ship mortgage.

8. An ancient and obsolescent form of loan to be repaid only if the vessel arrives safely in port. See ROBINSON, *ADMIRALTY* 370 (1939); but *cf.* *The Draco*, 7 Fed. Cas. 1032, No. 4,057 (C.C.D. Mass. 1835).

9. References to the codes of Belgium, Denmark, The Netherlands, France, Greece, Italy and Norway are given in CONSTANT, *op. cit. supra* note 7, Appendix A.

may arise and be enforced in a foreign tribunal having jurisdiction of the vessel. They attach to the ship as well as, in some instances, to her cargo and freights and may be enforced by an action *in rem* against the vessel itself. When, following such an action, the proceeds of a judicial sale of the ship are insufficient to satisfy all outstanding liens, their relative priority becomes of considerable importance.

Since familiarity with the terms used in admiralty law is not universal, there is here interpolated an outline of the *general classes* of maritime liens, all or some of which may, according to the law of the forum, be classed as superior to a mortgage, although arising subsequent to it.

1. Expenses arising from arrest of the ship during litigation, such as court costs and expenses, taxes and towage, pilotage and harbor expenses from the entrance into port from the last voyage until adjudication of all claims.
2. Unpaid wages of the master, the crew and of stevedores employed by the vessel.
- \*3. Damages arising from a tort of the vessel, such as wrongful collision.
- \*4. Salvage.
- \*5. Damages arising from breach of a contract of affreightment, such as damage to cargo.
- \*6. "General Average" (arising from a voluntary sacrifice by the cargo or ship resulting in the saving of part of the venture).
- \*7. Repairmen's liens for repairs to the vessel, including dry dock charges, etc.
8. "Necessaries" liens for fuel, food, supplies, etc., furnished the vessel.
9. Unpaid purchase price of last sale of the vessel.  
(\* Insurable)

The relative priority of a preferred ship mortgage<sup>10</sup> on a United States registered vessel and the relative priority of similar statutory mortgages under the laws of other countries as against maritime liens has been settled by statute in each maritime jurisdiction except the British, where it has been determined by a series of English decisions.<sup>11</sup> The fact that the mortgage lien may be inferior to any or all of the above maritime liens need not, however, affect its worth as security. The mortgagee may, through adequate insurance, protect his lien against all

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10. The non-preferred domestic ship mortgage in the United States, being a non-maritime contract, provides a non-maritime lien which is deferred to all maritime liens. See *infra* note 22. This is the result of decision rather than statute. (See note 44.)

11. The United States ranking is discussed *infra* p. 936-7; the British is treated in CONSTANT, *op. cit. supra* note 7, at 69-85. As illustrative of Latin American provisions see Panama: CODIGO DE COMERCIO, § 1507 (1931), as amended by Law 40 of 1946, [1946] LEYES; Argentina: CODIGO DE COMERCIO, §§ 1351-67 (1943). For reference to digests of the laws of other countries see note 9 *supra*.

of the important prior liens, and a properly drawn ship mortgage contains clauses designed to effectuate the continuance of such insurance.

Nothing can more clearly emphasize the importance of marine insurance in the shipping world. Cases involving collisions between two vessels almost invariably develop into contests between insurance underwriters. Where cargo is damaged, the controversy almost always lies between the "cargo underwriters," who have been subrogated to the cargo owners' claims, and the vessels' "liability underwriters." Liability of the vessel under all classes of maritime liens indicated above with an asterisk may be the subject of full insurance, covering the vessel itself, the freights it may earn, or its liabilities to others, with certain minor exceptions.<sup>12</sup> Of course, loss or damage to the subject matter of the mortgage, the ship itself, is fully insurable except possibly for loss caused by capture, confiscation, expropriation, nationalization, or similar manifestations of Statism. War risk policies issued during World War II, moreover, insured against capture, except capture, seizure, or detention by Great Britain and her Allies.<sup>13</sup>

Even more significant than the insurability of the mortgagee's security is the fact that maritime lienors have no claim, in United States law, against the insurance proceeds resulting from loss of the vessel. Their claim is only against the ship and the proceeds of her sale—which may be wholly insufficient to satisfy the liens.<sup>14</sup> The mortgagee, however, can collect the insurance free from all claims of maritime lienors if it is, as is customary, made payable to the owner and the mortgagee "as their interests may appear."<sup>15</sup> The extraordinary result is that whereas in point of law the mortgage may be inferior to the maritime liens involved, in point of fact the mortgagee may recoup his investment while the maritime lienors collect nothing—unless the mortgage is otherwise drawn.<sup>16</sup>

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12. While damage to the vessel arising from mischance is, of course, the major source of repairmen's liens of consequence, and is insurable, those repairs, usually called "owner's repairs," which do not arise from mischance and are merely the result of ordinary wear and tear or are necessary in the ordinary course of events to maintain seaworthy condition are properly part of the operating cost of the vessel and are not insurable.

13. Requisition of the vessel under the laws of most civilized countries would entitle the owner to just compensation and the mortgage should provide that this fund should be payable to the mortgagee.

14. *The City of Norwich*, 118 U.S. 468, 490 (1886); *A. M. Bright Grocery Co. v. Lindsey*, 225 Fed. 257 (S.D. Ala. 1915).

15. *Walsh v. Tadlock*, 104 F.2d 131 (C.C.A. 9th 1939). "In the Morro Castle disaster the insurance on the vessel ran to some \$4,200,000; . . . the United States as holder of a ship mortgage received some \$2,600,000 of the proceeds." *ROBINSON, ADMIRALTY 937* (1939).

16. As an example of variance in draftsmanship, compare the four forms of preferred ship mortgages set forth in 1 *BENEDICT, ADMIRALTY 181-242* (6th ed. 1940). Form No. 10 (Preferred Ship Mortgage between Private Parties) Article III (g) and Article XX; Form No. 11 (Preferred Ship Mortgage to United States of America [Maritime Com-

## THE PROBLEM OF ADMIRALTY JURISDICTION

Statutes in jurisdictions other than Great Britain and the United States which provide for recordation of domestic ship mortgages do not specifically provide for the judicial status of the mortgage on a foreign ship, recorded in accordance with the law of her flag in her foreign port of registry, except as discussed below in connection with the Brussels Convention of 1926. But there is no reason to doubt that the courts of such maritime countries are open to the enforcement of valid mortgage rights in respect to foreign vessels within their jurisdiction, or that the relative priority of the foreign mortgage will be determined by the laws of the forum in accordance with usual principles of conflict of laws.<sup>17</sup> In these jurisdictions the mortgagee is not confronted with the problem of admiralty jurisdiction peculiar to the Anglo-American legal world.

While in Anglo-American jurisdictions statutory provision is made for the exercise of admiralty jurisdiction over certain recorded domestic mortgages, such statutes do not in terms render the admiralty process available for the enforcement of mortgages recorded outside the jurisdiction. The right to arrest the ship in an admiralty action *in rem* and the power of an admiralty court to sell the vessel, free and clear of all maritime liens, to satisfy a mortgage are legal resources of obvious value to a mortgagee seeking to foreclose a mortgage on a foreign ship in American or British courts.

Although it is a commonplace that Anglo-American admiralty courts have jurisdiction over ship mortgages only by comparatively recent statute,<sup>18</sup> it is likely that only by construction of an ancient statute did admiralty lose jurisdiction over a class of transactions which now includes ship mortgages. Statutes of Richard II limited the admirals to judgments upon things done upon the sea (*fait sur le meer*).<sup>19</sup> A subse-

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mission], Edition of September 1939) Article I, Section 3(c) (1) (i) (b) and Article II, Section 5; and Form No. 12 (Preferred Ship Mortgage to Reconstruction Finance Corporation) Article II, Section 4 and Article IV—all provide that in the event of partial loss of the vessel, if the mortgagor be in default, the insurance proceeds, which are made payable to the mortgagee, are to be applied *first* to indemnity against liens prior to the lien of the mortgage and *thereafter* to the payment of the defaulted loan secured by the lien of the mortgage. But Form No. 14 (Preferred Mortgage of a Fleet of Coastwise Vessels, evidently taken from a 1938 mortgage to a Baltimore bank), in Sections *Sixth* and *Eighth*, provides for the application of the insurance proceeds, which are made payable solely to the mortgagee, “. . . forthwith to the amount of the principal of said notes, irrespective of whether or not the same be then due, . . .”

17. RESTATEMENT, CONFLICT OF LAWS § 265 (1934); 2 BEALE, CONFLICT OF LAWS § 265.1 (1935); GOODRICH, CONFLICT OF LAWS § 148 (2d ed. 1938).

18. ROBINSON, ADMIRALTY 440 (1939).

19. “. . . [T]he admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea [*fait sur le meer*], as it hath been used in the time of the noble prince King Edward, grandfather of our lord the King that now is.” 13 RICHARD II, c. 5 (1389). “. . . [O]f all manner of contracts, pleas

quent statute of Henry IV authorized common law courts to issue writs of prohibition against the exercise by the admiralty of jurisdiction contrary to the statutes of Richard II.<sup>20</sup> As a result of centuries of dispute between the admiralty and common law courts, the admiralty courts eventually were deprived of jurisdiction to enforce contracts of sale or mortgage of a ship, which had come to be regarded as contracts made within the realm rather than things done upon the sea, or, in modern terminology "non-maritime" contracts.<sup>21</sup> Bottomry bonds, however, (even if executed within the realm) have always been considered as somehow more related to the credit of the ship and the risk of the voyage; hence, despite the increasingly tenuous distinction in principle between bottomry and mortgage, particularly in the later American decisions,<sup>22</sup> such bonds have always been treated as maritime contracts enforceable in admiralty.

The established doctrine that a ship mortgage is a non-maritime contract has not been discussed by the courts as to origin or justification and is, as we have seen, hidden in the mists of English legal history. The American cases are founded on the *Bogart* case.<sup>23</sup> The *Bogart* case

and quarrels, and all other things rising within the bodies of the counties . . . the Admiral's Court shall have no manner of cognizance, power nor jurisdiction . . ." 15 RICHARD II, c. 3 (1391).

20. 2 HEN. IV, c. 11 (1400).

21. A mortgagee never in possession was held not entitled to the surplus of the proceeds of the sale of a vessel by the admiralty court, which the court directed, without opinion, to be held in the registry. *The Portsea*, 2 Hagg. 84, 166 Eng. Rep. 175 (Adm. 1827). The opinion in full in an identical holding was: "The interest of a mortgagee is not a question for the decision of the Admiralty Court. I direct the proceeds to be invested in Exchequer bills." *The Exmouth*, 2 Hagg. 88, 166 Eng. Rep. 176, 177 (Adm. 1828). In a suit for a warrant of arrest to transfer possession of a vessel to the mortgagee under a defaulted conditional bill of sale, registered under the Registry Act of 1825, the court rejected the learned Lushington's argument that such Act seemed ". . . to confirm such a title; and to take the case out of the former practice and decisions of the Court." *The Fruit Preserver*, 2 Hagg. 181, 166 Eng. Rep. 210, 211 (Adm. 1828). For earlier holdings to the same effect by common law courts, see *Bridgeman's Case*, Hobart 23 (5th ed., p. 11), 80 Eng. Rep. 162 (K.B. 1614) and *Atkinson v. Maling* 2 T.R. 462 (1788). See Mears *The History of the Admiralty Jurisdiction*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 312, 353-64 (1908).

22. See opinion of Mr. Justice Story in *The Draco*, 7 Fed. Cas. 1032, No. 4,057 (C.C.D. Mass. 1835); cf. *Leland v. Medora*, 15 Fed. Cas. 298, No. 8,237 (C.C.D. Mass. 1846) and *Greely v. Smith*, 10 Fed. Cas. 1077, No. 5,750 (C.C.D. Me. 1847). The relationship between bottomry and mortgage is most clearly analyzed in Morrison, *The Constitutionality of the Ship Mortgage Act of 1920*, 44 YALE L.J. 1, 13 (1934). *The Draco* was reaffirmed in *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 41 (1934), subsequent to Professor Morrison's article.

23. *Bogart v. The Steamboat John Jay*, 17 How. 399 (U.S. 1854), cited with approval in *Schuchardt v. Ship Angelique*, 19 How. 239, 240 (U.S. 1856); *People's Ferry Co. v. Beers*, 20 How. 393, 400 (U.S. 1857); *The Lottawanna*, 21 Wall. 558, 583 (U.S. 1874); *The Eclipse*, 135 U.S. 599, 608 (1890); *The J. E. Rumbell*, 148 U.S. 1, 15 (1893).



cited only a dictum in *The Neptune*,<sup>24</sup> a decision subsequently reversed by a unanimous Privy Council.<sup>25</sup>

It should be noted that all of the American cases holding that a ship mortgage is not a maritime contract have been decided with respect to mortgages on United States vessels. Apparently the question whether a ship mortgage made abroad, or on a foreign ship, might be considered to be a maritime contract was never presented. In addition, it has been convincingly, though unsuccessfully, argued that the construction of the English statutes of Richard II should never have been considered to restrict the general admiralty jurisdiction exercised by American courts under the Constitution.<sup>26</sup>

#### THE FOREIGN SHIP MORTGAGE IN ENGLISH LAW

In England, the shift to the concept that admiralty could have jurisdiction over ship mortgages was preceded by legislative action to encourage the investment of private capital in shipping, taking two forms: (1) provision for registration of mortgages on domestic (British) ships, which eliminated the character of a "secret lien" and rendered the registered mortgage proof against assignees in subsequent bankruptcy of the mortgagor; and (2) provision for admiralty jurisdiction over mortgages so registered.

The first mortgage registration statute, enacted in 1825,<sup>27</sup> provided for the registration of mortgages on English vessels by endorsement in the Book of Registry containing the registry of the ship. The registered mortgagee, though expressed in the mortgage to be the legal titleholder, was relieved of all liability as owner of the vessel. And, finally, the statute preferred a ship mortgage registered prior to the mortgagor's bankruptcy to "any Right, Claim or interest which may belong to the Assignee" in bankruptcy of the mortgagor, "any Law or Statute to the contrary thereof notwithstanding."<sup>28</sup>

Would these provisions alone justify a warrant of arrest in admiralty in a suit to transfer title from mortgagor to mortgagee, after default in a registered mortgage (or, as we might put it, to foreclose the mortgage)? The celebrated proctor and later Judge in Admiralty, Doctor Lushington, submitted as counsel for a mortgagee that the Registry Act of 1825 seemed "to confirm such a title; and to take the case out of

24. 3 Hagg. 129, 132, 166 Eng. Rep. 354, 355 (Adm. 1834).

25. 3 Knapp 94, 12 Eng. Rep. 584 (P.C. 1835).

26. HALL, THE PRACTICE AND JURISDICTION OF THE COURT OF ADMIRALTY i-xxviii (1809).

27. 6 GEO. IV, c. 110 (1825).

28. See, e.g., Merchant Shipping Act, 1854, 17 & 18 Vic., c. 104, §§ 30 *et seq.*; Merchant Shipping Act, 1894, 57 & 58 Vic. c. 60, §§ 31-46. These provisions for the registration and protection at common law of ship mortgages have been expanded and incorporated in subsequent legislation both in England and later in the Dominions.

the former practice and decisions of the Court." But it was held that no enlargement of the jurisdiction of the Admiralty Courts had yet been created, and jurisdiction was found still lacking over ship mortgages, registered or not.<sup>29</sup>

The first necessary jurisdictional step was taken in England in the Admiralty Court Act, 1840,<sup>30</sup> which gave full jurisdiction to the admiralty court over mortgage claims whenever a ship, or the proceeds thereof, was already under arrest by admiralty process. But the mortgagee remained without right initially to arrest the ship upon default until the Admiralty Court Act of 1861,<sup>31</sup> which granted admiralty jurisdiction "over any claim in respect of any mortgage, duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship, or the proceeds thereof, be under arrest of the said Court or not." After this legislation all English registered ship mortgages had a maritime lien, fully enforceable *in rem* in admiralty.

The relative priority of the registered ship mortgage has been judicially fixed in England as subsequent to ancient maritime liens as existing before the statutory creation of the mortgage lien (pilotage, tort of the vessel, seamen's wages, salvage, master's wages and disbursements authorized by the owner, and bottomry and respondentia bonds). But the lien of a registered mortgage is therein superior to all other liens similarly created by statute, termed in England "statutory liens," (towage, necessaries not furnished in the home port, damage to cargo and breach of contract of affreightment, and personal injury and loss of life).<sup>32</sup>

Thus the registered English ship mortgage was made an attractive medium of investment after 1861. But both the Registration Acts and the Admiralty Court Acts since 1861 have been limited to ships entitled to registry under the British flag, and contain no statutory provision dealing with foreign mortgages (which might or might not be held by British capital) where both ship and mortgage were duly registered under the law of a foreign flag. Under a narrow statutory construction, since the Acts in terms apply only to British registered mortgages, their benefit would be denied to all other mortgages—not only unregistered mortgages on British vessels, but also mortgages on foreign vessels, whether or not registered under a foreign flag. In the broader view, of course, a mortgage registered abroad, given by the statute of the vessel's flag the status and attributes of a maritime lien, should be enforceable in our admiralty courts.

But the issue of foreign ship mortgages was not the subject of an

29. *The Fruit Preserver*, 2 Hagg. 181, 166 Eng. Rep. 210 (Adm. 1828).

30. 3 & 4 Vic. c. 65.

31. 24 Vic. c. 10.

32. CONSTANT, *op. cit. supra* note 7, at 69-85; PRICE, *THE LAW OF MARITIME LIENS* 106-7 (1940).

opinion in a court of record for many years. There are indications from a chancery case that it was the practice in the Admiralty Division to arrest ships upon claim by holders of foreign mortgages.<sup>33</sup> In addition, sufficiently foresighted counsel could by proper draftsmanship in foreign mortgages secure the jurisdictional rights, in an English admiralty court, of a registered English mortgage. In the very interesting case of *The Byzantion*,<sup>34</sup> both a right to proceed *in rem* against a Greek ship, and a priority, like that of an English registered mortgage, over a "statutory lien" for repairs, were held to be created by the following language in the unregistered mortgage:

"The owner agrees that . . . so long as the said vessel is within the jurisdiction of the English Courts the security shall, so far as the mortgagees desire, be dealt with in precisely the same way as if the ship had been registered in England by a statutory mortgage with a collateral mortgage agreement containing the same terms and conditions as those contained in the mortgage and these presents."

Said Hill, J. in the Admiralty Division:

"The effect is twofold—(1) as to jurisdiction, there is jurisdiction by contract; (2) as to rights, as between the Graham Company and Mr. Mango, the Graham Company are to be treated as if they were registered mortgagees of a British ship, and as if entitled to sue *in rem*."

The status of the foreign registered ship mortgage was eventually analyzed and settled in *The Colorado*.<sup>35</sup> The discussion of the problem in the opinions of the Court of Appeal was exhaustive, as the case was of importance in the field of conflict of laws as well as admiralty. The "Colorado" was a French vessel, arrested by English repairmen under a statutory lien, which, as pointed out above, is inferior to a maritime lien or the lien of a registered mortgage, but superior to the claim of an unregistered mortgage. Belgian mortgagees, under a "hypothèque" registered according to the law of France in the vessel's home port in France for a principal amount in excess of the proceeds of the sale of the vessel, were held by Hill, J. in the admiralty court to have priority over the repairmen. A French mortgagee, by French law, had what was described as a *jus in rem*, which apparently involved no right to take possession but only a right to proceed by legal process for the seizure and sale of the ship—but that right travelled with the *res* into whosoever's hands it might come. Therefore, the property right of the mortgagee already existed in the ship at the time when the repairmen first

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33. *Wilkes v. Saunton*, 7 Ch. D. 188 (1877).

34. 38 T.L.R. 744 (Adm. Div. 1922).

35. *The Colorado*, [1923] P. 102 (C.A.).

acquired any interest in her, namely, at the moment when they arrested her. Hill, J. thought that such right of property did not differ greatly from that under an English mortgage and that, therefore, he was bound to apply the English law of priorities, and prefer the "hypothèque" (even though under French law the repairman would be preferred over the holder of a registered "hypothèque"). The Court of Appeal unanimously affirmed.<sup>36</sup>

The *Colorado* case thus established that if a foreign mortgage was endowed by foreign law with the attributes of a maritime lien or of an English mortgage, it would be accorded the same preferential rights specifically granted by English statutes to English mortgages, even though such statutes did not in terms extend to foreign mortgages. While the holding involved only the substantive question of relative priority, there is no reason to doubt that under the doctrine of the *Colorado* case a foreign mortgagee could obtain original admiralty jurisdiction *in rem* for the satisfaction of his claim. And fundamentally implicit in the holding is the premise that a mortgage can be accorded the status of a maritime contract by foreign as well as domestic legislation.

#### THE BRUSSELS CONVENTION OF 1926

The extension to a foreign registered mortgage of the rights granted a domestic registered mortgage was reached less easily in continental Europe. What was established in England by judicial decision in *The Colorado*, a number of continental nations accomplished by a tortuous process of international negotiation over a period of thirty years, cul-

36. The *Colorado*, [1923] P. 102 (C.A.) Bankes, L. J. said: ". . . the right created by the mortgage deed was a higher right than a mere right to proceed *in rem*, and though not capable of exact description in terms applicable to well-recognized English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as a maritime lien or the right created by an English mortgage." *Id.* at 107.

Scrutton, L.J. said, in part: "The fallacy of the appellants' argument appears to be that because the French Courts would give a French *necessaries man*, or a *necessaries man* suing in the Court of France, priority over the claimant under a *hypothèque*, therefore an English Court should give an English *necessaries man* similar priority. The answer is that the appellants are not asking for French remedies, but English remedies; and the English law postpones them to persons who have what is equivalent to a maritime lien." *Id.* at 109.

Atkin, L.J. was, however, considerably impressed by the appellants' arguments that under the law of France a *hypothèque* is not a right of property: ". . . but a right to have the ship seized and sold by judicial authority, and to be paid the proceeds—not absolutely, but after payment has been made to certain classes of creditors, including *necessaries men*. They say that such a right differs essentially from a right such as is given by an English mortgage; and admitting that the *lex fori* determines their own right, and would postpone it to a true mortgage, they say that the claimants make no title at all to anything except to payment in the order prescribed by French law.

"I think myself that the question is one of fact. . . . I am not prepared to differ from the finding of the learned judge. . . ." *Id.* at 111.

minating in the Brussels Convention of 1926 for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages.<sup>37</sup> The Convention provides that mortgages on vessels

“duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel’s registry or at a central office, shall be recognized and treated as valid in all the other Contracting States.”

Such mortgages are ranked immediately after certain classes of maritime liens, and the Convention provides that municipal laws of the Contracting States may create other liens, but

“no modifications may be made in the priority conferred on mortgages . . .”

The only maritime liens preferred to mortgages are:

1. Court costs and expenses, towage, pilotage, and harbor expenses.
2. Wages of master and crew.
3. Salvage and general average.
4. Claims for collision, damage to docks, personal injury of passengers and crew and loss of baggage.
5. Authorized contracts of the master necessary for the preservation of the vessel or the continuation of the voyage.

At present there are fifteen States which are parties to the Convention.<sup>38</sup> In addition, Holland, Greece and China, while not parties to the Convention, have maritime laws similar thereto.<sup>39</sup>

The Convention does not, it is true, extend to recorded mortgages created under the laws of States not parties to the Convention, and while this omission may be a defect from the point of view of such non-member States, the remedies are simple: any State not now a member may become one by depositing a ratification in Brussels; or, of course, may by municipal statute provide for similar recognition of the status of foreign ship mortgages as maritime liens, to rank either with domestic registered mortgages or in some lower place in the maritime lien hierarchy.

#### THE FOREIGN SHIP MORTGAGE IN THE UNITED STATES

The United States (although its representatives at the Convention approved its terms) has not become a party to the Brussels Convention of 1926 nor has it determined the status of the foreign ship mortgage by

37. See note 3 *supra*.

38. Norway, Sweden, Denmark, Finland, Belgium, France, Spain, Italy, Portugal, Brazil, Poland, Hungary, Estonia, Monaco, Rumania.

39. PRICE, *op. cit. supra* note 32, at 236.

municipal legislation. While the *Colorado* case may be taken to have established the law on the question in the British Empire, there is no corresponding decision by a higher American court. In addition, certain peculiarities of American admiralty jurisdiction preclude the easy assimilation of the doctrine of *The Colorado* into our law.

We have seen that as first clearly enunciated by the Supreme Court in 1854 in the *Bogart* case,<sup>40</sup> the United States early adopted the historical English view that ship mortgages were non-maritime contracts and hence excluded from admiralty jurisdiction. Although by 1861 England had by statute extended her admiralty jurisdiction over registered ship mortgages the view of the American courts, as stated by the Supreme Court in 1893, continued to be that "An ordinary mortgage of a vessel, whether made to secure the purchase money for the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."<sup>41</sup> It is unfortunate that no case was ever presented to test the application of this antique jurisdictional theory to a foreign ship mortgage which was by foreign law made a maritime lien on the vessel. It appears wholly logical that under accepted principles of the conflict of laws, a foreign mortgage, valid and a maritime lien by the law of its creation, should be held valid and enforceable in admiralty.<sup>42</sup> Indeed, such result would seem required if our admiralty law is rightly to be called part of the *jus gentium*.

Desire on the part of Congress to encourage the development of our merchant marine after World War I led to legislative correction of the doctrine of the Supreme Court. The Ship Mortgage Act of 1920<sup>43</sup> combines both the registration and certain of the jurisdictional features of the English legislation into one statute, and at the same time lists those maritime liens entitled to priority over a ship mortgage registered in accordance with the Act. Such Federal registration is permitted only to a mortgage on a vessel registered under the United States flag; both the owner and mortgagee must be "citizens of the United States" as that term is rigorously defined. Various formalities as to registration and posting on board the vessel of notice of the mortgage must be complied with on pain of losing the maritime lien created by the Act. Registered

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40. *Bogart v. The Steamboat John Jay*, 17 How. 399 (U.S. 1854). The lien of such a mortgage was held inferior to all maritime liens and such a mortgage was therefore a most unsatisfactory form of security. This situation was only partially remedied by the provisions of the Ship Mortgage Act.

41. *The J. E. Rumbell*, 148 U.S. 1, 15 (1893).

42. See RESTATEMENT, CONFLICT OF LAWS § 265 (1934); 2 BEALE, CONFLICT OF LAWS § 265.1 (1935); GOODRICH, CONFLICT OF LAWS § 148 (2d ed. 1938). In *The Guatemala*, 1946 Am. Mar. Cas. 1719 (E.D.N.Y.), the court seemed to consider the mortgage on a foreign vessel a non-maritime contract although the question was not directly involved.

43. See note 4 *supra*.

mortgages are entitled to the statutory designation of "preferred ship mortgages" and are granted a statutory "preferred mortgage lien," enforceable in admiralty prior to all subsequent liens, maritime, possessory or otherwise, except those "preferred maritime liens" for

"damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage."

Prior to this Act the mortgage on a vessel was deferred to all maritime liens and gave a form of security which was almost wholly unacceptable to American lenders.

Thus, belatedly, the United States came to recognize the maritime nature of the ship mortgage. The purpose of the Act, however, was purely nationalistic: to encourage American investment in mortgages on American ships. Mortgages on foreign ships, or mortgages held by foreigners on American ships, are excluded from the status of such "preferred ship mortgages" under the Act. Furthermore those domestic mortgages which, usually for lack of technical conformance with the procedural provisions, failed to qualify as "preferred ship mortgages" under the Act retain the status of the pre-1920 ship mortgages, are not maritime contracts and are deferred to all maritime liens.<sup>44</sup> Therefore the Act, though endowing certain domestic mortgages with a maritime status by legislative fiat, has been held not to have altered the traditional view of our admiralty courts that domestic ship mortgages unaffected by statute are non-maritime contracts.

The conservatism of our admiralty courts may have been affected by the remarkable constitutional question raised by the Act itself. Extraordinary as it may now seem, for many years after the passage of the Act a portion of our admiralty bar was in doubt as to its validity. The argument was made that Federal admiralty jurisdiction was limited to the original constitutional grant to the Federal judiciary of "all cases of admiralty and maritime jurisdiction"; that such jurisdiction was limited to the general admiralty jurisdiction of England received in 1788, which excluded jurisdiction over ship mortgages; and that, therefore, to confer the character of maritime contracts upon ship mortgages, the proceeds of which could be used exclusively for non-maritime purposes, was to enlarge the original limited constitutional grant of Federal jurisdiction—a feat beyond the power of Congress under the Constitution.<sup>45</sup>

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44. *Morse Dry Dock & Repair Co. v. The Northern Star*, 271 U.S. 552 (1926); *The Emma Giles*, 15 F. Supp. 502 (D. Md. 1936); *The R. Lenahan*, 10 F. Supp. 497 (E.D. Pa. 1935); *The Bergen*, 7 F. 2d 379 (S.D. Cal. 1925).

45. "The Judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ." U. S. CONST., Art. III, §2. The constitutional points are discussed in Miller, *The Foreclosure of Vessel Mortgages in Admiralty*,

The logical conclusion of this reasoning, of course, required an amendment to the Constitution to achieve the modest and technical purposes of the Ship Mortgage Act. It was not until 1934 that the constitutional objection to the Act was finally exhaustively demolished in ten reasoned pages of opinion by Chief Justice Hughes, in the *Barlum* case upholding the maritime lien of a "preferred ship mortgage" under the Act.<sup>46</sup>

It is unfortunate that the same experienced and lucid Justice lacked occasion to pass upon the maritime nature of the lien of a foreign mortgage registered under the foreign counterparts of our Act. As it is, the question has never been presented in an officially reported case in the United States. The question arose, however, in *The Secundus*<sup>47</sup> which antedated and was not mentioned in Chief Justice Hughes' opinion in the *Barlum* case. It is doubtful if the claim of the foreign mortgagee could have been fully presented to the court in *The Secundus*, since the issue was clouded by other jurisdictional problems and by an alternative major contention of sovereign immunity by the mortgagee,<sup>48</sup> the Republic of France, which attempted to libel a French ship on the ground that it was the holder of a French "hypothèque" or mortgage. The entire legal discussion of Judge Moscowitz was as follows:

"The lien of the mortgage is not a maritime lien and must be dismissed. *Schuchardt v. Ship Angelique*, 60 U. S. 239; *Bogart, et al. v. Steamboat John Jay, etc.*, 58 U. S. 399."

The two cases cited in this terse exposition were both decided prior to the Act of 1920 and were to the effect that a ship mortgage was not considered to be a maritime contract.

The logic of *The Secundus*, while simple, appears completely fallacious. Its rough scheme is: (1) only maritime contracts are enforceable in admiralty; (2) ship mortgages are not maritime contracts; (3) "preferred ship mortgages" on American vessels are by our Ship Mortgage Act made maritime contracts and therefore enforceable in admiralty;

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70 U. OF PA. L. REV. 22 (1921); Canfield, *The Ship Mortgage Act of 1920*, 22 MICH. L. REV. 10 (1923); and Morrison, *The Constitutionality of the Ship Mortgage Act of 1920*, 44 YALE L. J. 1 (1934). It is not unlikely that doubt as to the constitutionality of the requisite municipal legislation strongly influenced the failure of the United States to become a party to the Brussels Convention of 1926. See note 3 *supra*.

46. *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 42-52 (1934), reversing *The Thomas Barlum*, 68 F. 2d 946 (C.C.A. 2d 1934).

47. 1927 Am. Mar. Cas. 641 (E.D.N.Y.) (not otherwise reported). The case is the only authority cited in 1 BENEDEICT, ADMIRALTY 163 (6th ed. 1940), for the proposition: "Neither will [admiralty] give effect to a mortgage of a foreign ship, made according to the mortgage laws of a foreign country, until all maritime lien claims, ranked according to our law, have been paid."

48. The extensive litigation is reflected in the following officially reported decisions all *sub nom.* *The Secundus* (E.D.N.Y. 1926): 13 F. 2d 469; 15 F. 2d 711; 15 F. 2d 713; and the following unofficial reports: 1927 Am. Mar. Cas. 639; 1927 Am. Mar. Cas. 642.



(4) but a foreign mortgage is not embraced in the terms of the Act and therefore is not enforceable in admiralty.

The major difficulty in the reasoning of *The Secundus* decision that, while the court concedes that our admiralty jurisdiction has been duly enlarged by domestic statute to embrace registered domestic mortgages as maritime contracts, it denies that foreign laws or statutes giving a similar maritime status to registered foreign mortgages give jurisdiction over them to our admiralty courts. To hold that a domestic mortgage, which fails to comply with the Act will not be enforced in a United States admiralty court can be supported by respectable, if wholly illogical, precedent. But there is no justification on the same basis to hold that a foreign mortgage which is made a maritime contract by foreign law may not be enforced in a United States admiralty court.<sup>49</sup>

If, by a process of reasoning similar to that in *The Secundus* case, our admiralty courts were to refuse to recognize a registered foreign ship mortgage as a lien of maritime nature, the mortgagee would have to seek his remedy by means of an original action in our state courts. Assuming a mortgage given to secure a note with a provision for acceleration of the maturity date in case of default, the result would be that the mortgagee would bring an action *in personam* on the note in a state court, and, in such states as New York, commence the action by attachment of the vessel as property of a foreign non-resident creditor.<sup>50</sup> Following seizure by a sheriff, the mortgagee, if no forthcoming bond for the release of the ship was posted, would have his ordinary remedy of a sale of the chattel to satisfy his judgment on the note.<sup>51</sup> Neither the mortgagor nor maritime lienors could remove the vessel to the custody of an admiralty court, the proper forum for the satisfaction of their liens. Sale by the state court would not, however, divest their liens; the ves-

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49. The ruling of *The Secundus*, applied, for example, to a ship mortgage recorded under the law of Panama, which classifies such a mortgage as a maritime lien, is not consistent with the U. S. theory of the nature of admiralty jurisdiction *in rem*. "The [maritime] lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise." *The Rock Island Bridge*, 6 Wall. 213, 215 (U.S. 1867). Republic of Panama: *Código de Comercio* § 1507 (1931), as amended by Law 40 of 1946, [1946] *Leyes*.

50. N. Y. CIVIL PRACTICE ACT §§ 902-3. See also *Leon v. Galceran*, 11 Wall. 185, 189 (U.S. 1870) (attachment of a schooner prior to suit by writ of sequestration under Louisiana law). Such procedure to obtain jurisdiction by attachment of the property of foreign non-resident creditors is not available under the Federal Rules of Civil Procedure. *Big Vein Coal Co. v. Read*, 229 U.S. 31 (1913); *Davis v. Ensign-Bickford Co.*, 139 F. 2d 624 (C.C.A. 8th 1944); see *Branic v. Wheeling Steel Corp.*, 152 F. 2d 837 (C.C.A. 3rd 1945); 3 MOORE, FEDERAL PRACTICE 3309 (1938).

51. There is no doubt that a ship is a chattel subject to all the process of common law or equity, and may be so seized when physically within the territorial waters of a state. *Rounds v. Cloverport Foundry Co.*, 237 U.S. 303 (1915); *North River Coal & Wharf Co. v. McWilliams Bros., Inc.*, 28 F. 2d 513 (S.D.N.Y. 1928).

sel would remain subject to libel in an admiralty court immediately after her sale by a state court; and consequently the purchase price received by the state court would be diminished by at least the estimated value of the outstanding maritime liens, unless the purchaser were innocent indeed.<sup>52</sup>

Theoretically the mortgagee would realize the same amount by a non-admiralty sale subject to maritime liens as he would by an admiralty court sale free of maritime liens which were superior to the mortgage. As a practical matter, however, the purchaser at an admiralty court sale would have what is in effect a judicial guaranty against the existence of liens on the vessel, a factor which would certainly enhance the salability of the ship. Of course, a mortgagee can at any time intervene and become a party if a maritime lienor has instituted proceedings in an admiralty court to enforce his lien. Or, if no admiralty proceeding is pending, the mortgagee may attain the same result by acquiring an assignment of a maritime lien, for value; instituting proceedings on such lien, and enforcing both the lien and the mortgage in an admiralty court.

These cumbersome alternatives to the simple process of enforcing the mortgage in admiralty indicate that the proper forum would seem to be the admiralty court. Even though American courts may take the view that the Federal Ship Mortgage Act of 1920 has not, of itself, given a maritime character to *all* ship mortgages,<sup>53</sup> nevertheless those ship mortgages which are given the attributes of a maritime lien under the law of a foreign nation should be held subject to admiralty jurisdiction in the United States. If, despite this reasoning, it should in the future be held that such a mortgage is not a lien of a maritime character enforceable by libel in admiralty, then it would be in our national inter-

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52. *The Gazelle*, 10 Fed. Cas. 127 No. 5,289 (D. Mass. 1858); *The E. L. Cain*, 45 Fed. 367 (D.S.C. 1891), approved in *Moran v. Sturges*, 154 U.S. 256, 281 (1894).

53. The opinion of Judge Cardozo in *S. & C. A. Commercial Co. v. Panama R.R. Co.*, 237 N.Y. 287 (1923), would seem to indicate a possible method of approach which might avoid the necessity of legislation. It was there held that: "Though the act does not govern, its standards are relevant to the inquiry whether public policy permits the enforcement of the contract." *Id.* at 291. And, quoting from the case of *Gooch v. Oregon Short Line R.R. Co.*, 258 U.S. 22, 24, Cardozo continued: "A statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." *Id.* at 291. The Court of Appeal in *The Colorado* in effect held that the British Ship Mortgage Act, which applied only to mortgages on British ships, so changed the jurisdiction of the British admiralty courts as to permit the enforcement therein of a foreign mortgage to which the Act did not apply. The *S. & C. A. Commercial Co.* case would seem to justify the conclusion that the United States Ship Mortgage Act of 1920 which brought about an enlargement of admiralty jurisdiction over certain ship mortgages could be held in effect to have enlarged the admiralty jurisdiction to include all ship mortgages. Thus a similar enlargement of jurisdiction might also be arrived at judicially rather than by legislation.

est, as a creditor nation, to improve the security of foreign ship mortgages held by the Maritime Commission and private American capital by becoming a party to the Brussels Convention of 1926 or by passing domestic legislation giving such mortgages a status similar to that of our domestic preferred ship mortgages.

The most expedient plan for the protection in American courts of American capital loaned on foreign shipping by both the Maritime Commission and private investors, would of course be the passage of an act by Congress granting a recorded mortgage on a foreign ship a maritime status similar to the grant to domestic mortgages contained in the Ship Mortgage Act of 1920. Even if no preference were granted to foreign mortgages, as was granted by the Ship Mortgage Act to qualifying domestic mortgages, and the foreign mortgage was therefore subordinated to all maritime liens, the maritime character granted by such statute and the consequent remedy *in rem* in an admiralty court, would both clarify and enhance the legal status of the foreign ship mortgage. Some such step seems advisable if the United States wishes to encourage American private financing of the transfer to foreign nations of the large surplus of shipping now in the hands of the United States Maritime Commission.