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## UNIFORMITY IN THE MARITIME LAW OF THE UNITED STATES. (I)

### RECOGNITION OF THE DOCTRINE: THE EARLY PERIOD.

In one form or another, from a time long antedating Lord Coke, the question has been argued whether maritime transactions should be governed by a law all their own, and, if so, how far such "particularism" should go.<sup>1</sup> Meanwhile, from a date quite as early, admiralty law has remained particularistic in most if not in all civilized countries, though in varying degree from time to time and place to place. But of course the fact that it has for so long had this quality is no reason why the situation should continue, and if there is no real basis for it in modern conditions, the silver oar should be taken down,<sup>2</sup> and the common law, enlightened by the statutes of today, should finally triumph as Lord Coke and Justice Daniel once hoped it would.

This question is not one which a lawyer alone should attempt to answer—it is quite as much of fact as of law; and neither should an economist. Together, however, they might

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<sup>1</sup> M. Julien Bonnecase, *Traité de Droit Commercial Maritime*, Paris, 1922, has most interestingly discussed the justification for particularism in the French maritime law, and has come to a generally adverse conclusion. But see the review of this book by Georges Ripert, 2 *REVUE DE DROIT MARITIME COMPARÉ* 783.

<sup>2</sup> 23 *LAW MAG. AND REVIEW*, (4th series) 5; 2 *id.* 298.

accomplish something. The field (if anything maritime may be so called) is vast. The whole subject of business, labor, and pleasure by sea and upon navigable waters should be investigated, with special attention to the waterfront and uptown at least as far as the offices and haunts of shipowners, importers, exporters, ship chandlers, ship and cargo brokers and surveyors; underwriters, shipbuilders and repairmen, boss stevedores, seamen, longshoremen, shipyard workers, and bankers doing a marine business. The lawyer and economist should direct this investigation and work upon its results together. But until they both have learned better to marry their energies, this question, like many others, will remain unsolved, and the lawyer will go his way guessing at facts and framing rules to apply to situations that are often quite different from what he conceives them to be; and the economist his, more familiar perhaps with actualities as a whole, but formulating impracticable or draconic laws to govern them. Though nothing final can be done until this marriage takes place, the lawyer as an analyst of current theories and conceptions, can at least furnish hypotheses which some day may serve to guide future investigators. In these articles my purpose is to set forth such an hypothesis, aimed towards answering the question above given, and more particularly to show it to be a worthy basis for investigation, and then to suggest lines of approach for determining how far our existing maritime law comports with this hypothesis. For the present, however, merely the hypothesis and its *prima facie* justification will be submitted.

The hypothesis or theory is uniformity,—that our admiralty law as a whole finds its justification for particularism in the desirability of a uniform law applicable to maritime enterprises and transactions, not only so far as they involve contacts between foreigners and citizens of the United States and between such citizens, whether of the same or of different states, but also so far as they involve contacts of a maritime nature throughout the civilized world. If this theory has been and is now to any considerable extent engrafted in the law of the United States, or even if it has merely been sanctioned by a strong current of legal opinion, I submit that it furnishes an hypothesis worthy of

consideration and investigation,—in other words, that it is *prima facie* justified.

The theory has, of course, recently been announced by a majority of the Supreme Court in such terms as to leave no doubt that they believe it to be a fundamental doctrine of our maritime law.<sup>3</sup> If it had not also been vigorously attacked—though perhaps rather as a principle of our law than as a desirable theory—one could accept the decisions of the Supreme Court as at least *prima facie* establishing its worthiness for consideration and investigation; but the array of opinion against it is so formidable<sup>4</sup> that it is, so to speak, put upon the defensive. In this connection it may not be wholly unfitting to observe that although the decisions announcing the theory are possibly unfortunate in result, this is not necessarily the fault of the theory. Uniformity of our maritime law was only their major premise. The minor premise is very likely an erroneous one. It may be good advocacy, but certainly it is not always sound political sense to seek to destroy indiscriminately every premise that has led to an undesirable conclusion. The premise of uniformity may have much to commend it in other applications. Injuries to workmen are not all of maritime law.

However this may be, let us consider how far the theory may be said to be engrafted in our law and in maritime law in general, apart from these cases. Is it a modern development or

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<sup>3</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917); *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *Grant Smith-Porter Ship Co. v. Rhode*, 257 U. S. 469 (1922); *State Industrial Com. of N. Y. v. Nordenholt Corp.*, 259 U. S. 263 (1922); *State of Washington v. Dawson*, 264 U. S. 219 (1924); *Cf. Panama R. R. Co. v. Johnson*, 264 U. S. 375 (1924).

<sup>4</sup> For example: *Holmes, J.*, dissenting in *Southern Pacific Co. v. Jensen*, and in *Knickerbocker Ice Co. v. Stewart*, *supra*, note 3; *Pitney, J.*, dissenting in the former case.

F. Cunningham, *Is Every County Court in the U. S. a Court of Admiralty?* 53 AM. L. REV. 749, 5 MASS. L. QUAR. 74; and *The Tables Turned—Lord Coke Demolished*, 55 AM. L. REV. 685; Edward Tremlett Fell, *Recent Problems in Admiralty Jurisdiction*, 40 JOHNS HOPKINS UNIV. STUDIES 287, 303; E. Merrick Dodd, Jr., *The New Doctrine of the Supremacy of Admiralty over Common Law*, 21 COL. L. REV. 647. See also J. G. Palfrey, *Common Law Courts and the Law of the Sea*, 36 HARV. L. REV. 777, 33 HARV. L. REV. 300, 37 HARV. L. REV. 1114. For list of further comments on these cases see *Washington v. Dawson*, 1924 Am. Mar. Cas. at 416 n. 18, 417 n. 20.

has it had a longer history than the past eight years? Is it a local theory or a general one? These are historical questions, of course, and for complete discussion require years of research and volumes of print. All that can be done here is briefly to survey a very large subject.

The beginnings of admiralty and maritime law as we know it today are to be found in the Middle Ages, and from the start, to speak generally, such law has been international in nature. Traders and merchants of that time, in varying degrees perhaps from place to place and century to century, had a body of customs or laws which governed them in their transactions wherever they might go, with their own special courts to give these customs or laws legal effect.<sup>5</sup> Among these courts were those that pertained to the maritime affairs of these men, and the particularistic law applied therein was the maritime law, a part of the law merchant.<sup>6</sup> The laws of Oleron spread over the Atlantic and Baltic seaboards;<sup>7</sup> the *Consolato del Mare* over large parts of the Christian Mediterranean;<sup>8</sup> the *Ordonnance of Louis XIV of 1681*, which brought into one code much of Oleron and of the *Consolato*, was adopted all over Europe;<sup>9</sup> and later the *Code de Commerce*, in its maritime portions based largely on the *Ordonnance*, had an even wider extension.<sup>10</sup>

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<sup>5</sup> Cf. Huevlin, *Essai Historique sur le Droit des Marchés et des Foires*; A. T. Carter, *The Early History of the Law Merchant in England*, 17 *LAW QUAR. REV.* 232; 1 *Select Cases on the Law Merchant* (23 Selden Soc.) Introduction; *Nouvelle Revue Historique de Droit*, 1891, 36, 193, 446. "And for that the said customary Law of Merchants, hath a peculiar prerogative above all other Customes, for that the same is observed in all places, whereas the Customes of one place, do not extend in other places, and sometimes they are observed, and sometimes they are neglected. But the Customes of Merchants concerning trafficke are permanent and constant . . ." Gerald Malynes, *Lex Mercatoria* (1622).

<sup>6</sup> Cf. Sir Travers Twiss, 2 *LAW. MAG. & REV.*, (4th series) 279, 2 *Black Book xxv*, lxvi; W. S. Holdsworth, *The Development of the Law Merchant and Its Courts*, 2 *Select Essays in Anglo-American Legal History*, 289; 1 *Danjon, Droit Maritime*, secs. 1-12; 1 *Blackstone* 273.

<sup>7</sup> Cf. 1 *Danjon, Droit Maritime*, sec. 3; 1 *Black Book*, lxvii, 448; 1 *Pardeus, Lois Maritimes*, 283.

<sup>8</sup> Cf. *Danjon, loc. cit.*

<sup>9</sup> *Danjon*, sec. 5; and see *Preface to Valin's Commentaries* (Becane's ed. 1840) viii.

<sup>10</sup> 1 *Danjon*, secs. 6-8.

Though in various countries, as they became increasingly nationalistic, the special courts for merchants by land or by sea tended to disappear, the admiralty court, despite various vicissitudes, usually survived, and at all events the law merchant was not lost. In England the well-known three-cornered battle for jurisdiction between the local commercial courts, the admiralty, and the common law courts resulted in the loss of their power by the first named, but the admiralty, which in the early period took over much of their jurisdiction, seems to have applied as they had done an international maritime law.<sup>11</sup>

This, then, was the situation at the time our country was being settled: there was a body of sea law, more or less incomplete and imperfect, no doubt, and with variations from place to place, but prevailing generally throughout the civilized maritime world, more striking in its similarities than in its local differences, and at all events much more uniform than the purely local law of the countries enforcing it. The international character of what may be broadly called the shipping man, of his enterprises, and of his customs, was surely the strongest factor in producing and continuing this uniformity. The maritime law reflected the conditions of trade by sea. They were international and so was it. Maritime trade established contacts between men of different nations, and maritime custom or law, following the trader, brought about like legal consequences from these contacts wherever he might go and into whatever commercial court he might be drawn, willingly or unwillingly. The

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<sup>11</sup> Cf. A. T. Carter, *The Early History of the Law Merchant*, 17 L. QUAR. REV. 232; R. S. Marsden, 1 *Select Pleas Admiralty* (6 Selden Soc.) Introduction, and particularly xiii, xlv, 2 *Select Pleas Admiralty* (11 Selden Soc.) Introduction and particularly xix; 4 Pardessus, *Lois Mar.* 197; W. Senior, *Admiralty Matters in the 15th Century*, 35 L. QUAR. REV. 290.

See for interesting instance, 1 S. P. A. 78, 203. The conflict between the admiralty and the common law is too well known to require citation beyond *De Lovio v. Boit*, 2 Gall. 398 (U. S. C. C. 1815) and *Benedict, Admiralty*, 5th ed.

For the sources of the maritime law of England during this period, see 1 S. P. A. 82; 2 S. P. A. xlili, 122; 1 *Black Book* xxxii, lxi, lxix, 255; 2 *Browne, Civ. Law & Adm.* 210; *Zouch, Jurisdiction of the Admiralty of England Asserted*, ed. 1663, 10, 11; *Roscoe, Adm. Prac.*, 4th ed. 31; *De Lovio v. Boit*, 401; 1. *Black Book* 448.

operative field of maritime law being thus in fact international, men of this time, less concerned than we are today with doctrines of sovereignty and sanction, regarded the maritime law as a part of the *jus gentium*.<sup>12</sup>

When our Constitution was being drafted, this conception of maritime law was certainly very widely adopted, but whether or not it was that of the framers is at present only a matter of inference, for remarkably little was said by them on the subject of admiralty and maritime law and jurisdiction. The grant thereof to the Federal tribunals appears in their first draft and remains unchanged to the end. There was hardly any debate upon it, and when such debate occurred the argument made was substantially that of Hamilton in the *Federalist*, later referred to.<sup>13</sup> When the framers went forth to justify the Constitution to the states, again little was said, for apparently it was taken for granted that if the Federal courts were to have any jurisdiction at all, they should have jurisdiction over admiralty and maritime matters.<sup>14</sup> The nature of admiralty and maritime law seems nowhere to have been discussed, although a deeper examination of contemporary opinion than I have made would no doubt bring more to light. On the other hand we do find Madison and

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<sup>12</sup> "The maritime law is not the law of a particular country, but the general law of nations." Lord Mansfield, *C. J.*, in *Luke v. Lyde*, 2 Burr. 887 (1759). "A tribunal similar to the district courts of the United States exists in every civilized country, peculiarly invested with the cognizance of all questions which result from the navigation of the sea, in which foreigners are or may be interested, and which are governed by the law of nations." Winchester, *J.*, *Stevens v. Sandwich*, 1 Pet. Adm. Dec. 233 (Dist. Ct., 1799-1806); *De Lovio v. Boit*, 2 Gall. 398, 472. Story, *J.*; W. S. Holdsworth, *The Law Merchant*, 1 *Select Essays in Anglo-American Legal History*, 289, 327, 330; F. M. Burdick, *What is a Law Merchant?* 2 *COL. L. REV.* 470, 3 *Select Essays* 34, 45; 4 *Blackstone* 67. For later echoes of this theory, too numerous to mention in full, see *The Scotia*, 14 Wall. 170, 187 (1871); *New Jersey Steam Nav. Co. v. Merchants Bk.*, 6 How. 344 (1848). The overriding of a particular law, otherwise applicable, by the "general maritime law" illustrates the same principle: *The Avon*, Brown Adm. 170 (C. Ct. 1873); *The Kongsi*, 252 Fed. 267 (D. C. 1918); on which see 26 *HARV. L. REV.* 356; *The Windrush*, 286 Fed. 251 (D. C. 1922).

<sup>13</sup> 5 *Elliott's Debates*, ed. 1845, 159.

<sup>14</sup> 2 *Elliott's Debates* 490; 4 *id.* 159.

Randolph in Virginia relating the grant of jurisdiction to the desirability of uniformity.<sup>15</sup>

Unless there was a commonly accepted opinion as to what the term "admiralty and maritime" included, the silence of the framers is difficult to explain. The only matter they discuss is the desirability of vesting jurisdiction over this "something" in the Federal courts. It seems probable, therefore, that this something had a generally understood meaning. The most likely meaning is that which we have seen was widely held at the time, and which certainly comports with what Madison said in Virginia, and with all else on the subject in Elliott's Debates. As to the Judiciary Act of 1789,<sup>16</sup> which it is customary to regard as containing a contemporaneous interpretation of the Constitution,<sup>17</sup> that act, so far as the grant of admiralty and maritime jurisdiction is concerned, is at most merely some evidence of the framers' attitude towards the concurrency of state jurisdiction. It is evidence of nothing more, and whether it is even that is at least doubtful, for, as Mr. Charles Warren has recently pointed out,<sup>18</sup> the Judiciary Act was a compromise measure and may have expressed less or more than the framers intended. Contemporaneous or nearly contemporaneous judicial opinion seems to throw more light upon the framers' meaning, and in the decisions of the early Federal admiralty judges we find at least a tendency

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<sup>15</sup> 3 Elliott's Debates 532, Madison: "If, in any case, uniformity is necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity. To the same principle may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this land, they ought to be uniform." See also, *id.* 571, Randolph.

<sup>16</sup> Laws of U. S., Act Sept. 24, 1789, c. 20, sec. 9, p. 47: ". . . the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it." See also Fed. Code, secs. 24, 256, as amended.

<sup>17</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297 (1888); *Southern Pacific Co. v. Jensen*, 244 U. S. at 225 (1917), Pitney, *J.*, dissenting. See also E. T. Fell, 40 Johns Hopkins Univ. Studies 292; J. G. Palfrey, 36 HARV. L. REV. 777, 784.

<sup>18</sup> *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53.

to regard the law they were applying as much more than merely local.<sup>19</sup>

Let it be conceded that there never was a general maritime law in the sense of a supernational law controlling the courts of a nation in their decisions; let it even be conceded that such principles as were commonly accepted were in no true sense part of the *jus gentium*, yet these facts remain: there were principles of common international acceptance in maritime matters; there were codes of maritime laws enacted by nation after nation with but slight changes or followed and approved without enactment; there were commentators upon maritime law and upon these codes who were honored outside their own countries; and, even of more significance, our early admiralty judges, over and over

<sup>19</sup> Our early judges sought to find the common law in English and local precedents with a strong preference for the decided case. The early district and circuit judges (1792-1810) sitting in admiralty cases proceeded differently. The following, by no means complete, shows to some extent what they looked to in determining questions of maritime law. Instances where common law abridgments and cases are cited—nearly always merely for what they contain of the maritime law—are not included. Such authorities are also, generally speaking, in the minority.

Bee, *D. J.*, Dist. of S. C., cites few authorities for his decisions 1792-1808, except those of Judge Hopkinson in the Admiralty Court of Pennsylvania. Of general maritime authorities he cites Beawes, *Lex Merc.* (Bee, at 149, 154, 206); Molloy (*id.*, at 117, 238); Oleron (*id.*, at 118); Hanse Towns (*id.*, at 155, 255); Valin (*id.*, at 255).

Davis, *D. J.*, Dist. of Mass., cites in a single case, 1809, Wisby, Oleron, Hanse Towns, *Ordonnance of 1681, Consolato del Mare*, Cleirac, Valin, Kuricke, Pothier, Godolphin, Molloy (Bee, 441, ff.).

Peters, *D. J.*, Dist. of Penn., in cases involving salvage, seaman's rights and liabilities, disputes among part owners, and forfeiture (1792-1806), relies upon Oleron (Pet. Adm. Dec., at 54, 117, 119, 142ff, 162 172, 204, 270, 425); Beawes, *Lex. Merc.* (*id.*, at 207, 290); Malynes, *Lex. Merc.*, Valin, Emerigon, *Curia Phillipica* (*id.*, at 119); *Consolato del Mare* (*id.* at 119, 171); Digest (*id.*, at 119, 145); Wisby (*id.*, 144 162, 172, 253); Hanse Towns (*id.*, at 144); Molloy (*id.*, at 410, 425); Pothier (*id.*, at 136); Ord. 1681 (*id.*, at 292, 417); Zouch (*id.*, at 470).

Washington, *C. J.*, Cir. Ct. Dist. Penn. (1806), Oleron (Pet. Adm. Dec. at 158).

Winchester, *D. J.*, Dist. of Md., bef. 1806, Emerigon (Pet Adm. Dec. 192); Casaregis (*id.*, at 234); Zouch (*id.*, at 235); Beawes, *Lex. Merc.* (*id.*, at 235, 303); Maline (sic.) (*id.*, at 192). The following citations cover cases where before the revolution admiralty judges relied upon what might be characterized as international maritime authority, Hopkinson, *J.*, Bee 339 (Admiralty Court of Pa.), Bottomry; Molloy; Bee 348, same, Molloy and common law prohibition cases; Bee 353, hypothecation, Molloy; Bee 419, shipwright's right to sue, common law authorities; Drayton, *J.*, Admiralty Court of South Carolina, Bee 433 (1786), shipwright's lien, Molloy and common law authorities.



again adhered to this same tradition of internationality, applied these principles, followed these codes, and adopted as applicable to their problems the theories of these commentators. There might be a difference of opinion as to how far we were to follow England, but of the early judges the one who most flatly declared that we had taken over English admiralty law, most frequently relied upon these international authorities.<sup>20</sup> This attitude continued far into the nineteenth century and was particularly that of Justice Story.<sup>21</sup> It has never wholly ceased to exist, in spite of many applications of the principle of *stare decisis* which well might have less operative force as to commercial maritime law than as to local common law matters,—a principle taken over from the common law by judges trained therein without apparent realization of its localizing consequences, and in this respect perhaps the greatest of all the enemies of the international uniformity of maritime law.<sup>22</sup>

Be that as it may, much uniformity of law in fact existed, and a conception of maritime law resulting to a large extent in uniformity was prevalent, when the Constitution was adopted. But before the place of the doctrine of uniformity in our law after this time is considered, attention should be called to Hamilton's argument for the grant of admiralty and maritime jurisdiction to the Federal judiciary. In the *Federalist* he says: "The most bigoted idolizers of State Authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." The considerations to which he refers, set forth in an earlier part of the paper, are, in brief, "that the peace of the WHOLE ought

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<sup>20</sup> Peters, *D. J.* See 1 Pet. Adm. Dec. 229 and n. 19.

<sup>21</sup> See for Story, *J., e. g.*, *Emerson v. Howland*, 1 Mason C. C. 45 (1816); *De Lovio v. Boit*, *supra*, note 11. Ware, *D. J.*, 1 Ware 187 (1831), 1 Ware 265 (1834). For instances of the classical method in more recent cases, see Brown, *D. J.*, *A Raft of Cypress Logs*, 1 Flip. 543 (Dist. Ct., W. D. Tenn. 1876); Holmes, *J.*, *The Blackheath*, 195 U. S. 361 (1904); Hough, *C. J.*, *The Saturnus*, 250 Fed. 407 (C. C. A. 1918).

<sup>22</sup> Cf. W. S. Holdsworth, 1 *Select Essays* 320.

not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members, . . .” for which reasons, he states, Federal courts have jurisdiction over disputes involving foreigners, and between citizens of different states.<sup>23</sup>

Whether this was advocacy aimed merely to counteract a particular popular fear or was intended to express the whole reason for the grant of jurisdiction is by no means clear. If the latter were true and were given effect as a contemporaneous interpretation of the Constitution, the maritime law developed in this country might have taken a somewhat different course. Jurisdiction might well have depended solely upon the question whether or not a foreigner was involved in a maritime transaction with a citizen. The diversity clause would be sufficient to take care of cases between citizens of different states. On the other hand such jurisdiction ought necessarily to be altogether exclusive of the state courts, and if not,—even if Congress had still passed the Judiciary Act and if its saving clause were held constitutional,—the states in exercising concurrent jurisdiction should be bound to apply Federal maritime law, and should be subject to review thereon by the Supreme Court. In short, such a reason, so far as foreigners are concerned, clearly justifies the major premise of the recent decisions of the Supreme Court, and is predicated upon an ideal of uniformity with regard to a particular sort of maritime contact.

With hesitation, however, I suggest that this statement of Hamilton's does not express the whole reason why admiralty and maritime jurisdiction was vested in the Federal courts. If the conception of maritime law at the time of the Constitution was as stated, it would seem to follow that the framers intended that the new Federal courts should have jurisdiction to apply, and should apply, the international maritime law, the law of the sea, to all cases within its scope without special regard to whether the maritime contact involved was between domestic persons, persons of different states, foreigners and domestic persons, or even

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<sup>23</sup> The Federalist, LXXX. For similar arguments, see 3 Elliott's Debates 532, 571.

foreigners.<sup>24</sup> At any rate we find in early decisions no thought of limiting jurisdiction as it might well have been limited if Hamilton's argument had been the sole reason for the grant.<sup>25</sup> Instead we find the early Federal judges carrying on a tradition with no apparent consciousness that they as admiralty judges were saving the nation. On the other hand, Hamilton may well have stated, if not the sole, at least one reason for the grant of jurisdiction. If so, only the limitation implicit in his statement need go; <sup>26</sup> the rest remains, that is, the necessary domination of the state law by the Federal maritime law, at least with regard to cases involving foreigners. Furthermore, Hamilton seemingly refers to disputes between citizens of different states as included within the grant of jurisdiction, and it is unlikely that he contemplated a maritime law for them different from what it was for foreigners. The tacit premise of his reasoning is uniformity; such was the expressed premise of Madison's argument in Virginia; and such a premise is at least latent in the attitude of many of our early admiralty judges towards the maritime law. This premise, tacit or express, is of course ill developed as to all its applications. Nevertheless, can anyone confidently assert that the framers of the Constitution did not intend that the law to be applied to persons engaged in maritime transactions should be uniform whether in the Federal admiralty or in the state courts? It is of course true that in England <sup>27</sup> and to some

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<sup>24</sup> 1 Pet. Adm. Dec. 46 n. (D. C. 1797); *id.* 48 (D. C. 1806); *id.* 284 (1807); *Cf.* Bee 97 (D. C. 1799), 116 (1798), 124 (1798), 300, 308 (1804), 313 (1805).

There are many cases in these volumes where the parties must have both been Americans, either of the same or of different states.

<sup>25</sup> *Cf.* Frederick Bausman, 36 AM. L. REV. 186.

<sup>26</sup> On the other hand, the limitation implicit in Hamilton's statement is connected with the tendency in early cases to exclude from admiralty jurisdiction disputes between citizens of the same state. *Cf.* *Nicholson v. State*, 3 Harris & McHenry, 109 (Md. 1792); and cases cited in note 41; but see *Peyroux v. Howard*, 7 Peters 324, 341 (1833) and the longer continuing tendency to exclude cases not involving interstate or foreign commerce, *e. g.*, *Allen v. Newberry*, 21 How. 244; *McGuire v. Card*, 21 How. 249 (1858); but see, *e. g.*, *The Belfast*, 7 Wall. 625 (1868).

<sup>27</sup> In England, at least, as late as 1539 there was no such concurrency: 2 Select Pleas Admiralty, xliii. See also 1 Black Book 69, 83, and W. S. Holdsworth, 2 Select Essays in Anglo-American Legal History 297; De Lovio v. Boit, 2 Gall. 398, 422, 428 (1815); *Steele v. Thacher*, 1 Ware (2d ed.) 85,

extent at least in the colonies<sup>28</sup> common law courts had concurrent *jurisdiction*, but there is nothing to show that the framers intended that in the exercise of this jurisdiction the state courts might apply whatever law they pleased, at least in the case of the foreign litigant, who was a defendant in a state court,—perhaps also in the case of the defendant from another state, or even of the citizen. Until we know more of the opinion of the framers and more as to the extent of differences at this time between the general maritime law and state law as to maritime transactions, it is improper to assume such an intent on the part of the framers. And even if there were differences, can we be sure that the framers who were forming a Federal union intended to perpetuate them? Such an intent might more reasonably be implied if the framers were confronted with possible differences between the maritime and the local law of a single political unit having a single sovereign responsible for both systems. But, as seems not generally to have been noticed, the situation confronting the framers was a very different one. The union brought together thirteen different sovereigns, each responsible only for its own common law, and as to this not at all controlled by the Federal Government. The framers, because of the multiplicity of differences likely to exist and because of the fact that the Federal Government would otherwise have had no control, may well have intended to resolve them once for all in favor of the law of the new national government.

Whatever the framers may have had in mind, their actual intent is of less importance than what they were subsequently believed to have intended and what was done with the words they placed in the Constitution.

The striking features of the early history of our maritime law are, first, the geographical extension of jurisdiction, second, the increased resort to admiralty courts particularly in commer-

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89 (1825). The subsequent invasion of the exclusive admiralty jurisdiction by the common law was, of course, largely based on fictitious venues. Cf. *De Lovio v. Boit*, 422, 448, 476. It resulted in a return invasion of the common law by principles of the law merchant including parts of the maritime law: *Holdsworth*, 315-320. *Chandler v. Grieves*, 2 H. Bl. 606a.

<sup>28</sup> See 1 Dall. 81 (Pa. 1766). Cf. *id.* 165 (1792); *Ancient Charters*, Mass. App. 716; 3 AM. L. REV. 672, 673.

cial cases, necessitating the formulating of rules as to jurisdiction, and third, the recognition of power in the states to create maritime liens for supplies, repairs, and materials furnished to vessels in their home port. With these three subjects I will deal in turn, so far as they bear one way or the other on the doctrine of uniformity.

The first may be dismissed in a few words. The repudiation of the English limitation of admiralty jurisdiction to tidewaters came only after some time,<sup>29</sup> but perhaps not much later than commerce developed on the inland non-tidal waters of the United States. As has occurred often in our maritime history, the courts were more concerned with the destruction of limitations than with the construction or statement of the reasons that moved them to decide as they did. Indeed we find little more than a tacit assumption that because commerce on these inland waters resembles and is connected with sea-borne commerce, the admiralty jurisdiction that exists as to the latter should exist as to the former. In short, the maritime law followed the merchant and trader as it had done in the past. A decision that drew an arbitrary line between two groups of maritime transactions similar in character would of course have been subversive of uniformity. On the other hand the actual decisions do not in themselves indicate any very clear recognition of the theory.

The second feature is more significant both for and against it. Even earlier than this geographical extension of the domain of the admiralty, began a series of cases that ultimately set a rule for determining jurisdiction over maritime contracts. Many of our early judges believed that, on becoming independent, the United States took over the English admiralty law with its limited jurisdiction just as the States took over or continued with the common law.<sup>30</sup> It was, however, quite early established that

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<sup>29</sup> *The Genesee Chief*, 12 How. 443 (1851); *The Hine v. Trevor*, 4 Wall. 555 (1866).

<sup>30</sup> *Cf.* *Washington, J.*, in *U. S. v. McGill*, 4 Dall. 426 (1806); *Davis, J.*, in *Netterstrom v. The Hazard*, Bee 441, 458 (D. C. 1809); *Peters, J.*, in *Gardner v. The New Jersey*, 1 Pet. Adm. Dec. 228, 229 (D. C. 1806). *Cf.* *Waite, C. J.*, in *The Harrisburg*, 119 U. S. 199 (1886); *Johnson, J.*, *Ramsey v. Allegra*, 12 Wheat. 611 (1827). There are many early cases to the same effect.

this was not so, and that our admiralty *jurisdiction* at least was broader than that of England at the time of the Constitution.<sup>31</sup>

In passing, it might be observed that it is rather difficult to see why this emancipation from the limitations of English law did not also mean emancipation from the rule of concurrent jurisdiction in the common law courts, the growth of which rule was a result of the same causes that led to the limitations; or at least why it cannot be argued with much force that since our constitutional grant of admiralty and maritime jurisdiction is a grant of a broader power than that which England knew at this time, the Constitution never guaranteed concurrent jurisdiction to the state courts,—in short, that their right to this concurrency arises, if at all, only out of a statute of Congress. But however this may be, it is a fact that the jurisdiction actually exercised by our admiralty courts in the early days was not much greater than the jurisdiction of the English admiralty courts as a matter of law. Cases involving carriage of goods by sea, marine insurance and even general average were almost invariably brought in the state courts. Yet these subjects furnished a large, if not the greater part of the maritime law of other nations,<sup>32</sup> and jurisdiction had been freely exercised over them by some of the Colonial courts.<sup>33</sup> A condition therefore existed, which to some extent at any rate worked against uniformity, differentiating our law in practice from that of other nations except England. The admiralty courts, however, regained, or as some would put it, acquired jurisdiction in these matters,<sup>34</sup> and the rule for deter-

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<sup>31</sup> *Waring v. Clarke*, 5 How. 44 (1847); *The Jerusalem*, 2 Gall. 345 (C. C. 1815). Cf. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344 (1848). There are many other cases to same effect. Cf. also as to meaning of term "maritime," 2 Willoughby, Const. Law, sec. 637; Watson, Const., 1103; Benedict, Adm. 5th ed., secs. 38, 123-126; *De Lovio v. Boit*, 2 Gall. 398, 471.

<sup>32</sup> An examination of the *Ordonnance of 1681* and of the *Code de Commerce* will make this clear.

<sup>33</sup> *The Underwriter*, 119 Fed. 713, 734 (D. C. 1902); see 3 AM. L. REV. 666.

<sup>34</sup> *Drinkwater v. Freight and Cargo of the Spartan*, 1 Ware (2d ed.) 145 (D. C. 1828) may be the first suit in the federal admiralty court directly upon a contract of transportation by sea, and *De Lovio v. Boit*, *supra*, the first involving a contract of marine insurance.

mining whether or not a contract fell within the competency of the admiralty court was finally determined by the Supreme Court<sup>35</sup> following of course, the magnificent decision of Justice Story many years before.<sup>36</sup> As usually stated the doctrine of these cases is that the nature of the contract is the determining factor and that if the contract may be characterized "as maritime" admiralty courts have jurisdiction. But the principal task of the court in both these cases was to destroy arguments based on English limitations, and it was all but assumed that the contracts sued on in these cases—contracts of marine insurance—were truly "maritime." Therefore, and it is a pity, the court was not called upon to state fully what considerations went to determine the meaning of this adjective. Nevertheless we find consciousness of the theory of uniformity in both decisions. In the Supreme Court Justice Bradley, after adverting to the jealousy of the admiralty exhibited by the courts of the common law, in a brief description of admiralty courts and admiralty law, repeats Lord Mansfield's saying that the admiralty law was not the law of any particular country but the general law of nations, and then describes it as a law "embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world." He points out that the English limitations on jurisdiction stood alone, that they were not carried over into this country, that the fundamental inquiry in questions involving jurisdiction over contracts was the subject matter which if maritime gave jurisdiction to the admiralty, and then determines that the contract of marine insurance is maritime because of the nature of its principal incident,—a guaranty against loss by sea perils,—because in origin it was a maritime institution, and because in other nations, except England, it is so considered.<sup>37</sup> In short, throughout this decision we find consciousness of our admiralty law as part of an international system and of an effort in determining the scope of its jurisdiction to integrate our law therewith. Although in *De*

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<sup>35</sup> *Insurance Co. v. Dunham*, 11 Wall. 1 (1871).

<sup>36</sup> *De Lovio v. Boit*, *supra*, note 11.

<sup>37</sup> 11 Wall. 1, at 23-35.

*Lovio v. Boit*, Mr. Justice Story was mainly concerned with the history of the controversy between admiralty and common law, nevertheless after pointing out that our admiralty jurisdiction was not so limited as that in England, that the term "maritime" expands the constitutional grant, and that this term includes maritime contracts and marine insurance, he says:

"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, all over Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all maritime states; that jurisdiction in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind. Of this great system of maritime law, it may truly be said: 'Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna et immortalis, continebit.' [*Cic. Frag. de Repub. lib. 3 (Editio. Bost. 1817, tom. 17, p. 186)*]." <sup>38</sup>

There are, of course, several theories as to the meaning of the adjectives "admiralty and maritime." The first word is no doubt more specific than the second and the tendency is to look upon it as intended to describe some known system or institution. The word "maritime," however, is not a term of art. In determining so momentous a matter as the jurisdiction of a court it seemingly would scarcely be sufficient to use the dictionary meaning of the term, even though it were Johnson's, nearest perhaps to the time of the Constitution. This adjective should be given a meaning that will comport with whatever theory the court has as to the proper basis for the existence of an admiralty and mari-

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<sup>38</sup> 2 Gall. 398 (U. S. C. C. 1815), at p. 472.



time system of law differentiated from the common law.<sup>39</sup> When, therefore, we find Justice Bradley and Justice Story speaking in the terms of the theory of uniformity, we are justified in believing that "maritime contracts" meant to them those contracts relating to sea transactions within the scope of their idea of uniformity.

The standardizing of the test of jurisdiction in contract cases seems therefore to comport with the doctrine. The similar standardizing of the rule in tort cases has very little relation to it. One who believes that the recent decisions of the Supreme Court are evil and wishes to trace that evil to its source, need go no further back than *The Plymouth*.<sup>40</sup> This case, sharply differentiating tort from contract, as the history of maritime law seemingly never warranted, made locality, not subject matter, the basis of jurisdiction in tort cases. Such a test leaves wholly out of account the nature of the contact involved. Even a rule of averages cannot justify *The Plymouth*. Too many torts, maritime in nature by whatever reasonable meaning we give that term, may be excluded, and too many torts, equally non-maritime, brought in. It was largely as a consequence of the locality test that the longshoremen and shipyard workers in hosts came into the admiralty courts with very little consideration whether consistently with the theory of uniformity or any other reasonable theory they were rightly there or not.

Looking upon these two subjects as one, we find this situation: in contract cases a test of jurisdiction still vague but con-

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<sup>39</sup> If the phrase "admiralty and maritime" has a definite meaning inconsistent with the theory of uniformity, then all discussion of that theory, so far as jurisdiction is concerned, is closed. Certain authors show what may be called an institutional bias, that is maritime, as to which there are in the civilized world admiralty, that is, particularistic legal, institutions. See Benedict Adm., 5th ed., secs. 38, 39. Many courts have given the word a broader meaning. That is maritime, which relates to commerce and navigation by sea. See Hughes Adm., 2d ed., 18. In general, however, courts and authors have merely pointed out that the word maritime was incorporated in the Constitution to guard against a narrow interpretation; *De Lovio v. Boit*, 2 Gall. 398, 471 (1815); 2 Willoughby, Const. Law, sec. 637; Watson, Const., 1103.

<sup>40</sup> *The Plymouth*, 3 Wall. 20 (1865). There have, of course, been many efforts towards a modification of this rule. Cf. *The Blackheath*, 195 U. S. 361 (1904); *Campbell v. H. Hackfield & Co.*, 125 Fed. 699 (C. C. A. 1903); 18 HARV. L. REV. 299; 8 COL. L. REV. 499.

sistent with the theory of uniformity,—indeed rather favoring it than not; in tort cases a test framed with regard to no rational basis whatever.

The third of the three features in the early development of our maritime law remains to be considered. Before our admiralty law was fairly on its legs, it was held that no maritime lien or right to proceed *in rem* arose where supplies or repairs were furnished to a vessel in her home port, with a dictum that if her home port law, so to speak, that is, the state law, gave a lien, such was a matter of local concern.<sup>41</sup> Some of the opponents of the doctrine of uniformity have seized upon this dictum and the decisions applying it<sup>42</sup> as showing that the admiralty law itself has sanctioned non-uniformity. Certainly, admitting this power in the states, diversity of law at once appears, but that diversity is of course confined to the field in which the state law operates, and that field is, generally speaking, local. So long as "home port" means the port where the owner resides, and not the port of the vessel's enrollment or registry, the contact involved is between the owner, a local man by hypothesis, and the supplyman, who is rarely other than local.<sup>43</sup> True, there is not uniformity of law as to all persons engaged in "maritime transactions," but there is uniformity as to that class of transactions where seemingly it is desirable—those involving interstate and international contacts. If we once concede that as the operative field of the ideal of uniformity is not necessarily coterminous with the field of jurisdiction as the latter has been developed,—a concession which, as I hope to show later, we should be willing to make,—there is nothing in these cases inconsistent with an ideal of uniformity,

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<sup>41</sup> The General Smith, 4 Wheat. 438 (1819). See also *Peyroux v. Howard*, 7 Pet. 324 (1833); *The J. E. Rumbell*, 148 U. S. 1 (1893). The rule was evidently based on the practice in the Federal courts: *Gardner v. The New Jersey*, 1 Pet. Adm. Dec. 213 (D. C. 1806); *Norfin v. The Eagle*, Bee 78, 79 (D. C. 1796). Cf. *Shrewsbury v. The Two Friends*, Bee 433 (Adm. Ct., S. C., 1786); *Turnbull v. The Enterprise*, Bee 345 (Adm. Ct., Pa., 1785). Judge Peters turned jurisdiction over to the state courts as a matter of discretion to avoid conflicts: *Gardner v. The New Jersey*, 228; *U. S. v. McGill*, 4 Dall. 426 (1806).

<sup>42</sup> See *E. T. Fell*, 40 Johns Hopkins Univ. Studies 298; *Pitney, J.*, dissenting in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 237 (1917).

<sup>43</sup> *The General Burnside*, 3 Fed. 228 (D. C. 1880).

that is, uniformity where seemingly it is most desirable. While the rule above mentioned has not always manifested itself in such a way as to limit the contacts which the state lien law can regulate, nevertheless the weight of opinion, eventually culminating in a decision of the Supreme Court, held that state lien laws were not effective as to foreign vessels or vessels from another state.<sup>44</sup>

This discussion has been limited to the question of the power of states to affect admiralty law by the passage of lien laws for the benefit of local supply, repair, and materialmen. The larger subject of the conflict between state and Federal courts as to the right to proceed *in rem*, together with such matters as the enforcement of local death acts, concurrency of jurisdiction, the "saving clause," and others, remains for further treatment.

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<sup>44</sup>The *Chusan*, 2 Story 455 (C. C. 1843); *The Roanoke*, 189 U. S. 185 (1903); *Cf.* also *The Kate*, 56 Fed. 614 (D. C. 1893). *Cf.* also the rule that makes the matter of priorities under these state lien acts a matter of Federal maritime law: *The J. E. Rumbell*, 148 U. S. 1 (1893).