RECENT CASES

Admiralty—Jurisdiction—Amphibious Tort Involving Trespass to Foreign Land Held within Jurisdiction of Admiralty Court—[England].—The plaintiffs brought an action in rem in the Admiralty Division of the English High Court against the owners of a British ship, alleging that they were the owners of a wharf situated in Nigeria which was damaged by the negligent navigation of the libelled ship. The defendants denied the plaintiff's ownership of the wharf and contested the jurisdiction of the court. The Admiralty Division in a reserved judgment[1] held that the Admiralty Court Act of 1861[2] conferring jurisdiction over "any claim for damage done by any ship" did not limit the locality in any way. On appeal to the Court of Appeal, the defendants contended that this Act should be interpreted in the light of accepted practices of international law, and that under the rule of the celebrated *Moçambique*[3] case the British courts had adopted as such a practice the rule that they should entertain no jurisdiction over suits for trespass to foreign land. *Held*, the Admiralty Division had jurisdiction because this rule was inapplicable to actions in rem in admiralty. *The Tolten.*[4]

In this case the British court was confronted, for the first time, with essentially the same problem as that which has caused the American admiralty bar so much grief—the amphibious tort.[5] The American cases, however, have reached a contrary result. In a line of cases going back to *The Plymouth*[6] the Supreme Court has declared that admiralty jurisdiction extends only to "maritime torts," and that in order to come within the area comprehended by that term, "the wrong and injury complained of must have been committed wholly upon high seas or navigable waters."[7]

Ever since formulating this jurisdictional test, the United States Supreme

[1] United Africa Company v. Owners of The Tolten [1946] W.N. 7 (1945), 40 Am. J. Int. L. 856 (1946), noted in 62 Scot. L. Rev. 34 (1946).

[2] 24 Vict., c. 10, § 7 (1861).

[3] British South Africa Co. v. Companhia de Moçambique, [1893] A.C. 602 (H.L.); see also Livingston v. Jefferson, 15 Fed. Cas. 660 (D.C. Va., 1811).

[4] [1946] p. 135 (C.A.).

[5] Previous English cases involving damage by ships to land structures located in England include The Veritas, [1901] P. 304; The Uhla, L.R. 2 A. & E. 29 n. 1 (1867); however, since England does not have the system of dual sovereignty prevailing in the United States, the cases are not strictly analogous to the American cases. The precise problem of The Tolten has arisen once before in The Mary Moxham, 1 P.D. 43 (1875), but the court there found that the parties had consented to the jurisdiction of the British Admiralty.

[6] 3 Wall. (U.S.) 20 (1865).

[7] Ibid., at 35; see also the opinion of Mr. Justice Story in De Lovio v. Boit, 7 Fed. Cas. 418, No. 3, 776 (C.C. Mass., 1815).

Court (with a little help from Congress) has been steadily whittling it away. In *The Blackheath*,[8] the Court eliminated aids to navigation from *The Plymouth* doctrine. Indeed, the language of the Court would appear to overrule *The Plymouth*, although an attempt was made by the majority to distinguish the two cases. Mr. Justice Brown, concurring, enthusiastically accepted the opinion as overruling the prior cases.[9] Four years later, however, the Court expressly disavowed the views of Mr. Justice Brown and upheld *The Plymouth* doctrine, restricting *The Blackheath* to cases involving aids to navigation.[10] This category was subsequently expanded to include those objects which were "intended" to be used as aids to navigation.[11] However, it does not include wharves.[12] Another substantial bite was taken out of *The Plymouth* doctrine in *Richardson v. Harmon*,[13] in which an act of Congress[14] limiting the liability of shipowners was held applicable to amphibious torts. The courts have also evidenced a propensity for getting around the "place of harm" jurisdictional test by concluding that harm actually suffered on land was for judicial purposes suffered on navigable waters.[15] The Court has also refused to allow *The Plymouth* doctrine to defeat an action brought by a seaman under the Jones Act[16] for personal injuries suffered on land.[17]

[8] 195 U.S. 361 (1904).

[9] "To attempt to draw the line of jurisdiction between different kinds of fixed objects, as for instance, between beacons and wharves, would lead to much confusion and much further litigation." Ibid., at 369. This prophetic warning has been fulfilled. For an analysis of the objects within the respective cognizance of admiralty and the state courts, see 1 Benedict, Admiralty 349 (6th ed., 1940); Robinson, Tort Jurisdiction in American Admiralty, 84 U. of Pa. L. Rev. 716 (1936); Lord and Sprague, Cases on Admiralty (2d ed., 1940). A good example of the sort of tenuous subtleties which determine the proper court in these cases is to be found in cases involving damage to submerged cables, where the presence or absence of admiralty jurisdiction is evidently determined by the character of the messages sent over the cables. See note in 27 Corn. L. Q. 554 (1942).

[10] Cleveland T. & V. R. Co. v. Cleveland SS. Co., 208 U.S. 316 (1907).

[11] The Raithmoor, 241 U.S. 166 (1915).

[12] Doullut and Williams Co. v. United States, 268 U.S. 33 (1925).

[13] 222 U.S. 96 (1911).

[14] "The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending. . . . ." 23 Stat. 57 (1884), 46 U.S.C.A. § 189 (1928).

[15] The Admiral Peoples, 295 U.S. 649 (1935), where a passenger was injured by falling off the gangplank onto the dock; Sound Marine and Machine Corporation v. Westchester County, 100 F. 2d 360 (C.C.A. 2d, 1938), noted in 39 Col. L. Rev. 498, which involved a suit alleging that pipe laid by defendant had obstructed ingress and egress to and from plaintiff's shipyard.

[16] 41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1944). This act is in effect a federal workmen's compensation act.

[17] O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36 (1943). The Court has refused to extend the doctrine of this case to injuries suffered by workmen other than seamen. Swanson v. Marra Bros., 328 U.S. 1 (1945).

However, even thus curtailed, *The Plymouth* rule operates to deny admiralty jurisdiction when the damaged object is a wharf—the situation in *The Tolten*—although it is well settled that the converse situation, where damage has been inflicted by a land structure upon a ship, is one properly within the competence of admiralty.[18]

The plaintiffs in *The Tolten* would have been without a remedy once the ship left Nigeria had admiralty not taken jurisdiction; and even prior to such departure, the remedies afforded by the Nigerian courts may have been worthless. The owner of a damaged wharf in America, denied access to the courts of admiralty, is in an equally unhappy position. His contributory negligence, which in admiralty would operate merely to mitigate damages, may preclude recovery in some state courts.[19] If the offending ship is under the direction of a compulsory pilot (as is often the case), the owners may be immunized from liability in a state court,[20] but not in admiralty.[21] Such pilots are generally judgment proof. An even greater disadvantage to which the wharfinger is subjected is his inability to utilize the admiralty suit in rem with its maritime lien—usually the only adequate security for his claims.[22] Thus where the wharfinger is denied access to admiralty courts, he may in effect be without an adequate legal remedy.[23]

Consequently, it is not surprising that the American doctrine has been widely criticized.[24] Several attempts have been made to alter it by legislation,[25] and a

[18] Philadelphia, Wilmington, and Baltimore R. Co. v. Philadelphia and Havre de Grace Steam Towboat Co., 23 How. (U.S.) 209 (1859); Southern Bell Telephone v. Burke, 62 F. 2d 1015 (C.C.A. 5th, 1933).

[19] Contributory negligence is not a bar in admiralty. See Robinson, Admiralty 853 (1939). However, this treatment of contributory negligence has been termed "procedural," and need not be employed by state tribunals. Beldin v. Chase, 150 U.S. 674 (1893); but cf. Maleeny v. Standard Ship Building Co., 237 N.Y. 250, 142 N.E. 602 (1923).

[20] Homer Ramsdale Co. v. La Compagnie Générale Transatlantique, 182 U.S. 406 (1901).

[21] The China, 7 Wall. (U.S.) 53 (1869).

[22] Common law attachment is an inadequate device for according security to a claimant since no court except an admiralty court can sell the res free of maritime liens. Morgan v. Sturges, 154 U.S. 256 (1894); The Resolute, 168 U.S. 437 (1897). The in rem action is not within the constitutional prerogative of the state courts. Moses v. Taylor, 4 Wall. (U.S.) 411 (1866); The Hine, 4 Wall. (U.S.) 555 (1866).

[23] Apparently wharfingers have to some extent been able to secure restitution by refusing wharfage to tortfeasors until compensation is made for damages. On at least one occasion an announced intention to litigate the matter in hopes of a reversal of the Plymouth doctrine has resulted in a willingness to settle on the part of the tortfeasor. See Plunkett, Admiralty Jurisdiction of Wharves, 16 World Ports 469, 473 (1928). However, such self-help techniques are at best a poor substitute for legal process.

[24] See 1 Benedict, Admiralty 353 (6th ed., 1940); Farnum, Amphibious Torts, 43 Yale L.J. 34 (1933); Bruncken, Tradition and Commonsense in Admiralty, 14 Marq. L. Rev. 16 (1929); Olverson, Admiralty Jurisdiction and the Amphibious Tort Problem, 29 Va. L. Rev. 1010 (1943); Reports of the American Bar Association in 54 A.B.A. Rep. (1929), 55 A.B.A. Rep. 303 (1930), 56 A.B.A. Rep. 311 (1931), 59 A.B.A. Rep. 397 (1934), 60 A.B.A. Rep. 411 (1935).

[25] S. 2603, 76th Cong. 1st Sess. (1939); S. 554, 78th Cong. 1st Sess. (1943); S. 1722, 17th Cong. 1st Sess. (1941); S. 1030, 79th Cong. 1st Sess. (1945).

bill for that purpose is now pending in the House of Representatives.[26] Before 1934 there was considerable doubt as to the constitutionality of such a bill.[27] It was an oft-repeated dictum that Congress could not legislatively increase the area of the constitutional grant of admiralty jurisdiction;[28] and if amphibious torts were not within the constitutional grant of "admiralty and maritime jurisdiction" it followed that Congress could not broaden the scope of that grant.[29] However in 1934, the Supreme Court in *The Thomas Barlum*[30] upheld an Act of Congress granting admiralty jurisdiction in cases involving foreclosure of ship mortgages. Previous decisions of the court had excluded such matters from "admiralty and maritime jurisdiction."[31] While reiterating the congressional incapacity to enlarge the grant of jurisdiction, the Court upheld the act as an incident of the congressional power to "alter, qualify, or supplement" the law of admiralty. The Court went out of its way to indicate that it would not let its old decisions stand in the way of Congress,[32] and dropped some rather explicit dicta that what Congress could do for mortgages they could do for amphibious torts. Any lingering doubts about the constitutionality of such legislation after *The Thomas Barlum* were dispelled by *O'Donnell v. Great Lakes Dredge and Dock Co.*,[33] where a statute was construed to confer admiralty jurisdiction in cases where personal injuries were incurred on shore in an amphibious tort. The Supreme Court has in effect invited Congress to rectify the present

[26] H.R. 238, 80th Cong. 1st Sess. (1947). "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the admiralty and maritime jurisdiction shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any case such suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water." This bill has the backing of the Maritime Law Association and the American Bar Association. It does not differ from the bills introduced in previous Congresses.

[27] See 55 A.B.A. Rep. 303 (1930), 56 A.B.A. Rep. 311 (1931).

[28] The St. Lawrence, 1 Black (U.S.) 522 (1861); The Lottawanna, 21 Wall. (U.S.) 558, 576 (1874); Crowell v. Benson, 285 U.S. 22, 55 (1932); The Blackheath, 195 U.S. 361, 365 (1904).

[29] Farnum, op. cit. supra note 24, answers that argument thus: "There is something paradoxical, to say the least, in excluding a field of adjudication from the cognizance of the only court that through equipment and resources is fully competent to deal with it, on the ground that the litigation within this field possesses none of the essential characteristics of the type of cases with which this particular court was specially created to deal."

[30] 293 U.S. 21 (1934).

[31] The John Jay, 17 How. (U.S.) 399 (1854).

[32] "The authority of Congress to enact legislation of this nature was not limited by previous decisions as to the extent of admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned." The Thomas Barlum, 293 U.S. 21, 52 (1934).

[33] 318 U.S. 36 (1943).

jurisdictional anomaly in these cases. Although the only vested interests which would apparently be injured by the enactment of legislation such as that provided in H.R. 238 are those of tortfeasors, such a bill has as yet to be reported out of committee in Congress.

It is somewhat difficult to determine the legal basis or justification for the American rule. In *The Plymouth,* where the rule was conceived, and in *The Cleveland,*[34] where it was revitalized after being apparently discarded, the opinions consist largely of restating the conclusion in varying forms. It appears from the plaintiff's brief in *The Plymouth* that the defendant based his plea of lack of jurisdiction on the state of the law existing in the admiralty courts in England at the time of the American Revolution. However, it had already been established that the limitations on the prerogative of the English Admiral were not necessarily operative on the maritime courts in the United States;[35] and even if the competency of the American courts is limited to that area allotted by the statutes of Richard II,[36] it would appear that "the traditions of England favor it [jurisdiction] in a case like this."[37] It has been said that "the precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history,"[38] but any jurisdictional test antedating *The Plymouth* would appear to comprehend amphibious torts.[39] It appears that the legal basis upon

[34] 208 U.S. 316 (1907).

[35] The Genesee Chief, 12 How. (U.S.) 443 (1851); Waring v. Clarke, 5 How. (U.S.) 440, 453 (1847); The Magnolia, 20 How. (U.S.) 296, 341 (1858). The British admiralty courts had fought a long losing battle with the common law courts, and at the time of the Revolution had reached the nadir of their power; beginning in 1840, a series of statutes restored their former jurisdiction. See Meers, Admiralty Jurisdiction, 2 Essays on Anglo-American Legal History 312 (1908).

[36] 13 Richard II, c. 5 (1389). This is the statute under which the jurisdiction of admiralty was curtailed. Its provisions have been held inapplicable to American maritime jurisdiction. See Mr. Justice Story in the Schooner Volunteer, 1 Sumner 551, 563 (C.C. Mass., 1834).

[37] Mr. Justice Holmes in The Blackheath, 195 U.S. 361, 365. After examining much historical material, Mr. Justice Holmes concludes that "the foregoing references seem to us enough to show that to maintain jurisdiction in this case is no innovation upon the English law. But a very little history is sufficient to show that the constitution does not prohibit what convenience and reason demand." Ibid., at 367. The Tolten agrees with Mr. Justice Holmes that the amphibious tort would probably be considered within the former jurisdiction of the admiral. The Tolten, [1946] P. 135, 158–59.

[38] The Blackheath, 195 U.S. 361, 365 (1904).

[39] "The language of the Constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe." Mr. Justice Story, in De Lovio v. Boit, 7 Fed. Cas. 418, 443, No. 3, 776 (C.C. Mass., 1815). The statement that the maritime jurisdiction conferred by the Constitution is that of the law of nations, comparable to the Seerecht and droit de mer of Germany and France, is to be found throughout the early admiralty cases. See Waring v. Clarke, 5 How. (U.S.) 440 (1847); The Vengeance, 3 Dall. (U.S.) 297 (1796). As to the extent of this jurisdiction, compare the famous Ordonnance of Louis XIV: "Toutes affaires relatives à la navigation et aux navigateurs appartiennent au droit maritime." 1 Benedict, Admiralty 9 (1940). The "general law of the sea," as expounded in De Lovio v. Boit, has been rather shabbily treated by the Supreme Court in the last seventy-five years. In The Lotta-

which jurisdiction was refused in *The Plymouth* rests upon a principle adopted from the criminal law; namely, that the place where the harm occurs is the place which has jurisdiction.[40] Thus the Court in effect read the maxim of lex loci delicti into the admiralty clause of the Constitution.[41] The *Moçambique* doctrine, which was raised as a bar to jurisdiction in *The Tolten*, is a ramification of the lex loci delicti principle. Thus the problem confronting the American Supreme Court in 1865 and the British Court of Appeal in 1946 was essentially the same.

The British court in *The Tolten*, however, recognized the force of both the local action doctrine expressed in the *Moçambique* case and the universality of admiralty jurisdiction. "The two competing principles of law . . . . are equally universal in scope, and on the facts of the present case, seem to be mutually exclusive—one therefore must give way to the other. . . . ."[42] Two of the Lord Justices, Somervell and Cohen, were convinced that the *Moçambique* rule would have to give way, drawing an analogy to the practice of equity which ignores the local action doctrine. Lord Justice Scott in his opinion resolved the conflict by utilizing the substantive law of admiralty—a choice of law which was predicated upon the capacity of that body of law to provide an adequate remedy in the fact situation presented.[43] He was not particularly impressed by the wording of

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wanna, 21 Wall. (U.S.) 558 (1874), the Court maintained that discussion of such a law did not advance the argument one whit, and that the Court was concerned only with "the maritime law as accepted and received in the United States"; indeed, the law of the United States was the general maritime law, and if the law of every other maritime country differed, such laws were mere local ordinances. Mr. Justice Clifford, dissenting, fought a valiant rearguard action. In The Western Maid, 257 U.S. 419, 432 (1922), Mr. Justice Holmes relegated the maritime law to the position of a nonexistent "mystic overlaw"; and in the period when the admiralty jurisdiction was being employed as a device to cut down the effective area of social legislation (see Note, 3 Univ. Chi. L. Rev. 321 [1935]), the same justice discovered that "the maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." See the dissenting opinion in Southern Pacific v. Jensen, 244 U.S. 205, 220 (1917). Yet, the text writers on admiralty still trace the ancestry of their subject to the Laws of Oleron and Wisbuy and the Ordonnance of Louis XIV. And the "general maritime law" of De Lovio v. Boit has shown a marked tendency to appear suddenly in recent Supreme Court opinions. See The Thomas Barlum, 293 U.S. 21 (1934) and O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36 (1943).

[40] From the arguments presented in the plaintiff's brief (the defendant's brief is not reprinted in the reports) and the cases cited in the opinion, it is apparent that the authority on which the decision rested consisted of criminal cases where the criminal act occurred on the sea and the resultant injury on land. Among the cases cited are United States v. Davis, 2 Sumner 482 (C.C. Mass., 1837), a murder case where a shot fired on ship killed a native standing on the shore, and United States v. M'Gill, 4 Dall. (U.S.) 395 (C.C. Pa., 1806) where a victim clubbed on shipboard died after removal to land.

[41] For a thorough analysis on this point, see Rheinstein, The Place of Wrong, 19 Tulane L. Rev. 4, 165, 190 (1944). Professor Rheinstein ascribes the decision in The Plymouth to the states rights' controversy which was raging at the time.

[42] The Tolten, [1946] P. 135, 140.

[43] See the choice of law technique presented in Cavers, A Critique of the Choice of Law Problem, 47 Harv. L. Rev. 173 (1933).

the statute relied upon by the lower court since the "present jurisdiction of the Admiralty Division of the High Court is based partly on statutes but primarily, and mostly on principles previously adopted by the admiralty court from the general law of the sea. . . . ."[44]

The substantive law of the sea, to which Lord Justice Scott refers, embodies two related principles: the concept of *fortune de mer* and the maritime lien. Thus, while the maritime law traditionally accorded the shipowner the right to limit his liability to the ship and its cargo (*fortune de mer*), it also gave his creditors a privileged claim against these assets (maritime lien).[45] Lord Justice Scott cites as authority for the existence of this lien in these circumstances the International Convention of Maritime Mortgages and Liens of 1926.[46] Such a lien, wherever created, will be enforced in the British admiralty courts.[47]

This opinion of the British court is of interest to the American admiralty bar because it once again emphasizes the many shortcomings of the American rule and may provide the basis for an assault upon that obsolete doctrine. The language of the court cogently indicates that a maritime lien should be found in all situations where the right of limitation of liability exists. Since the latter right is recognized by the American cases in the amphibious tort situation,[48] it would seem that the maritime lien should also be recognized. And as Justice Story has indicated, "Whenever a lien or claim is given upon the thing by the maritime

[44] The Tolten, [1946] P. 135, 148. See note 39 supra.

[45] "There is an integral—almost an organic—connexion between the two [limitation of liability and maritime lien] in the history of our own admiralty law, and that connexion comes from the ancient law of the sea in which it is deep-rooted." The Tolten, [1946] P. 135, 149. Compare this language with that of Bonnecase, Traité de Droit Commercial Maritime 463 (1923): "Ces deux institutions: Droit de suite et faculté d'abandon . . . . caractérisent le Droit commercial maritime actuel au point de vue organique." The "droit de suite" is the right of creditors to the res as security even in the hands of a bona fide purchaser. The "faculté d'abandon" is the right of the shipowner to escape further liability by surrendering the ship and cargo to creditors. This interrelationship has been recognized on occasion by the American courts. The China, 7 Wall. (U.S.) 53, 68 (1869). For a study on the nature of the maritime lien and its relationship to limitation of liability see Price, Maritime Liens, 57 L.Q. Rev. 409 (1941).

[46] 3 Hudson, International Legislation 1845 (1926); 15 Revue du Droit Maritime Comparé 865. Article 2 reads: "The following give rise to maritime liens on a vessel. . . . . 4. Indemnities for collision or other accident of navigation, and also for damage caused to works forming part of the harbor, docks, and navigable ways." This convention has been ratified by most of the maritime nations of the world, but the United States is not a party. 4 Hackworth, Digest of International Law, 343 (1942).

[47] Literally construed, the language of the court would seem to extend a remedy to the American wharfinger who can arrest the damaging ship in British waters. Lord Justice Scott says at 147: "In my view the law maritime of 'damage,' as administered in our admiralty court, vests a right of action in any person, who suffers an injury *anywhere in the world* either to his person or to his property, whether movable or immovable, afloat or ashore, when caused by the maritime faults of the owner of a ship, he being responsible for the acts or defaults of his servants." Italics added. At 161, the court cites approvingly a passage of Dicey's to the effect that "the court has jurisdiction to entertain an action in rem for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists." Lord Justice Scott says, "I regard it as an accurate statement. . . . . He was far too careful a writer to omit any relevant qualifications. . . . ."

[48] Richardson v. Harmon, 222 U.S. 96 (1911).

law, the admiralty will enforce it by a proceeding in rem; and, indeed, it is the only court competent to enforce it."[49]

The problem involved in the amphibious tort cases is basically, as Professor Rheinstein has pointed out, a choice of law problem.[50] The solution provided by the technique employed in *The Tolten* seems to be a more desirable one than the solution reached by the mechanical use of the lex loci delicti rule in *The Plymouth*. Eighty years of experience with the American rule have demonstrated that an amphibious tort victim is left without an effective remedy. There seems to be no justification for the rule, either in policy or history; it effectively removes the specialized type of problem involved from the court best equipped to deal with it; and its adoption has resulted in an American practice which is directly contrary to a maritime practice uniform throughout the world. Congress should rectify this situation,[51] as it has so often done in the past when the admiralty jurisdiction has been excessively restricted.[52] However, legislation may not be necessary. Conceivably it can be demonstrated that later cases have in fact overruled *The Plymouth*.[53] In the event that Congress fails to assume this obligation, the Supreme Court is well fortified with precedents to take upon itself the task of righting the inequities occasioned by its decision in 1865.

[49] The Brig Nestor, 1 Sumner 73, 78 (C.C. Me., 1831). This statement has been extensively approved on both sides of the Atlantic. The Bold Buccleugh, 7 Moore P.C. 267, 284 (1851); The Resolute, 168 U.S. 437 (1897); The Pacific Hemlock, 53 F. 2d 492 (D.C. Wash., 1931).

[50] See Rheinstein, op. cit. supra note 41, at 193. The American courts have never expressly stated that the extent of admiralty jurisdiction is a choice of law problem. However, two opinions of Mr. Justice Story in the field of maritime contracts indicate the possibility that he so regarded it. The cases involved are The General Smith, 4 Wheat. (U.S.) 438 (1819) and The Schooner Volunteer, 1 Sumner 551 (C.C. Mass., 1834). Each case involved an action in rem by a materialman against the ship to whom the materials were furnished. In the latter case, in which the ship was from a "foreign" port (i.e., its home port was not in the same state as the port where materials were furnished), Story decided that the "general law of the sea" governed the case, and a maritime lien enforceable in admiralty existed. But when, as in the former case, the ship is from the same port as the materialman, the local law governs, and if no maritime lien is given by it, none exists and admiralty has no jurisdiction.

[51] Solution by state action is not feasible. See Note, 14 Tulane L. Rev. 451 (1940). One solution would be to impose a maritime lien by state legislation, which lien would be enforced in the federal admiralty courts. Such liens have been enforced in the past. The J. E. Rumbell, 148 U.S. 1 (1938). However, there are constitutional difficulties. Campbell v. Sherman, 35 Wis. 103 (1874); and the Supreme Court itself has commented upon the shortcomings of such a system. The Lottawanna, 21 Wall. (U.S.) 558, 602 (1874).

[52] For an enumeration of the instances in which Congress has exercised its prerogative to alter the admiralty jurisdiction see The Thomas Barlum, 293 U.S. 21 (1934).

[53] The argument runs thus: Since The Thomas Barlum there has been little doubt that Congress has power to grant jurisdiction in The Plymouth situation. In order for Congress to possess such a power, it is necessary that this situation be included within the area of "admiralty and maritime jurisdiction" as expressed in the constitutional grant. However, Congress has already conferred jurisdiction upon the federal courts in all cases of "admiralty and maritime jurisdiction" by the Judiciary Act of 1789. Unless the words "admiralty and maritime jurisdiction" contained in the Act of 1789 have a different meaning than the exact same words in Article III of the Constitution, it follows that any action constitutionally maintainable under an Act of Congress is presently maintainable. "Congress cannot enlarge the constitutional grant of power, and therefore if it could permit a libel to be maintained, one can be maintained now." Mr. Justice Holmes in the Blackheath, 195 U.S. 361, 365 (1904).