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Accord in Maritime Obligation

In the Courts of Great Britain, France
and the United States*

CONFLICTS of maritime law may be referred as much to jurisdictional considerations as to fundamental differences in substantive obligation. The admiralty systems of Great Britain, France and the United States exhibit such marked dissimilarity in judicial cognizance, are characterized by restraints of law so varied and deep-rooted, that the exact relations of one system to another must be sought in basic considerations of the nature of the maritime obligation—its inclusion not only of remedial right, of ultimate substantive liability, but, through the doctrines of the conflict of laws, of national comity, and the law of nations, its demasurement in terms of its foreign correlatives. Analogies, so far as they are determinable, point to the need of an enlarged capacity, an extension of jurisdictional power, mandatory upon admiralty courts, in respect to the administration of foreign law, or where the adjudication of foreign rights is otherwise discretionary in the courts.

The Federal government, says Professor Wigmore, has hitherto hesitated to use the untried agency of the treaty power¹ to solve conflicts of law: "The Federal Legislature has no power to adopt an international rule, uniformly adopted elsewhere, which shall be actually effective throughout this county; it has only two very limited powers, each of which will still leave at least two distinct rules of law in operation within each state;" i. e., the power of Congress over interstate and foreign commerce, and the treaty-making power. It is believed, however, that these powers are adequate to the adoption of a uniform international rule for solving conflicts of law in maritime law or to so assimilate "the several bodies of substantive law to each other that no conflict can arise."² It is observable that the Federal treaty-making power, while its limitations are recognized, transcends the power of Congress with respect to altering the municipal law of the states,³ and the Supreme Court declares: "The states have no power to work material

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¹ Wigmore, *Problems of the Law*, p. 124.

² *Ibid.*, p. 120.

³ *Missouri v. Holland* (1920) 252 U. S. 416, 64 L. Ed. 641, 40 Sup. Ct. Rep. 382.

prejudice to the characteristic features of the general maritime law in its international and interstate relations."⁴ The treaty power itself must respond to the principle: "no single nation can change the law of the sea; that law is of universal obligation, and no statute of one or two nations can create obligations for the world."⁵ Judicial opinion has indeed made clear the possible resources of the treaty power, as well as its limitations.

If we examine first the doctrine of *res judicata*, it is found that the obligation of foreign judgments under modern practice, in the absence of treaty stipulation or legislative rule, rests on grounds essentially differing in British and American law. "By one law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence and not conclusive."⁶ There is no statute of the United States and no treaty of the United States with France, or with any other nation, which has changed that law or has made any provision upon the subject. It is not to be supposed that if any statute or treaty had been made it would recognize as conclusive the judgment of any country which did not give like effect to our judgments. It appears to us equally unwarrantable to assume that the comity of the United States requires anything more."⁷ Here judicial opinion refers itself to a quite modern principle of international law and, failing to extend to foreign judgments the benefit of *res judicata*, constitutes a plain limitation upon the treaty power, if that be coextensive only with the comity of the nation. The exercise of judicial discretion in this case was severely condemned in the dissent of Fuller, Brewer, Harlan, and Jackson, who concurred: "It is for the government and not for the courts to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." "It is agreeable to the law of nations that we should take notice and approve" the "laws" and "suits" of other nations, declared King's Bench in 1680, leaving to the Crown and his liege ambassador the righting of injustice done

⁴ *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. Rep. 524.

⁵ *The Scotia* (1871) 81 U. S. (14 Wall.) 170, 20 L. Ed. 822; *The Paquete Habana* (1900) 175 U. S. 677, 711, 44 L. Ed. 320, 20 Sup. Ct. Rep. 290.

⁶ See *contra*: *Rapelje v. Emery* (1795) 2 U. S. (2 Dall.) 231, 1 L. Ed. 361 (Supreme Court of Pennsylvania); *Vasse v. Ball* (1797) 2 U. S. (2 Dall.) 270, 1 L. Ed. 377 (Supreme Court of Pennsylvania).

⁷ Mr. Justice Gray in *Hilton v. Guyot* (1895) 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

subjects abroad,⁸ a rule admitted by Marshall: "The court is decidedly of opinion that reciprocating to the subjects of other nations or retaliating on them its unjust proceedings towards our citizens is a political and not a legal measure. It is for the consideration of the Government, and not of its courts."⁹

The decision in the King's Bench proceeds upon the analogy of its cognizance of suits in the admiralty, which affords interesting deductions when it is considered that most early admiralty actions in England were *in personam*, and judicial notice of foreign law as well as the execution of foreign judgments was peculiarly within the province of the admiralty: "The judge of the admiralty is the proper magistrate for this purpose for he only hath the execution of the civil law within the realm."¹⁰ It exhibits a departure in modern practice from the established law of nations. The British Lords find Marshall's famous dictum¹¹ relative to the binding obligation of the judgment *in rem* to be equally the law of England and consistent with British legal doctrine. As said by Marshall: "It appears to be settled in this country that the sentence of a competent court proceeding *in rem* is conclusive with respect to the thing itself and operative as an absolute change of property. By such sentence the right of the former owner is lost and a complete title given to the person who claims under the decree." Yet upon a further examination a sharp divergence is manifest between Marshall's opinion and recent British authority. In England, a foreign judgment, even *in rem*, may be examined and disregarded if it appears on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations.¹² "Any peculiar legislation of foreign countries which has not been recognized by the world at large may destroy the conclusive effect of a judgment."¹³ "A foreign court may settle the conditions on which it will exercise its jurisdiction. Those conditions being fulfilled, it may exercise that jurisdiction, but the judgments given under such circum-

⁸ Hughes v. Cornelius (1683) 2 Shower (K. B.) 232, 89 Eng. Rep. R. 907.

⁹ Marshall, C. J., in *The Nereide* (1815) 13 U. S. (9 Cranch) 388, 422, 3 L. Ed. 769.

¹⁰ Weir's case (1607) Pasch. 5 Jac. B. R., K. B.

¹¹ *The Fortitude*, Williams v. Armroyd (1813) 11 U. S. (7 Cranch) 423, 3 L. Ed. 392.

¹² Simpson v. Fogo (1862) 1 Jo. & H. 18, 1 H. & M. 195, 71 Eng. Rep. R. 85; in part overruled by *Castrique v. Imrie* (1890) 39 L. J. C. P. 350, L. R. 4 H. of L. 414, 23 L. T. 48, 19 W. R. 1.

¹³ Simpson v. Fogo, *supra*, n. 12.

stances cannot claim extra-territorial authority unless pronounced in accordance with the rules of international public law."¹⁴

On the other hand, Marshall sustains a sentence rendered under the Milan Decree admittedly "subversive of the laws of nations"; adding that it might have been competent for Congress to have conferred upon the Federal courts a jurisdiction adequate to review such judgments *in rem*, which, it may be observed, would have vitally affected stipulations in early American treaties as to jurisdiction in prize. In *Rose v. Himely*¹⁵ Marshall had held that the sentence of a French tribunal, in the exercise of a competency inconsistent with the laws of nations, would be disregarded; but reluctantly acquiesced in the decision in *Hudson v. Guestier*,¹⁶ overruling his former view, holding that such a sentence *in rem* was not reviewable unless the court passing the sentence should lose its jurisdiction by some circumstances which the law of nations might notice.

Both British and American decisions attribute the character of suits *in personam* to civil actions in France terminating in the *saisie execution* of ship and its sale.¹⁷ "All proceedings in the courts of common law are of this nature" declares the House of Lords,¹⁸ finding a parallel for the sale of vessel under French decrees in the sale by sheriff under a *feri facias*, and giving no better title. The British courts have distinguished between the competency of French civil tribunals proceeding *in personam* and that of the Anglo-American courts in admiralty proceeding *in rem*, in the exercise of which jurisdiction they will direct "that the thing and not merely the interest of any particular party in it be sold or transferred."¹⁹ It is obvious that the Federal common-law courts possess no process to vindicate a foreign obligation,²⁰ but "this of course the Admiralty would not disregard, but would respect the right when brought before it in any legitimate way."²¹

What, however, is the actual jural character of the *droit de suite* in French law, ultimating in arrest of vessel and its judicial

¹⁴ *Shaw v. Gould* (1868) 37 L. J. Ch. 433, L. R. 3 H. of L. 55, 18 L. T. 833.

¹⁵ (1808) 8 U. S. (4 Cranch) 241, 2 L. Ed. 608.

¹⁶ (1810) 10 U. S. (6 Cranch) 281, 3 L. Ed. 224.

¹⁷ *The Kongsli* (1918) 252 Fed. 267.

¹⁸ *Castrique v. Imrie*, supra, n. 12.

¹⁹ *Castrique v. Imrie*, supra, n. 12.

²⁰ *Slater v. Mexican National Railroad Co.* (1904) 144 U. S. 120, 48 L. Ed. 900, 24 Sup. Ct. Rep. 581.

²¹ *Holmes, J.*, in *The Hamilton* (1907) 207 U. S. 398, 405, 52 L. Ed. 264, 28 Sup. Ct. Rep. 133.

sale? It clearly proceeds on a right *in rem* independent of title or indeed of possession and good against all the world. Under the French code of commerce²² creditors of the vendor of a ship have a right to pursue their claims against the ship, whether specially or generally, a right which constitutes an exception to the common law of France, that possession in, or delivery to a new acquirer, cuts off prior claims to it against the vendor. A regular and not a fraudulent sale does not operate to preclude this action. But *droit de poursuite* is not an innovation upon ancient sea law. It is sanctioned by the Ordinance de la Marine of 1681, declares Professor Ripert, though the term is not used by the older authorities.²³ It attaches though the sale occurs during a voyage. Professor Ripert repudiates the theory that the *droit de suite* is here an extension to ships of a privilege touching real rights.²⁴ He distinguishes between the privilege in favor of certain creditors against a definite category of rights and *droit de suite*, availing alike to privileged as to ordinary contract claimants, claims against the owner not incident to his nautical faults or those of commercial character attaching to the maritime transport "good against all the world."²⁵ As far as given to ordinary holders of the owner's paper, it is simply a right to attach the ship before its sailing in spite of the alienation, giving no action against third party vendees, who are held, however, *propter rem*. True, *droit de suite* flowing from the French maritime *hypothèque*²⁶ prevails against ordinary contract claims but not against those privileged, which Ripert thinks is its proper obligation. Only after judicial sale do privileged claims assert their priority over ordinary contract claims, the interest of the claimants in the *res* being then transferred to its proceeds, and the priority of privileged claimants working no prejudice to the other class, since these latter in case of deficiencies avail against non-maritime property of the vendor. It is notable that *droit de suite* of creditors with the above limitations subsists during the life of the *res*, while in case of maritime *hypothèque* it survives in all these instances in which the ordinary *droit de suite* disappears.²⁷

It is important to consider the practice of French tribunals

²² Arts. 190, 193.

²³ 1 Ripert, *Droit Maritime*, pp. 670, 673, § 831.

²⁴ 4 Lyon-Caen et Renault, §§ 1470, 1473.

²⁵ Ripert, loc. cit. p. 672, § 833.

²⁶ Legislation of 1874 and 1885.

²⁷ Ripert, loc. cit., §§ 851, 1000.

in respect to the *saisie conservatoire* of vessels. This provisional remedy, as the libel in American practice, does not flow from execution-judgment, but by virtue of Article 417 of the Code of Civil Procedure of France, avails in respect to foreign vessels to all creditors of the owners,²⁸ including tort as well as contract claimants, whether foreigners or French, with the reservation, however, that French courts will not adjudicate upon the merits (*fond*) in controversies wholly between foreigners and affecting foreign ships.²⁹ French jurisprudence is here, save in collision cases,³⁰ dependent upon the ability to summon the debtor personally, in which point French practice departs from the rule that "wherever there is a maritime lien on a ship, an admiralty court can take jurisdiction on principles of the Civil Law, that in a proceeding *in rem* the proper forum is the *locus rei sitae*"³¹ Ripert notes the distinction, observing: "In our ancient law, we admitted in general that the arrest of a thing induced the competency of the *forum arresti*, in vindication of a quasi-real right, a *jus ad rem*,"³² remarking, in British practice, the action *in rem* ultimates in the constitution of a real property right in the ship.³³ But the analogy between French practice and American law remains. The test of jurisdiction in the Federal courts is the nature of the claim on which the suit is founded and not the form of remedy resorted to.³⁴ The application of the law of the flag in respect to the privilege arising in foreign maritime *hypothèques*, Ripert considers to be analogous to the rule of *lex rei sitae*.³⁵

French practice here exhibits a close and important analogy to the maritime lien arising *ex obligatio*. The admiralty system of the United States is bound, in fact, to follow the "provisions of the general maritime law and the principles of the Roman or civil law."³⁶ To the correlation in American practice of right

²⁸ Ripert, *loc. cit.*, p. 693; Cour de Cassation (March 9, 1880) Dalloz 1880, 1, 203, Suarez 1880, 1, 407.

²⁹ Douai (Jan. 22, 1890) 7 *Revue Internationale du droit maritime*, p. 117.

³⁰ Ripert, *loc. cit.*, § 882.

³¹ Story, J., in *The Jerusalem* (1814) 2 Gall. 191, 345, Fed. Cas. No. 7293. No. 7294.

³² Note the ancient use of this term, *supra*, n. 25.

³³ Ripert, *loc. cit.* § 867.

³⁴ 1 C. J., Admiralty, IV. 16, 1251, n. 49.

³⁵ Ripert, *loc. cit.*, p. 828, § 1057.

³⁶ Peters, J., in *Walton et al. v. The Neptune* (1800) 1 Peter's Adm. 142, Fed. Cas. No. 17135.

and remedy of the maritime lien and the right to proceed *in rem*³⁷ is attributable much of the divergence between it and the British law. Slight precedent is adducible, declare British authorities, to support the dictum in the *Bold Buccleugh*³⁸ that "where a proceeding *in rem* is the proper course there a maritime lien exists."³⁹ However, the *Bold Buccleugh* is regarded by the Supreme Court of the United States "as sound law in courts exercising admiralty jurisdiction."⁴⁰

The Roman *hypotheca* gave a right *in rem* which might include possession. The Latin expression *obligatio rei* is the more ancient and characteristic of *hypotheca*.⁴¹ Its contractual nature is best expressed *quo jus in re constituitur creditori in securitatem crediti*.⁴² As between *hypotheca* arising *ex contractu*, and *nuda conventio* (comparable to equitable mortgage by deposit of title deeds), *hypotheca* created by testament and by judicial decree, and finally *tacita*, or *hypothecae* arising *ipso jure*, the latter bears the closest analogy to the American maritime lien. This is defined in American law as a *jus in re*, an appropriation of the thing made by the law.⁴³ It is a right of property subsisting irrespective of the state of title⁴⁴ and independently of possession, *idem erga omnes*. The classical jurists say *actio in rem* or *in re* distinguishing it from the *jus ad rem*, a personal right, *jus ad acquirendam*. "A court of admiralty does not seek to assert in behalf of a libellant a personal demand against a specific thing, the property of another, and give it the validity of a *jus in rem*, for, as has been seen, the *jus in re* subsists independently of possession, if not state of title."⁴⁵ "Though not by the maritime law a strictly Roman hypothecation, the pure maritime lien is closely assimilated in Federal practice to tacit hypothecation of Roman law, and the Roman privilege. Emerigon says that this privilege was strictly personal, and gave only a preference against single contract creditors, and had no effect against those who were secured

³⁷ *In re Rock Island Bridge* (1857) 73 U. S. (6 Wall.) 213, 18 L. Ed. 753.

³⁸ *Harmon v. Bell* (1851) 7 Moo. 267, 13 Eng. Rep. R. 884.

³⁹ Roscoe's Admiralty Practice 32; 1 Marsden, Select Pleas, introduction.

⁴⁰ *The Kongsli*, supra, n. 17; *The John G. Stevens* (1898) 170 U. S. 113, 127, 42 L. Ed. 969, 18 Sup. Ct. Rep. 544; *The Elfrida* (1898) 172 U. S. 186, 206, 43 L. Ed. 420, 19 Sup. Ct. Rep. 153; *The Robert W. Parsons* (1903) 191 U. S. 17, 37, 48 L. Ed. 73, 24 Sup. Ct. Rep. 8.

⁴¹ Labbe, *Ortolan's Justinian*, appendix.

⁴² Hubner, *Praelect*, lib. 20, tit. 1, 1022.

⁴³ *The Chusan* (1843) 2 Story 455, Fed. Cas. No. 2717.

⁴⁴ *The Kiersage* (1855) 2 Curtis 421, Fed. Cas. No. 7762.

⁴⁵ Marshall, C. J., in *Rose v. Himely* supra, n. 15; see also *The Bold Buccleugh*, supra, n. 38.

by express hypothecation; and that this personal privilege, given by the Roman law, is unknown in the French jurisprudence; for by the law of France every privilege carries with it a tacit and privileged hypothecation, at least as to the thing which is subject to it."⁴⁶

The attribution of *droit de suite* to simple creditors as well as privileged claims by the Code of Commerce⁴⁷ is denied by some French authorities⁴⁸ but is demonstrated to be law by Professor Ripert,⁴⁹ who thinks the former opinion overlooks the fact that the code regards the ordinary debts of the vendor, not the charterer. Article 193 of the Code of Commerce contemplates, in respect thereto, the extinction of the privilege, not the claim, when after a voluntary sale, without the interference of creditors of the seller, the vessel shall have made a sea voyage under the name and at the risk of the vendee.⁵⁰ This voyage, according to Valin,⁵¹ gave validity to the transfer of property in the ship and cut off claims against the vendor. Mr. Justice Story distinguishes: "The maritime law . . . where it gives a tacit hypothecation or lien . . . gives the lien upon the ship as an auxiliary to the personal security of the owner. It does not require the lien to be enforced before the voyage is completed . . ." ⁵² "It is certain that in the general maritime law of Europe privileged hypothecations were tacitly conferred in the cases in which what we term liens now exist."⁵³

In the ancient French systems the creditor had, by tacit hypothecation, against third parties, the *actio hypothecacia*, to secure possession and have the *res* condemned to the satisfaction of his debt; *actio mutui*, or *locatio conducti*. "An ordinary libel *in rem* to enforce a lien includes both these actions by Roman Law" declares American jurisprudence.⁵⁴ "The lawyers of the Middle Ages who gave form to the customs of the seas and arranged judicial procedure to carry them into effect certainly did

⁴⁶ Story, J., in *The Nestor* (1831) 1 Sumner 73, 805; Fed. Cas. No. 10126; see also Emerigon, *contrats a la Grosse*, ch. 12, sec. 1, 2; Merlin, *Repertoire, Privilège des Créances*, sec. 1; 2 Browne Civil Admiralty Law, 142.

⁴⁷ Arts. 190, 193.

⁴⁸ Cauvet in 3 *Revue Critique de législation et de jurisprudence*, p. 275; Hougard in 22 *Revue pratique de droit français*, p. 174.

⁴⁹ Ripert, loc. cit., § 831, et seq.

⁵⁰ Ripert, loc. cit., § 831; Vermond, § 31.

⁵¹ *Commentaire de l'Ordonnance de 1681*, lib. 11, tit. x, Act. 2.

⁵² *The Nestor*, supra, n. 46.

⁵³ Curtis, J., in *The Young Mechanic* (1855) 2 Curtis 404, Fed. Cas. No. 18180.

⁵⁴ *The Young Mechanic*, supra, n. 53.

not rank a lien or privilege among the *jura ad rem*.⁵⁵ Thus, in American practice, the suit in admiralty to enforce and execute a lien is a real action to enforce a real right.⁵⁶ These considerations evidence the fact that Federal judicial opinion is disposed to assimilate the French maritime privileged claim to its antecedent *special hypothèque et suite de navire*, known to the ancient sea-codes,⁵⁷ notwithstanding the fact that it is not strictly a real right in the eye of modern jurisprudence in France. It would seem that the ultimate *saisie conservatoire* of French practice should equally be assimilated in American decisions to the libel *in rem*. The French *droit de suite* attaching to privileged claims, since it constitutes essentially a *jus in re* accompanying the property into the hands of bona fide purchasers, and operating to the prejudice of general creditors, and since, in the view of American courts, such a lien or privilege is *strictis juris*, must ultimately, to be logical, in an action *in rem* and such, it is submitted, is its remedial obligation in French practice. The suit of the ordinary creditor in French law alone has the characteristics of a right *in personam* since not limited to the vessel and subordinated to the payment of privileged claims. American law distinctly follows Domat in holding "all privileges make a particular appropriation which gives to the creditor the thing for the pledge."⁵⁸

The coincidence between the *droit de suite* flowing to privileged maritime claimants and that to ordinary creditors is unintelligible in French jurisprudence unless it is seen that the former comports a limited privilege in the vessel and priority or *droit de preference* in its proceeds upon judicial sale, whereas the latter subsists without these, and in this sense is not a real right, but an *action revocatoire*, an extension of the Paulian action in favor of creditors prejudiced by the alienation of the ship.⁵⁹ It is observable that British law, attributing to foreign adjudication the conclusive obligation of judgments *in rem* where the proceedings have been to enforce a maritime lien in a state subject to a code founded on the civil law, or where the owners of the chattel, the property in which has been dealt with by the court have been summoned; in other words, if the intention of the foreign court

⁵⁵ The Young Mechanic, supra, n. 53.

⁵⁶ Justinian, Inst., lib. 4, tit. VI (De Actionibus).

⁵⁷ Emerigon, *Contrats a la Grosse*, ch. 12, sec. 4; 1 Boulay-Paty, *Course de droit Com. et. Mat.*, p. 38; 1 Pardessus, *Cot des Lois Maritimes*, p. 492, Art. 43; *Le Guidon*, ch. XIX, Art. 1, 2, et seq.

⁵⁸ Domat, *Les lois civiles* (Cushing's ed., 1765) book III, tit. 1, § 5.

⁵⁹ Ripert, loc. cit., § 834.

was to deal with the subject matter though the proceedings may have been inter-parties,⁶⁰ is equally receptive to the recognition that *droit de suite* so far as it vindicates real rights is the equivalent of an action *in rem*, and not *in personam*.

Mr. Justice Story has defined the true function of the court in respect to the international obligation of the maritime lien: "Where a lien exists upon property, upon general principles of justice, *jure gentium*, that lien ought to be presumed and admitted by every sovereign until the presumption is repelled by some positive edict to the contrary."⁶¹ In furtherance of this principle it is asserted that the jurisdiction of the Federal courts in admiralty by virtue of the Constitution and the laws of the United States made in pursuance thereof, is one "which is consistent with the laws of nations."⁶² No precise limitation exists upon the exercise of this beneficial and discretionary competency unless it be that in general the admiralty courts of the United States, in cases wholly of foreign origin and between citizens or subjects of different countries, will not, except in controversies *communis juris*, entertain jurisdiction to enforce a maritime lien given by the general maritime law, as obligatory and recognized in this country, "where libellant would not be entitled to such a lien in the place where the contract was made or where the cause of action accrued,"⁶³ a limitation which appears inaccurate under existing practice.

When the lien or privilege is created by the *lex locus contractus*, the question is not one of jurisdiction but of comity; it will "generally though not universally be enforced in all places where the property is found and where the rights can be beneficially enforced by the *lex fori*." In such a case the lien is regarded as being "an element of the original contract."⁶⁴ These premises accord with British practice: "The first question is whether the subject matter of the action is within the lawful control of the state under which the court exists, and secondly whether the sovereign authority of the state has conferred on the court juris-

⁶⁰ *Godard v. Gray* (1870) 40 L. J. Q. B. 62, L. R. 6 Q. B. 139, 24 L. T. 89, 19 W. R. 348; 1 *Castrique v. Imrie*, supra, n. 12.

⁶¹ *United States v. Wilder* (1838) 3 Summer 308, Fed. Cas. No. 16694.

⁶² Marshall, C. J., in *Rose v. Himely*, supra, n. 15.

⁶³ *In re Insurance Co.* (1884) 22 Fed. 109; *Spreckels Sugar Refining Company v. McClain* (1904) 192 U. S. 397, 48 L. Ed. 496, 24 Sup. Ct. Rep. 376; *Cuba Railroad Company v. Crosby* (1912) 222 U. S. 473, 56 L. Ed. 274, 32 Sup. Ct. Rep. 132; see also *The Maggie Hammond* (1869) 76 U. S. (9 Wall.) 435, 19 L. Ed. 772.

⁶⁴ Clifford, J., in *The Maggie Hammond*, supra, n. 63.

diction."⁶⁵ This liberal principle, obtaining foremost in American law, permits the enforcement of liens on foreign vessels, given by foreign law, though no lien exists by the maritime law of the United States. The recognition of the foreign right, though not in every case obligatory upon the American courts of admiralty, is sometimes regulated, says Taney, "with particular nations by treaty. But as a general rule, when there is no treaty regulation, and no law of Congress to the contrary, the admiralty courts have always enforced the lien which was given by the law of the state or nation to which the vessel belonged. In this respect the admiralty courts act as international courts and enforce the lien upon principles of comity."⁶⁶ On the other hand, the sanctions of the general maritime law under the Federal Constitution, and the equally obligatory "common law" of nations,⁶⁷ impel judicial cognizance of the pure maritime lien. Upon the same principles, it is submitted, the foreign complex of jural relations having substantially the character of the American maritime lien should be accorded equal validity and obligation, and this principle should dominate legislative and treaty-making authorities whenever directed to uniformity in international maritime law. Apart from the obligation *jure gentium* of the pure maritime lien, or its equivalent foreign right and correlated remedy, the British statutory lien or alone the British action *in rem* is admitted by the comity of the United States, in aid of an already granted jurisdiction, to the privilege of remedy given by Federal maritime law to the pure lien. It is questionable in American practice, while admittedly the courts of this country administer foreign law, whether the filing of the libel in the district court here does, in fact, "secure the same lien as if the libel were filed in a foreign jurisdiction."⁶⁸ This is immediately apparent from a consideration of British law.

"It is a mistake," declares an early American decision, "to consider the use of this process [procedure *in rem*] in the admiralty, as borrowed from or in imitation of the foreign attachment under the Custom of London. Its origin is to be found in the remotest history as well of the civil as the common law."⁶⁹ Thus

⁶⁵ *Castrique v. Imrie*, *supra*, n. 12.

⁶⁶ *Taylor v. Carryl* (1857) 61 U. S. (20 How.) 583, 611, 15 L. Ed. 1028.

⁶⁷ *Bradley, J.*, in *The Belgenland* (1885), 114 U. S. 355, 29 L. Ed. 152, 5 Sup. Ct. Rep. 860.

⁶⁸ *The Maggie Hammond*, *supra*, n. 63. See also *In re Insurance Co.*, *supra*, n. 63.

⁶⁹ *Monro v. Almeida* (1825) 23 U. S. (10 Wheat.) 473, 493, 6 L. Ed. 369.

the breach of the contract of affreightment leads to clear distinction between American and British practice. The American lien of ship on cargo for freight depends upon possession, actual or constructive,⁷⁰ while in British law discharge of cargo or transshipment does not preclude its arrest.⁷¹ The remedy *in rem* or *in personam* given by British law for damage to cargo carried into England or Wales, on British or foreign ships, depends on the foreign domicile of the owner or any part-owner of the vessel.⁷² "It was not intended to give a maritime lien, for a maritime lien occurs from the instant of the circumstances creating it and not from the date of the intervention of the court." It constitutes, then, a remedy, divorced from the security given by the general maritime law sanctioned in America; is subject to claims subsisting on the ship upon the institution of suit,⁷³ and is governed by the ordinary and recognized principles of the common law of England.⁷⁴ It denotes a *jus ad rem* since a respondent is really a defendant.⁷⁵

Similarly, in British law, claims for necessaries, of material men, etc., do not confer a maritime lien but merely a right to sue the ship. In cases where an action *in rem* is given to creditors of a ship-owner for maritime debts not secured by maritime lien, declares Lord Watson in *The Heinrich Bjorn*⁷⁶ the attachment of the ship "has the effect of giving the creditor a legal nexus over the proprietary interest of the debtor, as from the date of attachment." Change of ownership fails to defeat the creditor having a maritime lien who, without laches, brings an action *in rem*, whereas he, without lien, cannot have an action *in rem* unless at the time of its institution the *res* is the property of the debtor. From the foregoing, no doubt can remain as to the similarity of the French *droit de suite* and the American maritime lien, nor indeed as to their salient differences from British practice. The limitation of the *droit de suite* in France to privileged maritime and hypothecary claims must, in turn bring French

⁷⁰ *Britton v. Barnaby* (1858) 62 U. S. (21 How.) 527, 16 L. Ed. 177; *Bag of Linseed* (1861) 66 U. S. (1 Black) 108, 17 L. Ed. 97; *The Cassius* (1841) 2 Story 81, Fed. Cas. No. 564.

⁷¹ Orders and Rules of 1859, 9 r. r. 13.

⁷² *The Ella Clark* (1863) Br. & L. 32, 32 L. J. Adm. 211, 9 Jur. (N. S.) 312, 8 L. T. 119, 11 W. R. 524.

⁷³ *The Reve Superior* (1874) L. R. 5 P. C. 482.

⁷⁴ *The St. Cloud* (1863) Br. & L. 4, 8 L. T. 54.

⁷⁵ See Hughes, Admiralty, p. 302; Mear's Essay, 2 Select Anglo-American Legal Essays, p. 345; Gemma [1899] P. 285; Dupleix [1912] P. 8.

⁷⁶ (1886) 55 L. J. Adm. 80, 11 App. Cases 276, 55 L. T. 66, 6 Rep. M. C. 1.

jurisprudence into general agreement with that of other civil law countries, as well as that of the United States.⁷⁷

Professor Ripert argues that the law of the flag should be respected by French tribunals in reference to the validity of foreignly acquired maritime privileges, their refusal to recognize the privilege unless coincident with that given by French law leading to retorsion in foreign courts.⁷⁸ Minority opinion in France, however, admits the cognizance of privileges arising wholly under foreign law.⁷⁹ Ripert thinks it to be inexact to say that French tribunals apply the *lex fori* or the law of the *forum arresti* to foreign ships for debts contracted on foreign ports; but that they really admit the law of the flag subject to rules of internal order. The application of the law of the *forum arresti* in accordance with *droit commun*, where a privilege given by French and not by foreign law is asserted against foreign ships, he regards as an improper application of the *lex rei sitae* which warrants rather the law of the flag.⁸⁰ The same principle ought, it would seem, to insure the recognition of maritime liens given by American law, since they are real rights of property, as is the French maritime *hypothec*. It should also be borne in mind that *renvoi* to a foreign law in the interpretation of contracts has in French jurisprudence simply the effect of incorporating the dispositions of the foreign law and does not operate to invoke the foreign law as the law applicable according to the rule of the conflict of laws.⁸¹

American law, giving a lien in all cases whatsoever of collision damages, departs again from British practice. It recognizes a substantive right, a proprietary interest which when enforced by a proceeding *in rem* relates back to the time of the collision.⁸² The pure maritime lien is "one over which the common

⁷⁷ Ripert, loc. cit., § 6765; Italian Code of Commerce, Arts. 284, 675; Dutch Code of Commerce, Art. 312; Spanish Code of Commerce, Art. 596; Portuguese Code of Commerce, Art. 578; Belgian Laws of 1879, Art. 3; Belgian Laws of 1908, Art. 38; Greek Code of Commerce of 1910, Art. 16; The German Code of Commerce and the Maritime Law of the Scandinavian countries do not recognize *droit de suite*. In Germany all creditors of the ship have a lien whose enforcement by arrest and sale of the ship is the equivalent of a sentence *in rem*. See *In re Oriental Inland Steam Co., Ex parte Scinde Railway* (1874) 43 L. J. Ch. 699, L. R. 9 Ch. App. 557, 31 L. T. 5, 22 W. R. 810.

⁷⁸ Ripert, loc. cit., § 1056; 2 De Bar, *Theorie und Praxis des Internationalen Privatrechts*, p. 196.

⁷⁹ Rouen, May 7, 1888. 4 *Revue International du droit maritime*, p. 248.

⁸⁰ Ripert, loc. cit., p. 833, § 1063; 8 *Annuaire de l'institut de droit international*, p. 123 et seq.

⁸¹ Accord: *The Halley* (1868) L. R. 2 P. C. 193.

⁸² *The John G. Stevens*, supra, n. 40.

law affords no remedy."⁸³ The uncertainty in British practice as to the existence of the maritime lien prior to the decision in *The Bold Buccleugh*,⁸⁴ the question whether the lien exists in the absence of a personal remedy against the owner, and the limitation that fault must be attributable to the owner, or those that may fairly be said to represent him, compel the observation that, as evolved out of procedure, and as part of the municipal law of Great Britain, it is a creature of the *lex fori*, of remedy and procedure, and that in respect to collisions between foreign vessels on the high seas, it is this liability, though in derogation of the law of the flag, that the British admiralty enforces. The liability is rebuttable upon proof that the injury was done by the act of someone navigating the ship not deriving his authority from the owners: "In this sense, it may be said that the foundation of the lien is the negligence of the owners and their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is not more liable than any other property which the owner at the time of the collision may have possessed."⁸⁵

There is no element of tacit hypothecation in this remedy. Must one say the statutory lien in Great Britain has supplanted that familiar to its ancient practice?⁸⁶ American law insists: "The collision as soon as it takes place creates as security for the damages a maritime lien or privilege . . . in the offending ship; . . . all the interests existing at the time of the collision in the offending vessel . . . are parts of the vessel itself and as such are bound by and responsible for her wrongful acts."⁸⁷ An American admiralty court will not, in collision cases, "enforce the local law of a foreign country even if in terms it applies to the case."⁸⁸ Such cases are adjudicated by the general maritime law "as understood and administered in the courts of the country in which the litigation is prosecuted." The lien given by the general maritime law, under American practice, as distinguished from the purely statutory lien, is held to exist everywhere unless expressly excluded by statute.⁸⁹

⁸³ *The Moses Taylor* (1866) 71 U. S. (4 Wall.) 411, 431, 18 L. Ed. 397; *The Hine v. Trevor* (1866) 71 U. S. (4 Wall.) 555, 18 L. Ed. 451.

⁸⁴ See *supra*, n. 38.

⁸⁵ Roscoe's Admiralty Practice 116; *The Utopia* [1893] A. C. 492, 499.

⁸⁶ See Lushington, J., in *The Bold Buccleugh*, *supra*, n. 38, *The Johann Frederick*, 1 W. Rob. 35.

⁸⁷ Gray, J., in *The John G. Stevens*, *supra*, n. 40.

⁸⁸ *Randell v. La Cie. Generale Transatlantique* (1900) 100 Fed. 655, 40 C. C. C. 625.

⁸⁹ *The Champion* (1877) 65 Fed. 232, 5 Fed. Cas. No. 2584; *The Avon* (1877) 2 Fed. Cas. No. 680.

The lien in American law, whether given by *lex fori* or admitted by comity and arising from *lex locus contractus* draws to it a liability under the general maritime law, the equally substantive obligation of sea law.⁹⁰

A severance is apparent in British practice of foreign right and remedy. The former is governed by *lex loci*, the latter by *lex fori*.⁹¹ British decisions admit the validity of proprietary interests whether given by foreign municipal law or the law of the flag.⁹² But a different rule governs foreign obligations *ex delicto* in Great Britain.⁹³ The Civil Code of France confers no special maritime privilege in collision cases.⁹⁴ The substantive liability is primarily civil and personal in the ship-owner, in respect to all that is relative to the ship and the maritime carriage. The British maritime lien resembles but slightly the purely contractual special privilege of French maritime law.⁹⁵ The right of action resulting from collision damages under Article 418 of the Code of Civil Procedure is the same, however, as that given to privileged claims,⁹⁶ and ultimates in like provisional securities. Recollecting that the *droit de suite*, by Article 190 of the Code of Commerce, as well as the right to demand *saisie conservatoire* of the ship, belong equally to all creditors of the ship-owner,⁹⁷ it is apparent that, as in American practice, right and remedy are correlative, obligations *ex delicto* and *quasi ex delicto* falling within the same category of claims.

A comparative traverse of other applications of the theory of obligation in maritime law substantially accords with the foregoing. In England the liens of master and of seamen for wages apply to foreign as well as British ships, as part of the *lex fori*.⁹⁸ They do not arise out of contract but from services rendered.⁹⁹ Their legality is determined by the law of the flag, the case not being *communis juris*.¹⁰⁰

⁹⁰ Oceanic Steam Navigation Co. (The Titanic) v. Mellon et al (1914) 233 U. S. 718, 58 L. Ed. 1171, 34 Sup. Ct. Rep. 754; Chelentis v. Luckenbach Steamship Company (1918) 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501.

⁹¹ Don v. Lippman (1837) 5 Cl. & F. 1.

⁹² The Gaetano v. The Maria, 51 L. J. P. 67 (bottomry); Hooper v. Gumm, 36 L. J. Ch. 605 (title and mortgage).

⁹³ See "Admiralty and Maritime Jurisdiction of the Courts of Great Britain, France and the United States," 16 Illinois Law Journal (May, 1921).

⁹⁴ Art. 1382.

⁹⁵ Ripert, loc. cit., § 1055.

⁹⁶ Ibid., p. 1008, § 886.

⁹⁷ Ibid., §§ 841, 863.

⁹⁸ The Tagus [1903] P. 44.

⁹⁹ The Chieftain (1863) B. & Cal. 104; 32 L. J. Ad. 106.

¹⁰⁰ The Johann Frederick, supra, n. 86.

Alone in salvage has the principle prevailed that the obligation is a question of *jus gentium*.¹⁰¹ International convention notwithstanding, the obvious drift in British opinion is away from the theory that the procedure *in rem* is the foundation of the salvage suit.¹⁰² But the salvage lien recognized by British law approximates the American view, in that it constitutes a legal interest not to be divested save by the adjudication of a competent court.¹⁰³

In cases of bottomry and respondentia British law presupposes a contingent contractual interest, in which no property passes by mortgage and no possession as in pledge.¹⁰⁴ Here British law looks not to the *lex locus contractus* but to the law of the flag, and confers a lien to secure an obligation which it has chosen to regard as extra-territorial. In American practice, the security recognized is an express lien created by act of the parties,¹⁰⁵ which, if assimilated to the Roman *hypotheca*, constitutes "a genuine dismembership of ownership."¹⁰⁶ The British ship mortgage creates a valid charge on the vessel from the day it is given, but the remedy *in rem* carries with it no lien, the rights of the plaintiff becoming operative only when the suit is actually commenced but before persons having an equivalent right *in rem*.

The ranking of preferred mortgage liens over preferred maritime liens prior in time under the American Ship Mortgage Act of 1920, places it above the British security in all those instances in which English statutes accord no maritime lien. In so far as American judicial opinion admits the enforceability of English actions *in rem*, and imply a maritime lien, it is clear that they are enforcing a liability created by British law and give it a greater priority than that accorded by such foreign law. French judicial opinion exhibits great indecision as to the recognition of priorities claimed under foreign ship mortgages, the Cour de Cassation declaring that the foreign contract cannot give claimants a ranking under French law, an executory judgment being

¹⁰¹ *The Two Friends*, Lush. 552, 8 Jur. 1011, 1 Ch. Rob. 271, 278; cited with approval in *The Belgenland*, supra, n. 67.

¹⁰² *The Cargo ex Post Victor* [1901] P. 243, 249.

¹⁰³ *The Mona* (1819) Edwards 175, 177, 1 W. Rob. 137, 71 L. T. 24, 43 W. R. 173; *The Blenden Hall* (1814) 1 Dods. 414; *Mason v. The Blaireau* (1804) 6 U. S. (2 Cranch) 240, 2 L. Ed. 266.

¹⁰⁴ *Stainbarck v. Shepard* (1853) 13 C. B. 418, 441, 1 C. L. R. 609, 22 L. J. Ex. 341, 17 Jur. 1032, 1 W. R. 505.

¹⁰⁵ *The Grapeshot* (1869) 76 U. S. (9 Wall.) 129, 19 L. Ed. 651.

¹⁰⁶ 2 Sherman, *Roman Law in the Modern World*, p. 184, § 615.

required in France.¹⁰⁷ But Professor Ripert contests this view, holding that the claimant seeking to have a foreign claim admitted to its appropriate ranking needs no *titre exécutoire*.¹⁰⁸ He believes the rights flowing from the foreign ship mortgage should be determined by the law of the flag and opposes the trend of French decisions to respect the mortgage only in so far as it accords with French law.¹⁰⁹

"The recognition of the existence of foreign liens or privileges," says Story,¹¹⁰ "is not to be confounded with the giving to them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws," referring to Marshall's opinion: "The law of the place where a contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is to be expounded. But the right of priority forms no part of the contract. It is extrinsic and rather a personal privilege, dependent on the place where the property lies, and where the court sits which is to decide the cause."¹¹¹ The exercise of *lex fori* here involves no violation of the comity of the nations, but in fact proceeds under the principle *lex rei sitae*.¹¹²

It is apparent that notwithstanding the large sphere occupied by the principle of *lex locus contractus* no real *forum concursus* exists in the admiralty systems under consideration for the adjudication of foreign rights between foreigners, and only a very limited cognizance and application of foreign law in cases between citizens or subjects and foreigners. The recourse allowed foreigners in limitation of their liability goes hand in hand with obvious incompetency to observe the concurrence of foreign right and liability. British judicial opinion declares: "The rules of the *lex fori* where a question is raised between, or by, or against foreigners, are not to be applied to matters affecting the substance of the remedy. . . . If the adoption of the law of the domicile would occasion a prejudice to the rights of other states or their citizens, or if it would contravene a prohibitory enactment, the comity of

¹⁰⁷ Cour de Cassation (Nov. 25, 1879).

¹⁰⁸ Levillain, Dalloz (1883) 2, 68; Lyon-Caen, *Etudes de droit commercial prive maritime*, No. 33, 29.

¹⁰⁹ *Lex fori* governs the marshalling of claims in Great Britain; The Union (1860) Lush 128, 30 L. J. Adm. 17; 3 L. T. 280.

¹¹⁰ Story, Conflict of Laws, § 323.

¹¹¹ Harrison v. Sterry (1809) 9 U. S. (5 Cranch) 289, 298, 3 L. Ed. 104.

¹¹² Johnson, J., in Ogden v. Saunders (1827) 25 U. S. (12 Wheat.) 213, 362, 6 L. Ed. 606.

nations would not require its adoption."¹¹³ In American decisions there is similar equity in the adjudication of foreign liability. As said by Mr. Justice Holmes,¹¹⁴ "The owner of a cargo on a foreign ship cannot expect the foreigner to run greater risks than he would in respect to the goods of his own nation." But, under American law, if an action is brought on a foreign contract, it is not from comity that the Federal courts receive evidence of the laws of the country where such contract was made, but in order to ascertain in what manner and to what extent the parties have obligated themselves. From the broad rule established by Story¹¹⁵ that "in the silence of any positive rule, affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests," American jurisprudence endeavors "to conciliate the rational limits of national laws or legislative jurisdiction and the rights of foreigners."¹¹⁶ "The Admiralty," says Judge Peters,¹¹⁷ "proceeds by a law which considers all nations as one community and should not be tied firm to the precedent of one nation. . . . I conceive that where the greater number of particular laws are coincident in general principle this will establish what is called general law."

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¹¹³ *Cope v. Doherty* (1858) 2 De G. & J. 614, 27 L. J. Ch. 600, 6 W. R. 695.

¹¹⁴ *The Kronprinzessin Cecilie* (1917) 244 U. S. 12, 61 L. Ed. 960, 37 Sup. Ct. Rep. 490; *The Teutonia* (1872) L. R. 4 P. C. 171, 26 L. T. 48, 20 W. R. 421; *The San Roman* (1873) L. R. 41 L. J. Adm. 72, 5 P. C. 301, 307, 28 L. T. 381, 21 W. R. 393; *Oliver v. Maryland Insurance Co.* (1813) 11 U. S. (7 Cranch) 487, 493, 3 L. Ed. 414.

¹¹⁵ Story, *Conflict of Laws*, § 38.

¹¹⁶ 1 Beale, *Conflict of Laws*, pt. 1, § 2.

¹¹⁷ *Jennings v. Carson* (1792) 1 Pet. Adm. 1, Fed. Cas. No. 7281, 8 U. S. (4 Cranch) 5, note.