A View from the Bridge: Some Observations on Amphibious Tort Jurisdiction in Admiralty

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A VIEW FROM THE BRIDGE: SOME OBSERVATIONS ON AMPHIBIOUS TORT JURISDICTION IN ADMIRALTY

By Thomas A. Clingan, Jr.†

Where o where is the New River in Virginia?
It made the jurisdiction of the admiralty.
Nice little river near the tops of the mountains,
Never saw a steamer and it wouldn't float a tugboat.
Roosevelt wanted power for some Tennessee farmers,
So it made the jurisdiction of the admiralty.
Anonymous ditty.

I.

INTRODUCTION

WITH THE PASSAGE of the Admiralty Jurisdiction Extension Act of 1948,† the Congress of the United States, yielding to a steadily increasing pressure for legislative relief, negated an eighty-year old rule of maritime tort jurisdiction known as the "locality" rule. This was the rule first announced by the Supreme Court in the case of The Plymouth² in 1865 when it held that a tort involving damage done by a ship to a shore structure was outside admiralty jurisdiction with regard to the right of the structure owner to bring suit if the locus or consummation of the damage sued upon was on the shore. The Court's theory was that if the tort occurred on the shore, it must be the civil, or common law courts, and not the admiralty who had cognizance.

The inequities created by this ruling are apparent, though just how severe they are as compared with the increase in maritime operating costs engendered by a contrary position might well be a matter for dispute.³ Because admiralty had no jurisdiction over one side of the controversy strange results were to be encountered. In a situation

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2. 70 U.S. (3 Wall.) 20 (1865).
3. The increased costs to be borne by industry because of judicially created rules of liability and procedure are often the subject of debate. As an example, Mr. Thomas E. Byrne, Jr., in a discussion on the seaworthiness doctrine before the Admiralty and Maritime Law Committee of the Federal Bar Association on September 25, 1963, commented:

From 1946 to date, there has been an appreciable reduction in the American Merchant Marine. According to TMM magazine, the fleet decreased 41.9% in the ten year period ending January 1, 1963. The overall cost of the extension of the
where both parties might be to blame in the collision of a ship with a bridge, for example, the shipowner might sue immediately in admiralty, taking advantage of the "both to blame" rule of comparative negligence, or, if he preferred, he could wait until sued at common law by the bridge owner and then assert the absolute defense of contributory negligence. In addition, in those cases where the ship was under the control of a compulsory pilot at the time of collision, the lack of jurisdiction over a subsequent action by the owner of the shore structure rendered him completely remedyless.

It was to the practical solution of these and other such problems that the 1948 Act was addressed. Its passage was not a hasty reaction to various forms of political pressures, but became a fact only after interested groups and individuals had resolved some serious doubts. Because of the history of this Act, it has been selected as the focal point for this discussion of the Supreme Court and its treatment of admiralty tort jurisdiction.

By its terms the 1948 Act extended the jurisdiction of the admiralty courts of the United States to include all cases involving "damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." By the simple reality of enactment the Congress swept away the rule of The Plymouth, making clear that in its collective judgment it had not created a new cause of action but rather directed the courts to exercise a jurisdiction that had always existed but previously laid dormant. Stated differently, the Congress had re-

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6. The full text of that Act, as it pertains to the present problem, is:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water. The remainder of the Act deals with other problems and has been omitted.
minded the courts that the jurisdictional clause of the Constitution from which admiralty courts drew their power was broader in scope than the corresponding clause of the judiciary acts, and that the legislature was setting those courts free from previous misunderstandings about constitutional restrictions so that they might exercise beneficial power in this particular area. The language of the judiciary act is exactly the same as that used in the Constitution; thus the result of the 1948 enactment would appear to be such as to give one meaning to the words in one instance, and a different meaning in the other. How can it be that two identical sources of law can convey different content? For the answer to that question, there is need for examination of constitutional history, tradition, and matters of policy.

II.

SOME GROUNDWORK IN THEORY

Before becoming deeply involved with the specifics of the problem, it would be well to pause and place the issues in perspective — at least to the extent that it is necessary to consider constitutional questions. First, and most likely foremost, the obligation to change traditional concepts, or even sweep them away, if necessary to keep pace with the demands of a metamorphic society must be recognized. This responsibility is almost an absolute. To fail to accept its obligation on the excuse of infringement of legislative prerogative would be remiss on the part of any court, admiralty or otherwise. Professor Carl Brent Swisher has described the obligation in this manner:

If the dominant sentiment of the community as to 'what ought to be' deviates away from previously accepted interpretations of the Constitution, the judiciary will refrain from falling into line only at its peril. He who witnesses changes in our conceptions of rightness but nevertheless expects constitutional interpretations to remain unchanged has much yet to learn about the character of our institutions.9

7. U.S. CONST. art III, § 2, “all cases of admiralty and maritime jurisdiction.” With regard to the reason for including both “admiralty” and “maritime” in the face of apparent redundancy, see the observations of Mr. Justice Wayne in The Huntress, 12 Fed. Cas. 984, 989 (No. 6914) (D.C. Me. 1840).
8. The Judiciary Act of 1789, 1 Stat. 73. For the language of this statute, as it bears upon the issue, see the text at page 466 infra.

Also, it is clear, then, that if we are to solve modern problems in terms of the Constitution someone must read new content into old language. Id. at 216. And, it [the Supreme Court] is, in a sense, as it has at times been characterized, something in the nature of a constitutional convention, yet it is a convention which functions within the pattern and in terms of the principles of a constitution which has already been established. Ibid.
A second postulate is still the correlative of the first, however. It is equally true that while obligations rest upon courts and legislatures to respond to special stimuli, that responsibility cannot be exercised in an arbitrary manner. There must be something more than a simple need for relief. If Professor Swisher's conceptions of rightness become synonymous with expediency, the standards of statutory and constitutional interpretation become arbitrary and empty phrases. Whether the approach is general, or restricted to the narrow context of admiralty, there is a line which still exists between that which is and that which is not. In admiralty, perhaps more than in any other area, there are inherent constitutional limitations beyond which necessity cannot carry us without doing irreparable injury to the stability of the law which, while not an idol, is (with apologies to Confucius) one of the cements that holds our society together.

A scale is needed to balance the need for change in admiralty law. The rich and very distinctive heritage of admiralty tradition has been used to strike the balance between admiralty law and common law for centuries, but this is not to say that equilibrium has always been attained with precision. Rather, admiralty tradition must be used in precise amounts and with the utmost care or the balance will not be struck. Of equal importance with the accuracy of the scale is the perceptiveness of the scale-reader. Unwanted parallax is easily introduced.

With reference to the amphibious tort problem, it can be said at the outset that the passage of the 1948 Act suggests a problem of fine balancing. Judge Brown once observed that if the Congress had the unlimited power of a British Parliament, there could be no question of its ability to legislate on any matter of jurisdiction. At the same time he recognized that the Supreme Court, and not the Congress, must be the final arbiter of constitutional limitation. "It seems inevitable, therefore, that the Court must continue for an indefinite time to grope among conflicting codes for the true definition of 'all cases of admiralty and maritime jurisdiction,' and that Congress, at best can play only a minor part." The Extension Act would suggest

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10. The need for constitutional limits is seldom, if ever, denied. But in practice, proclamations of judges and commentators espousing such limitations are rarely of use to a pragmatic. Some simply beg the question. Consider: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

11. Confucius believed that convention is the cement of society. He used the term "li" to represent the whole complex of conventional and social usage. See generally, CREEL, CHINESE THOUGHT FROM CONFUCIUS TO MAO TSE-TUNG (1960).

just the opposite. However, it would seem that to place the picture in perspective it will be necessary to participate in a certain amount of groping on our own. In addition to examining problems of constitutional limits, such investigation should help to analyze the practicality as well as the desirability of the results achieved by this legislation. To commence, then, let us examine whether the Congress, in announcing this previously untapped reservoir of constitutional power, gave adequate consideration to the roots of admiralty jurisdiction, or, if having examined them with appropriate vigor, gave proper weight to what they found.

III.

THE EARLY TRADITION

As will be seen in discussions to follow, many courts rely heavily upon maritime history as a source of justification for their particular conceptions of the breadth of the constitutional grant of admiralty jurisdictions. For that reason, this section is devoted to a brief recount of salient features. Not surprisingly, our admiralty tradition draws heavily upon the English, although there is much authority for the principle that the substantive law of the sea is based upon that entire body of maritime rules as has always been recognized by the major seagoing communities. There would seem to be little justification, however, for diluting the particular impact of English law, simply because that nation may have drawn impetus in turn from the continent. It is now clear that our conceptions of jurisdiction are not to be circumscribed by the narrow borders of early English tradition, but that material is still relevant if only for the purpose of mood setting.

Following in the continental tradition, English coastal towns shared in the development of maritime law by establishing local courts


14. In Luke v. Lyde, 2 Burr. 882 (1759), Lord Mansfield observed, at 887, that the court was not restricted to English law because the "maritime law is not the law of a particular country, but the general law of all nations." The same theme appears in GILMORE & BLACK:

Maritime law . . . grew up and came of age under the tutelage of the civil law, and it still bears the imprint thus acquired, even when administered in the courts of common law countries. As the great national states arose in Europe, the international law of the sea came to be assimilated into national law, or at least to be restated as authoritative codifications; the classic one is the Ordonnance de la Marine of Louis XIV.

GILMORE & BLACK, op. cit. supra note 13, at 8, 9.

The impact of the Ordonnance was due in great part to the respect afforded the French courts of that time. See generally, 4 BENEDICT, ADMIRALTY 355-58 (6th ed. 1940).
with jurisdiction over admiralty problems. These courts drew for their substance upon customary sea law as then understood.\(^\text{15}\) About 1350, however, greater notice was being taken of the Court of the Admiral, a King’s prerogative court consisting of a naval officer charged with certain responsibilities concerning piracy and wrecking.\(^\text{16}\) The growth of prerogative admiralty courts was slow at first, but once firmly established their jurisdiction began to conflict seriously with that of the local maritime courts of the port towns, resulting in the loss of revenue to them. By the year 1685, the powers of the Admiral’s Court had expanded greatly and were not unlike those later to be codified in the Ordonnance de la Marine of Louis XIV.\(^\text{17}\) One provision of that code is deserving of particular notice at this point:

\[\text{[The judges of admiralty] shall also take cognizance of the damages done to the keys, banks, moles, palisadoes, and other works cast up against the violence of the sea, and shall take care that the depth of the ports and roads be preserved and kept clean.}\]

The similarity between this provision and that contained in the 1948 Act cannot pass without notice. Indeed, it is often referred to by its supporters as authority. As support for “traditional” jurisdiction, however, the Ordonnance should be used cautiously. While the courts of the Admiral did have jurisdiction of the type described in its early days, it is interesting to note that this particular jurisdiction was rejected by them prior to the enactment of the French code. Jurists often tend to use the code as necessary to support a point, and reject it when the language suggests a contrary result to that desired.\(^\text{19}\)

During the reign of Richard II (1377–1400), pressures were brought upon the King to return control of maritime affairs to the coastal towns who were then beginning to feel the economic pinch. One other likely reason would seem to be a degree of apprehension on their part with regard to the exercise of the King’s prerogative. At any rate, the thrust of these pressures was directed at limiting the jurisdiction of the Courts of the Admiral to cases involving those

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17. L.I. tit. 2, art. 1–11 (1681).
19. Consider as an example the language of Chief Justice Tilghman of the Supreme Court of Pennsylvania in 1806:
These ordinances, and the commentaries on them, have been received with great respect, in the courts both of England and the United States; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration.
Morgan v. Insurance Co. of North America, 4 Dall. 455, 458 (Pa. 1806).
things "done upon the sea."20 The efforts were more or less successful, and this pronouncement of jurisdictional limits, coupled with the use of the common law writ of prohibition, was a powerful ally to the common law courts in this battle. Henceforth, the admiralty was carefully confined to cases of contracts or torts actually terminated upon the high seas, or so closely related thereto as to amount to the same thing.21 In the American colonies, the Courts of the Vice Admiral fared better. The Crown was well aware of the advantages of having a prerogative court in the outreaches of the empire, and, at the same time, such courts were too far flung to disturb the equilibrium of the trade centers in the coastal towns of England.22 The commissions granted to such Vice Admirals were quite broad, encompassing everything done upon the sea or public streams, fresh waters, ports and creeks within the ebb and flow of the tide from the first bridges toward the sea.23 Just how much influence these commissions had on later treatment of admiralty jurisdiction in this country is quite speculative. During the period between the Declaration of Independence and the Constitutional Convention the picture is considerably confused. During this period of some thirteen years no federal form of judiciary existed, and a decentralization appears to have taken place which tended to destroy any uniform pattern which might formerly have been spawned. Each political unit was free to create the kind of maritime law it pleased, or, indeed, none at all.24 It was obvious, therefore, when the delegates came together in convention in 1787, that diversity in the control of maritime affairs was not effective, and what was really needed was a kind of federal jurisdiction that would create the proper atmosphere for the growth of a strong and effective maritime industrial complex.

Against this complicated backdrop, then, Article III of the Constitution was drafted, bestowing admiralty jurisdiction upon the federal

20. This is the statutory standard of 13 Rich. II, c. 5 (1389).
21. By the time of the American revolution, the King's courts had been reduced to handling the following kinds of problems: (1) enforcement of foreign judgments where the person or goods were within reach of the court; (2) suits for mariner's wages (where the contract was not under seal); (3) bottomry; (4) salvage, if the property was not cast ashore; (5) cases of disputes between port owners regarding the employment of a vessel; (6) collisions and injuries occurring upon the high seas; and, (7) droits of the admiralty. 4 BENEDICT, op. cit. supra note 14, at 398-99.
23. See, for example, the commission granted to Lord Cornbury as Vice Admiral in 1701. 4 BENEDICT, op. cit. supra note 14, at 409-19.
24. Pennsylvania, by Act of March, 1780, amending its act of 1778, decreed that its judges should "hold a Court of Admiralty, and therein have cognizance of all controversies, suits and pleas of maritime jurisdiction, not cognizable at common law." Virginia gave its courts jurisdiction equivalent to that held by the English courts prior to the Statute of Richard. Rhode Island adopted the Laws of Oleron. By 1778, maritime courts in one form or another, exercising widely differing functions, were in operation in all thirteen states. 4 BENEDICT, op. cit. supra note 14, at 439-41.
judiciary to hear all cases of admiralty and maritime flavor. While this was a new jurisdiction in the sense that it was inapposite to the individualized approach of the colonies, its exact content had meaning only in the reflected light of prior history. But what history, in which country, at what point of time? If we are to accept that the convention intended traditional maritime jurisdiction, then the lack of definition coupled with the hotchpot of prior history would seem to suggest that what was intended was not the jurisdiction of a particular point, but rather the general concepts of maritime law in existence and common acceptance in the maritime nations of the world. If the founding fathers gave any direct thought along this line, it is well hidden, for little passed their lips upon the convention floor.25 There are indications, however, that the feeling of the time ran strongly in favor of a universal approach to admiralty, as reflected in the following excerpt from the Federalist:

The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizance 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 relative to the public peace.26

While setting the tone, this expression of general sentiment did little to aid in analysis of the grant of power; thus the chronicles of the first fifty years of admiralty in the United States are crammed with instances reflecting the steady press for greater definition. Early opponents of a strong federal judiciary did their best to constrain admiralty within those limits associated with the English courts at their lowest ebb. With no firm guidelines to point the way, it can be said that there certainly was room for their argument. Had it been adopted, of course, the 1948 Act would have clearly been made impossible.

In 1789, the Congress enacted the first Judiciary Act, and rather than clarifying the problem, only served to intensify it. Section 9 of that Act stated:

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25. The reports of the convention as given in FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION (1911) reveal little. It is not possible to conclude, however, that nothing was said with regard to this issue for it is not entirely clear that these records are complete.

26. The Federalist, No. 80, at 590-91 (J.C. Hamilton ed. 1864). Consider also Governor Randolph's address to the Virginia Constitutional Convention:

Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign powers may be affected by admiralty decisions; as they ought therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct jurisdictions, — this jurisdiction ought to be in the federal judiciary... 3 ELLIOTT'S DEBATES 571 (1789).
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. [Emphasis added.] 

The language used, as emphasized above, is the same as for the constitutional grant. Clearly, the question was now whether the content was the same, or something different.

IV. STEPS TOWARD FURTHER DEFINITION

Because the amphibious tort problem raised by The Plymouth and dealt with in the 1948 Act is a geo-jurisdictional problem, it is somewhat helpful to compare other areas which centered upon geographical limitations upon jurisdiction, particularly the “tidal” concept. The English theory was that a tort, to be within the reach of admiralty, must take place within waters affected by the rise and fall of the tide. While this particular problem relates to the nature of the waters upon which the admiralty might exert influence rather than the nature of the cause of action itself, it is useful in demonstrating the thinking of the early periods of American development with regard to the scope of admiralty matters.

In these early and tentative gropings, there is to be found a discernible appreciation for the distinctions to be drawn between the problems of an island maritime nation with its commerce restricted by and large to the fringes of its land, and those of a large nation, continental in size, abounding with great inland rivers and lakes without identifiable or significant tides. This appreciation can be seen in the classic case of De Lovio v. Boit in which Mr. Justice Story suggested that admiralty jurisdiction, whatever its precise nature, “comprehends all maritime contracts, torts and injuries. That latter branch,” he emphasized, “is necessarily bounded by locality; the former extends over all contracts . . . which relate to the navigation, business or commerce of the sea. . . .” Clearly this opinion did not spell out the limits of power, but it was progressive in point of time. It accomplished

27. 1 Stat. 73, 76-77. This provision appears in revised form in 28 U.S.C. § 1333 (1958), but the interpretation given by the courts is the same. See Madruga v. Superior Court of Cal., 346 U.S. 556, 560 n.12 (1954).


29. Ibid.

30. Ibid. at 444.
two things: (1) it set the stage for the locality rule of tort jurisdiction and (2) made it clear that whatever the scope of admiralty jurisdiction, it was not to be limited to those things "done upon the sea."

Ten years later the steamboat Thomas Jefferson departed Shippingsport, Kentucky, on the first steamboat ascent of the Missouri, carrying supplies for the exploratory Yellowstone expedition. The venture proved so financially disastrous that upon the vessel's return there was not enough money to pay the crew. When the resulting libel reached Mr. Justice Story, he struck it down with a four-paragraph opinion that cited no authority. He was simply unable to find any precedent regarding any incident beyond the reach of the rise and fall of the tide which would justify libellant's position. The reversion to a more restrictive view of jurisdiction was indeed surprising after the promise of De Lovio. It could be that the famous jurist suffered a temporary lapse of insight, but the answer is more likely to be found in the extrinsic pressures in action at the time. Already decided in favor of expanded federal power were such landmarks as Osborn v. Bank of the United States and McCulloch v. Maryland, and it is just conceivable that the financial and economic pressure for this particular kind of expansion was not strong enough to justify the Court's incurring further wrath from still strong state's rights advocates.

In any event, the tidal limitation was firmly in operation and continued so until 1845, by which time the economic climate had warmed considerably. Nearly half of the steamboat tonnage of the United States was to be found upon the western rivers, not to mention that upon the Great Lakes. Because these areas of commerce were non-tidal, a large portion of those who dealt with shipping were denied the beneficial use of the maritime lien. Congress, responding to the growing hue and cry to which the Supreme Court seemed oblivious, provided litigants with the maritime lien in a statute very carefully titled "An Act extending the jurisdiction of the district courts to certain cases (1) upon the lakes and navigable waters connecting the same." There was nowhere any reference to "admiralty" or

32. Mr. Justice Story's stand in The Thomas Jefferson becomes even harder to understand if it is viewed in the light of some of his later writings, such as: This grant in the Constitution, extending the judicial power 'to all cases of admiralty and maritime jurisdiction,' is not limited to, nor interpreted by, what were cases of admiralty jurisdiction in England, when the constitution of the United States was adopted, but extends the power, so as to cover every expansion of such jurisdiction.
34. 17 U.S. (4 Wheat.) 316 (1819).
35. Hunter, Steamboats on the Western Rivers 33 (1949).
“maritime” in this act. Congress apparently had no intention of expanding upon the judiciary act but rather to bestow an “admiralty-like” jurisdiction upon the federal courts under the auspices of the Commerce Clause.87 We are, unfortunately, not well appraised of the congressional feelings in this matter. We are not clearly told whether this particular solution was selected because there was no room left for further expansion within the confines of the judiciary act.

We do know, however, that the enactment of that statute spawned a new series of opinions. In *Waring v. Clarke*,88 the Court held that a collision which occurred some 95 miles up the Mississippi from New Orleans was “within the ebb and flow of the tides” even though at that point the only way any tide was discernible was to note a slight slowing of the current at the time of flood tide.89

The solution to the tidal problem was reserved for the case of *The Genesee Chief v. Fitzhugh*,90 in which a vessel had rammed and sunk the schooner *Cuba* on Lake Erie. The defense to the libel was lack of jurisdiction placing the 1845 Act squarely into issue. Mr. Justice Taney rejected the commerce clause as adequate support for the jurisdiction claimed,41 but he did not dismiss the action. It was his opinion that the 1845 Act might still be sustained because in reality it drew its power from Article III. The analogy of the tidal problem to the Extension

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37. Only two years later, Daniel Webster, while arguing his case, criticized the use of the commerce clause as a source of admiralty jurisdiction:

The only objection to this necessary law seems to be, that Congress in passing it, was shivering and trembling under the apprehension of what might be the ultimate consequence of the decision of this court in the case of the Thomas Jefferson. It pitched the power upon a wrong location. Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, or does extend, to all navigable waters, fresh or salt.


38. 46 U.S. (5 How.) 441 (1847).

39. The *Waring* trend was reinforced by New Jersey Steam Nav. Co. v. Merchant’s Bank, 47 U.S. (6 How.) 344 (1847). While the tidal concept was not rejected it was weakened.

40. 53 U.S. (12 How.) 443 (1851). There was initial uncertainty as to the scope of the holding. But in *Fretz v. Bull*, 53 U.S. (12 How.) 466 (1851), the Court held that admiralty jurisdiction reached collisions on the Mississippi on the authority of the “Chief”. Jurisdiction was found on canals in *Ex Parte* Boyer, 109 U.S. 629 (1883). Three more cases, *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296 (1858); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867); and *The Eagle*, 75 U.S. (8 Wall.) 15 (1869), already decided, combined to make clear that the tidal concept in the United States was truly dead. The *Hine v. Trevor*, supra, is also noted for its interpretation of the “saving to suitors” clause. For more on that subject, see *Sprague, The Extension of Admiralty Jurisdiction Law, A Century of Progress* 294 (1937).

41. Following the *Genesee Chief* there was a period of some confusion over the precise role, if any, to be played by the commerce clause. There was a feeling by part of the Court that while the clause was not proper support for the substance of admiralty law, it still, by some mysterious emanation, had bearing upon the scope of jurisdiction. See, e.g., New Jersey Steam Nav. Co. v. Merchant’s Bank, 47 U.S. (6 How.) 244 (1847); *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296 (1858); *Allen v. Newberry*, 62 U.S. (21 How.) 244 (1859). It was not until *The Belfast*, 74 U.S. (7 Wall.) 624 (1869), that it was agreed that the admiralty power was not to be circumscribed by the scope of that clause.
Act of 1948 must be noticed. In deciding the *Genesee Chief*, the Court told the bar that there was yet room within the constitutional grant of jurisdiction to add this new jurisdiction to that already announced in the judiciary act. Now the question becomes one of deciding whether history has repeated itself in providing a new jurisdiction within the scope of Article III, or has the legislature exceeded the limit this time?

V.

**SUPREME COURT TREATMENT OF THE AMPHIBIOUS TORT PROBLEM**

Like the tidal problem, discussed above, the amphibious tort deals with geographical restrictions, but in a slightly different sense. The question posed by *The Plymouth* in 1866, was: does the admiralty grant include the banks of navigable waters. There are two approaches to such a question, of course. One is to say that it is within the constitutional grant, but specific jurisdiction had not been provided for by statute. The other is to take the position that it is outside traditionally recognized powers. The Court did not make its position clear, stating that while every tort upon navigable waters was of admiralty cognizance, a tort commencing there but consummated upon the shore was not. In *The Plymouth*, sparks from a vessel called the *Falcon* set fire to a wharf. When foreign attachment was brought against a sister vessel, the Court found the locus of the tort to be ashore where the "substance and consummation of the injury" had occurred; thus there was no jurisdiction. Exceptions were subsequently to be carved out of this rule, to be sure, but usually by the use of artificial devices. Where, for example, a vessel collided with a navigational beacon in the Mobile ship channel, the Court avoided the *Plymouth* rule by finding that the tort had been consummated at a point "which is only technically land, through a connection at the bottom of the sea."
While owners of shore structures were thus ejected from admiralty, ship owners in similar situations were not. Admiralty would take jurisdiction, for example, if a ship was damaged by pilings unlawfully placed in navigable waters,\(^45\) or telephone wires negligently strung,\(^46\) or by a negligently operated drawbridge\(^47\) or defective wharf.\(^48\) This kind of line-drawing at the river bank in favor of the shipowner was awkward, inequitable, annoying and expensive to otherwise deserving litigants. Because of these imbalances pressure was brought to bear by commentators\(^49\) and the interested bar\(^50\) for reform.

VI.

THE FORM OF RELIEF OBTAINED

Action was first taken in 1930 when the American Association of Port Authorities suggested that the American Bar Association sponsor a bill designed to extend jurisdiction over amphibious torts.\(^51\) The ABA assigned the problem to a committee for study, but the issues were not to be quickly or easily resolved. In its first pertinent report, the committee took the strong position that the authorities “leave no doubt that the Congress has no authority to extend the Admiralty jurisdiction beyond torts committed on navigable waters.”\(^52\) In the 1931 report of the same committee it was stated: “Admiralty jurisdiction does not and cannot be made to extend to land structures, even by act of Congress, for the court has stated that the Congress cannot enlarge the constitutional grant of power.”\(^53\) As an alternative, the committee offered a statutory draft intended to provide non-maritime liens upon vessels so involved.

This position remained essentially unchanged until 1933 when two things happened to alter the perspective. First, Mr. George R. Farnum, dissenting member of the committee in 1930 and 1931, published an


\(^{46}\) Southern Bell Tel. & Tel. Co. v. Burke, 62 F.2d 1015 (5th Cir. 1933).

\(^{47}\) Dorrington v. Detroit, 223 Fed. 232 (6th Cir. 1915).


\(^{49}\) The following are examples: Robinson, Admiralty 50 n.121; 1 Benedict, Admiralty 353 n.9 (6th ed. 1940); Brown, Jurisdiction of the Admiralty in Cases of Tort, 9 Colum. L. Rev. 1 (1909); Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L.J. 34 (1933); Note, 42 Harv. L. Rev. 553 (1929).

\(^{50}\) See, e.g., the letter of Mr. George C. Sprague, Chairman of the Standing Committee on Admiralty of the Association of the Bar of the City of New York dated January 1939, addressed to Senator Robert F. Wagner: “As far as I can learn all of the interested bar associations are now in agreement that a bill in the above form should be enacted. . . .” See also the material in this article, infra, on the program of the American Bar Association in 1935.

\(^{51}\) 55 A.B.A. Rep. 303 (1930).

\(^{52}\) Id. at 307.

article attacking the majority position. As a result of that article, the committee voted to reconsider its position, but still concluded that it could not reverse its previous stand without the "most careful study and consideration." While such a study was being undertaken the second, and deciding factor, came into play. The Supreme Court, on November 5, 1934, decided that admiralty jurisdiction extended to ship mortgage foreclosures which had previously been declared outside the cognizance of federal admiralty courts. Reference will be made to this case later, but it is appropriate at this stage to note the impact of the decision upon the deliberations of the ABA committee. In 1935, the committee said:

... the prospect of the Supreme Court sustaining the constitutionality of an act of Congress as herein proposed, is much more favorable at the present time than when the report of the 1931 Committee was submitted. ...

After five years of hesitation, the Association voted approval of the proposed amphibious tort legislation. Following ABA approval, S. 680 was introduced by Senator Copeland at the Association's request. The bill was referred to committee where opposition was found to the inclusion of injuries to the person within its scope. Because of such opposition, the bill was shelved pending a report from the Maritime Commission. In the early part of 1938, the Commission filed a report with the Senate Committee on Commerce recommending the passage of the bill and all major bar associations having an interest in the matter rallied 'round the flag. In its 1943 report, however, the ABA Committee on Admiralty and Maritime Law made reference to its continuing difficulty in having the desired legislation introduced. This hesitation on the part of the Congress appeared to be, at least in part, still due

54. He said: "Any argument of unconstitutionality comes down to little more in substance than that, by tradition, logic and precedent, the subject-matter is definitely excluded from an artificial and arbitrary legal category." Farnum, *Admiralty Jurisdiction and Amphibious Torts*, 43 YALE L.J. 34, 35 (1933). Compare this additional language from the same article with the philosophy of Carl B. Swisher, supra note 9: [T]here is every reason, if the law is to find its justification in the measure in which it satisfies business needs and promotes public convenience and equity, to bring this field of wrongs within the cognizance of the admiralty courts.

Id. at 36, 37.
55. 59 A.B.A. REP. 397, 399 (1934).
56. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934).
57. 60 A.B.A. REP. 411, 414 (1935).
58. On April 26, 1937, the late Mr. Kennedy introduced H.R. 6658, which differed from S. 680 in that it omitted the words "persons and" in an attempt to avoid problems created by the Senate version. Thus amended it drew the approval of the Association of the Bar of the City of New York and the Maritime Law Association of the United States. 63 A.B.A. REP. 210 (1938).
59. 64 A.B.A. REP. 167 (1939).
60. 68 A.B.A. REP. 189-95 (1943).
to doubts with regard to the inclusion of jurisdiction of personal injury claims within the overall scheme. By 1947 these doubts seem to have been resolved, and on March 8, 1948, the bill was reported. Both House and Senate reports placed major reliance upon the opinions of the Navy Department, the Maritime Commission, and the Department of Justice, all of which took the position that the bill did not create a new cause of action but was a directive to the courts to exercise that jurisdiction already conferred by Article III.

VII.

THE FIRST TEST — PROPERTY DAMAGE

In 1951 the district court for the Eastern District of New York was the first to hear a challenge of the Act upon constitutional grounds. The tugboat Gloria O had collided with a bridge and was libelled in rem. An action in personam was brought against the owners, as well, under section 740 of the Extension Act. Respondent's position that the Congress had exceeded the limitations of Article III, section 2 of the Constitution brought the validity of that statute directly into issue. The court held that restriction of owners of the bridge to their common law remedies "merely because of the incidence of the damage said to have resulted from the character of the tug's handling, would seem to be strained and artificial. . . ." In language reminiscent of the De Lovio case, Judge Byers said that he was

61. The 1943 report, in speaking of objections voiced by the Subcommittee of the House Committee on Judiciary, said:

The objections in question were summarized by the Clerk of the Committee in a letter to Mr. Hickox in this manner:

* * * * * *

2. Inclusion of 'person' would enhance the question of constitutionality. Our right to legislate is limited to maritime matters. Inclusion of 'persons' might also compound benefits. Recovery under this bill might be added to the compensation under the Longshoremen's Compensation Act.

62. The 1948 report, in speaking of objections voiced by the Subcommittee of the House Committee on Judiciary, said:

The objections in question were summarized by the Clerk of the Committee in a letter to Mr. Hickox in this manner:

* * * * * *

2. Inclusion of 'person' would enhance the question of constitutionality. Our right to legislate is limited to maritime matters. Inclusion of 'persons' might also compound benefits. Recovery under this bill might be added to the compensation under the Longshoremen's Compensation Act.

Id. at 193.

63. American Bridge Co. v. The Gloria O, 98 F. Supp. 71 (E.D.N.Y. 1951). Earlier cases dealing with the statute restricted discussion to problems of interpretation of mechanical details, such as whether the statute could be applied retroactively, All America Cables & Radio v. The Dieppe, 93 F. Supp. 923 (S.D.N.Y. 1950), the meaning of "caused by a vessel," Hovland v. Fearnley & Eger, 110 F. Supp. 657 (E.D. Pa. 1952), and whether statutory condition precedent to suit had been complied with, Clark Terminals v. United States, 100 F. Supp. 59 (D. Mass. 1951).

64. 98 F. Supp. at 74.
... unable to find any decision, nor have counsel cited any, in which an Act of Congress, adopted pursuant to the quoted part of Art. III, Sec. 2, has been held invalid as transcending constitutional power thereby imparted. 65

The *Gloria O* relied for much of its strength upon a panoramic view of prior legislative extensions in admiralty. One of these, the Ship Mortgage Act of 1920, 66 was of doubtful utility. 67 The Limited Liability Act of 1884, 68 designed to protect the shipowner from total financial ruin in the event of a maritime disaster, was also relied upon. This latter act would seem to have more bearing upon the amphibious tort problem. It was tested and upheld in *Richardson v. Harmon*, 69 which decided that the protection afforded by the Act extended to non-maritime as well as to maritime torts. On its face it would appear that if the jurisdiction of the admiralty court can extend to the determination of the *limitation* to be placed upon the amount of damages in a non-maritime tort case, it must also extend to include a determination of the liability giving rise to the need for such limitation. That rationale, of course, ignores the practice of treating liability as a divisible problem in collision cases calling for separate actions for determination of the two issues. Be that as it may, the custom of referring for support to legislative enactments and their tests in analogous areas leaves one with the feeling that he is being boot-strapped to death.

The question of constitutionality was raised again in 1953 when a tug collided with a government-owned dike and was libelled. 70 The approach taken by the court in this case was to sustain jurisdiction as being consistent with the conceptions of admiralty generally recognized and understood in the law of sea-going nations. Judge Stevens drew upon English and French history to illustrate that it would be strange indeed to argue that Congress had not the power to give

65. Id. at 73.
67. Prior to the passage of the Mortgage Act, it was believed that admiralty had no jurisdiction over actions to foreclose mortgages on vessels. The Act extended jurisdiction to this critical area because of the intimate relation that financial security has with trade and commerce, and, as in the problem under discussion, the need for legislative relief. The Act was tested in *The Thomas Barlum*, 293 U.S. 21 (1934), and upheld. Mr. Justice Hughes relied upon past extensions of jurisdiction for his support, but did not analyze them with care.

Judge Byers, in the *Gloria O* suggested that it would be sheer temerity to refute the logic of the *Barlum* opinion. Even if true, the suitability of that case as precedent for amphibious tort problems is open to doubt. The Mortgage Act deals with consensual transactions. As early as *De Lovio* the courts recognized that jurisdiction over consensual transactions is measured by the nature of the transaction rather than the locality of its execution. 68. 23 Stat. 57, as amended, 46 U.S.C. §§ 183-89 (1958).
69. 222 U.S. 96 (1911).
70. United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953). An earlier attempt to construe a dike as an aid to navigation within the rule of *The Blackheath* was not successful. The *Panoil*, 266 U.S. 433 (1925).
United States Courts the same broad jurisdiction as enjoyed by courts of those nations. While arguments may rage whether history does in fact warrant the claimed extension, Judge Stevens' approach is generally more persuasive than that utilized by Judge Byers in the *Gloria O*.

In view of this judicial atmosphere, it seems that there is little reason to expect that the Supreme Court would disappoint the expectations of the ABA Committee in 1935, at least so far as property damage cases are concerned. One cannot help but be still somewhat disturbed, however, by the facts that (a) for eighty years the Supreme Court could not seem to locate this reservoir of power, and (b) that the result is once again to give different content to two identically worded grants.

VIII.

THE MORE SEVERE TEST — INJURY TO THE PERSON

Complications arising from personal injuries sustained in an amphibious tort situation were first dealt with in 1950 in the case of *Strika v. Netherlands Ministry of Traffic*.71 The injured party was a longshoreman hired to load a vessel. Prior to leaving work for the day, the libellant was instructed to replace a hatch cover which had been stored upon the dock. As the cover was being hoisted aboard by ship's gear, one end dropped, striking libellant as he stood upon the dock, resulting in the amputation of one of his legs below the knee.

Judge Learned Hand, speaking for the court, ruled that the district court sitting in admiralty had jurisdiction over the injury. Interestingly, there is no indication that the solution rested upon the power granted by section 740; rather, Judge Hand relied upon his conviction that the court had direct and inherent power under Article III and the judiciary act apart and distinct from that granted by the 1948 statute — a position in keeping with that of the Navy Department and others.72

The line of thought in *Strika* weaves a rather tenuous but interesting pattern. Judge Hand begins his analysis with *O'Donnell v. Great Lakes Dredge and Dock Co.*,73 in which the Supreme Court had ruled that the Jones Act74 applied to a seaman injured ashore if he was injured while engaged in the pursuit of his occupation. *O'Donnell* was

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71. 185 F.2d 555 (2d Cir. 1950).
73. 318 U.S. 36 (1943).
silent with regard to the rights of a longshoreman injured ashore, reserving that problem until it might subsequently arise. It did arise, however, two years later in Swanson v. Marra Bros., Inc.\(^7\) when a longshoreman sued his employer under the Jones Act for injuries incurred by him while he was engaged in his duties ashore. The court held, however, that in view of the fact that the exclusive remedy of a longshoreman against his employer was compensation under the Longshoremen's and Harbor Workers' Compensation Act,\(^6\) he could not claim under the Jones Act, which was traditionally reserved for the use of seamen. Judge Hand inferred very properly that the reason that the longshoreman was precluded was because of the bar of the Longshoremen's Act. But he then concluded that absent that Act there would have been nothing in Swanson to prevent him from recovering against some third party, such as the shipowner. While it is obvious that that Act has nothing to do with the longshoreman-shipowner relationship, adherence to this view is tantamount to a declaration that the longshoreman is to be treated the same as a seaman for all purposes of admiralty jurisdiction. The closest the courts have come to that position is to hold that a longshoreman may recover for injuries incurred while actually working aboard ship, since a seaman could recover in the same instance.\(^7\) But there is a traditional distinction between the longshoreman aboard ship and his counterpart ashore.

By manipulation of O'Donnell and Swanson, Judge Hand blurred two basically distinct problems: (1) injury of a longshoreman engaged aboard a vessel and (2) a seaman engaged in duties ashore. The seaman has always been viewed as a ward of admiralty, and thus the protection of that court has always followed him.\(^7\) The same type of protection has been afforded the longshoreman aboard ship because at such time he is acting like a seaman and for the moment performing similar duties. When he goes ashore he is no longer acting as a seaman, nor is he under any traditional protective wing. Judge Hand's efforts to use Swanson to fill the gap between these two areas is simply not effectual. Swanson is a poor piece of oakum with which to caulk such a leaky jurisdictional seam. Absent the Longshoremen's Act there is still a great deal, it would seem, to come between the injured worker and a suit against the shipowner.

\(^{75}\) 328 U.S. 1 (1945).
\(^{77}\) Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
\(^{78}\) Language to this effect is often quoted from Harden v. Gordon, 11 Fed. Cas. 480 (No. 6,047) (C.C.D. Me. 1823) and Reed v. Canfield, 20 Fed. Cas. 426 (No. 11,641) (C.C.D. Mass. 1832). For a latter-day exhibition of paternalism, see the case of a messman who, while on shore leave, fell through the french doors of a dance hall, Warren v. United States, 340 U.S. 523 (1951).
The year 1961 brought with it another such case. In *Fematt v. City of Los Angeles*, a California district court accepted the validity of the 1948 Act on its face, insofar as any problem of property damage might be involved, but questioned the constitutionality of the Act in the personal injury area. Judge Kunzel analyzed the problem by reference to two fundamental sources of authority, concluding that the extension which was challenged was proper. His first line of support is the 1948 Act's legislative history which is limited to statements of the executive branch with regard to the effect of the proposed legislation. Secondly, the judge placed a good deal of emphasis upon the reasoning of the *Matson* case, particularly such language as "... injuries to shore structures by ships have long been recognized as maritime torts by the Continental Courts." His decision apparently was that the result of the legislative history and the provisions of the Ordonnance of Louis XIV produced a vector which amply justified the *Matson* rule.

Of some interest, but seldom referred to, is a case falling in point of time between *Strika* and *Fematt*. In this case a longshoreman was injured upon a dock due to a defect in the vessel's hoisting equipment. The court, without analysis, concluded that the remedies of a longshoreman are restricted to those afforded by local law. We can only speculate on the grounds for Judge Sobeloff's holding. In view of *Strika*, the rejection of libellant's case would suggest either that the court viewed the case as falling outside section 740, or, in the alternative, that section 740 was invalid as applied to personal injuries. In view of the facts of the case, it would be difficult to justify placing the case outside the scope of section 740.

IX.

**Some Final Observations**

It is quite easy to sit in the comfort of one's armchair and take potshots, justified or not, at one or another Supreme Court doctrine. In some cases it would seem required. The purpose of these concluding comments is not to criticize for the sake of creating an atmosphere

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80. Id. at 92.
81. Id. at 93.
83. The jurisdictional question was disposed of negatively in two brief sentences: Since Revel was injured while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by the local law. ... This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States.

Id. at 84.
which might stimulate the Court to consider these problems. It has indirectly done so already. In the recently decided case of Gutierrez v. Waterman S.S. Corp. the court assumed the constitutionality of the act without discussion, and passed on to more routine considerations. The trend is, then, to find the Extension Act not only a useful tool, but entirely valid as applied to both property damage and personal injury cases although the justification for these decisions is muddled, confused, and generally unpersuasive.

In the property area, such as dealt with in the Gloria O and Matson cases, there is indeed much less reason to become involved with constitutional issues. Yet on a purely theoretical plane it is still disturbing to read the progeny of The Plymouth spanning a period of eight decades and then to see the issue turn upon a few brief pages of legislative history. There is a real possibility that The Plymouth was improperly decided. Many commentators have suggested that conclusion. If so, however, it would seem neater to set it aside than to strain the imagination by dreaming of ways to render that case still vital since the 1948 Act. In addition to the desirable aspects of such direct action, from a jurisprudential point of view, the Court would have a grand chance to attempt to provide more meaningful guidelines for future jurisdictional cases. However, the extension of jurisdiction to include personal injury claims has distorted the picture. There is no arguable or substantial support in history for the extension of admiralty jurisdiction to these cases. The general law of maritime nations, often touted, holds no key to the problem. The Ordonnance, previously mentioned and so often called upon to do yeoman service, makes reference to power respecting persons only with regard to crimes and corpses, and in neither instance is there any persuasive analogy to the modern situation. If, as suggested by Fematt, the answer is to be found in tradition and history, then it would seem that damage is being done to the limits of Article III.

Aside from these constitutional difficulties, there are reasons on other levels that render the application of the Extension Act to personal injury cases troublesome. As an example, it is entirely possible that one result of these holdings might be to preclude a longshoreman injured upon the dock from state-provided workmen's compensation

85. For a good example, see Brown, Jurisdiction of the Admiralty in Cases of Tort, 9 COLUM. L. REV. 1 (1909).
86. "[The judges] shall also take cognizance . . . of all crimes and offenses committed upon the sea, its ports, harbors and shores." English translation in 4 BENEDICT, ADMIRALTY 356-57 (6th ed. 1940).
87. "[The judges] shall take up the bodies of drowned persons, and shall draw up a report of the condition of corpses found at sea and on the sand, or in the ports. . . ." English translation in 4 BENEDICT, op. cit. supra note 86.
remedies because of the exclusiveness of admiralty law. The field may simply be pre-empted. Because the Longshoremen's Act applies only to injuries incurred upon the navigable waters of the United States, he would not be able to receive compensation under that statute. The result would be that he would be eligible for no form of compensation under any compensation statute and be instead restricted to his remedies by libel in admiralty. It was a very similar problem that the Longshoremen's Act was originally designed to overcome. The recent Calbeck decision has been cited as solving this problem, but in fact that decision does very little to clarify the picture. In that case the Supreme Court held that while employees engaged in the work of completing construction of a vessel afloat on the navigable waters might be compensated for injuries under a state statute, that fact did not preclude the bringing of an action under the Longshoremen's and Harbor Workers' Compensation Act. It is not clear just how far this case may be carried. If a broad interpretation is adopted, it is possible that an injured longshoreman might have a remedy under section 740 and at the same time preserve his freedom to elect appropriate state compensation. But even if Calbeck does operate in this fashion, it is difficult to understand how it can be extended beyond those cases in which the injury occurred upon the navigable waters. If the injury were incurred as in Strika, Revel, Fematt, or Gutierrez, the longshoreman would be effectively barred from compensatory relief. The Longshoremen's Act simply does not reach him. Conceivably, another solution would be to extend the Longshoremen's Act coverage to the shore worker upon the dock, either by additional legislation or judicial interpretation. But without legislation it would seem quite difficult to hold that the term "navigable waters" includes not only the traditional areas, but also areas where the impact of an amphibious tort might be felt. Calbeck provides no firm guidelines for this kind of conjecture.

The so-called "tradition" of admiralty has been used and misused. While at one time it is used to support the case for extension, it is at another rejected because it leads to restrictive conclusions. It is interesting to note that many modern cases draw heavily upon such opinions as that of Mr. Justice Wayne in Waring v. Clarke, yet this is the very case that refused to discard the tidal concept.

On the other hand, if the practical problems created are not as serious as those solved by the 1948 Act, then it would seem best to

90. 46 U.S. (5 How.) 441 (1847).
recognize, frankly and honestly, that the Court was wrong in its estimate of the scope of jurisdiction. As the situation rests, we are left with no definitive statement of the extent of Article III. We are not told whether there is even room for more expansion, and, if true, in what direction it might extend. Most authorities fail to exhibit any concern. One who does is Professor Herbert R. Baer:

Surely, in this day and age of social security of every kind, the goal of the Court is in line with current political and social theory. Within the 'grey' areas we might well applaud this humanitarian action. However, when the Court rules contrary to congressional mandates, redefines the functions of court and jury, and permits jurors to classify as a seaman a person who obviously is not such but who as a 'seaman' may recover more dollars than he would be entitled to in his true capacity, one may well feel that our Court has sailed too far off course.

The pot of gold at the end of the rainbow is not the star on which our Supreme Court Mariners should fix their sights.91

In the same vein, the problem of providing the owner of a shore structure adequate redress for damage resulting from an amphibious accident could have been solved by other methods. The extension of jurisdiction and liberalizing of judicial restraints, as Professor Baer has so eloquently highlighted, has real merit in the areas of social consciousness. No one will dispute the need, for example, in Civil Rights litigation. But where, as the American Bar Association once suggested, adequate protection might be provided legislatively by the creation of an appropriate non-maritime lien, there seems little reason to distort traditional concepts by making them appear favorable, as though through rose-colored lenses in the more narrow context of admiralty law. In order to adopt a more colorful phrasing, so as not to be upstaged by Professor Baer, I might conclude that the increasing tightening of the back-stay to make a ship ready for fairer winds might well be putting too much tension upon the jurisdictional mast.

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