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Jurisdiction Over Foreigners in Admiralty Courts

THE extent to which courts of admiralty will exercise jurisdiction over foreigners is a matter of some uncertainty, not only in the United States, but also in other maritime countries. The theories on which jurisdiction is based differ rather widely in certain instances; and in our own country the question has undergone certain changes and development. It is not the purpose of the writer to advance any new theory of jurisdiction, nor to present an extended criticism of the theories now in vogue; but rather, after an examination of the cases and the writings of the publicists, to restate the law bearing on the subject in a form that will be readily accessible to the practitioner and the student. And while, for purposes of comparison, some reference will be made to the rules and practices of the courts in foreign countries, this paper will be primarily concerned with the rules as expounded and applied by the admiralty courts of the United States. Naturally, the cases discussed will be those only in which the act forming the basis of the suit is an act connected with navigation, and thus properly a subject of admiralty jurisdiction; and the ship will be sailing under a foreigu flag, or one or both of the parties will be subjects of a foreign nation.

The principal classes of cases which have most frequently arisen involving questions of jurisdiction are: crimes, salvage, collision, possessory suits, contracts, and torts affecting members of the crew.

The ancient maritime codes contain little which bears directly on the question of jurisdiction; but they seem rather to assume that controversies would occasionally be settled in the courts of a nation other than that to which the ship belonged. In the preamble to the Marine Ordinance of Louis XIV we find the following statement:

"Les juges de l'amirauté connaîtront provativement à tous autres, et entre tous personnes de quelque qualité où elles soient, même privilégiées, français et etrangers, tant en demandant qu'en defendant, de tout ce qui concerne, etc."[1]

So it is evident that at least as early as Louis XIV admiralty courts took cognizance of suits to which foreigners were parties. And today, in the admiralty courts of most countries, the fact that the parties are foreigners will not, of itself, result in a denial of jurisdiction.

The United States and Great Britain have adhered pretty strictly to the territorial theory of jurisdiction, holding that if the suit is in personam and the parties are before the court, the suit may be heard and the merits decided, regardless of the nationality of the parties. If the suit is in rem, the res must, of course, be within the jurisdiction of the court. Whether the owners in such an instance are before the court will make no difference.[2] The general rule stated above is subject to certain qualifications which will be dealt with presently.

Our courts are unanimous in saying that if the parties or the res are before the court, jurisdiction exists. But whether jurisdiction will be assumed is, in some cases at least, discretionary. Certain motives of convenience often induce the court to refuse jurisdiction —motives such as an unwillingness to enforce a foreign municipal law;[3] a disinclination to tie up a foreign ship by in rem proceedings,[4] etc. There seems to be no definite rule to be derived from the cases for the exercise of this discretion. The decision of the court of first instance in regard to whether jurisdiction would be assumed has in the majority of cases stood unquestioned. In those cases where an appeal has been taken the courts have shown themselves extremely reluctant to reverse the lower court. The most notable case of such an appeal is that of The Belgenland.[5] In this case a Norwegian vessel collided with a Belgian vessel on the high seas. The crew of the former were rescued and brought into port by the crew of the Belgenland. The master of the Norwegian ship brought an action civil and maritime against the Belgian ship. Objection to the jurisdiction was taken, which objection was overruled. On final appeal to the Supreme Court it was held that jurisdiction had been properly assumed by the court below and that the facts did

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[1] *Ordonnance de la Marine,* Louis XIV, Liv. I, Tit. II, 1-2.

[2] The Belgenland (1885) 114 U. S. 355, 29 L. Ed. 152, 5 Sup. Ct. Rep. 860.

[3] The Johan and Siegmund (1810) Edw. Adm. 242, 165 Eng. Rep. R. 1096.

[4] Gardner v. Thomas (1817) 14 Johns. (N. Y.) 134, 5 N. Y. Com. Law Rep. 804, 7 Am. Dec. 445.

[5] Supra, n. 2.

not warrant the Supreme Court in questioning the exercise of that discretion.

An earlier English case on this point is The Leon XIII.[6] Here the Spanish consul protested against the English court's assuming jurisdiction in a libel for wages brought by the crew of a Spanish ship. The objection was that the contract had been entered into with respect to the Spanish law and hence was to be governed by the law of Spain. Sir Robert Phillimore, who sat in this case, regarded it as a matter for the exercise of his discretion. On appeal, Brett, M. R., said,

> "It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeals? The plaintiff must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeal holds that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion."[7]

In Panama v. Napier[8] the lower court refused to take jurisdiction in a case where the British libelants had brought action against an American corporation. The higher court reversed the order dismissing the suit, which reversal was sustained by the Supreme Court. The action here was based on a tort which had occurred in the waters of Panama. The court said that if both parties had been foreigners the circumstances might have justified the court in refusing to take jurisdiction. But here there seemed to the Supreme Court no reason for refusing jurisdiction, particularly since the respondents were Americans.

It is quite usual, in cases arising in our courts between foreigners, for the consul of the foreign nation to protest against the jurisdiction of our courts and to ask to have the case dismissed. There was some intimation in certain of the earlier cases that jurisdiction was dependent on the assent of the consul.[9] Such a view is unsound, since it fails to recognize the fundamental principle on which jurisdiction is based, namely, sovereign control over the parties or the res. As Benedict in his treatise on admiralty forcefully says,

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[6] (1883) 8 P. D. 121, 52 L. J., Adm. 58, 48 L. T. 770, 5 Asp. Mar. Cas. 73.
[7] The Leon XIII, 8 P. D. 121, 125.
[8] (1897) 166 U. S. 280, 41 L. Ed. 1004, 17 Sup. Ct. Rep. 572.
[9] See Ex parte Newman (1871) 81 U. S. (14 Wall.) 152, 20 L. Ed. 887.

> "Nothing within the territory of a nation is without its jurisdiction, and no officer of a foreign government can grant or destroy jurisdiction of our courts."[10]

This point about the necessity of the assent of the foreign consul was raised in The Golubchick.[11] Dr. Lushington, who sat in that case, disposed of the contention as follows:

> "The court must possess original jurisdiction over the subject matter, or it can have none at all; for the consent of a foreign consul or minister never could confer jurisdiction upon a British Court of judicature."[12]

He then added, however, that in future cases of this sort the foreign consul would be informed when the suits were started so that reasons for dismissing the suit might be presented.[13] The view of Dr. Lushington in the Golubchick contains the kernel of the view generally held today. The assent of the foreign consul is not necessary to jurisdiction; but it may influence the court in exercising its discretion in taking jurisdiction.[14] Ordinarily great respect will be paid to the protests of the foreign consul. Frequently, if the controversy has been heard by the consul and a decision has been reached by him, the courts will not intermeddle.[15] But where it appears that justice has not been done, and that to refuse jurisdiction will result in injustice to the parties, the court will hear the case, even in the face of the foreign consul's protest.[16]

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[10] Benedict's Admiralty (3d ed.) § 284.

[11] (1840) 1 W. Rob. 143, 166 Eng. Rep. R. 526, 528.

[12] The Golubchick, I W. Rob. 143, 147.

[13] The rules of the admiralty court in Great Britain (see Rules of Court, Order V, Rule 16 (18)) require that in a suit in rem for wages the libelant must set out in his affidavit that the foreign consul in London has been notified of the suit; and a copy of the notice must be attached. By Rule 17 the court may, in any case, if it seems fit, waive the notice to the consul.

[14] See Hay v. Brig Bloomer (1859) Fed. Cas. No. 6,255.

[15] The Belvidere (1898) 90 Fed. 106; The New City (1891) 47 Fed. 328; Camille v. Couch (1889) 40 Fed. 176. See U. S. Rev. Stats. § 4079, 13 U. S. Stats. at L. 121, U. S. Comp. Stats. (1918) § 7629, 3 Fed. Stats. Ann. (2d ed.) 57.

[16] Patch v. Marshall (1853) 1 Curtis C. C. 452, Fed. Cas. No. 10,793; Bernhard v. Creene (1874) 3 Sawyer, 230, Fed. Cas. No. 1,349; Bolden v. Jensen (1895) 70 Fed. 505. In the case last cited, Bolden, an American citizen, was a member of the crew of a Chilean vessel. For insolence and insubordination he was chained, in such a manner that he lost permanently the use of his hands. In passing on the question of jurisdiction when Bolden libeled the mate of the ship, the court said, "Although the injury was inflicted at sea, on board a foreign ship, the case is within the jurisdiction of this court; and, even if the libellant were an alien, it would be the duty of this court, which for such cases is a court of the world, to administer justice. In doing so the court exerts its powers under the law, and without any infraction of the rule of comity, as that rule has been defined in all the adjudged cases." Bolden v. Jensen, 70 Fed. 505,509.

Granting that the court has jurisdiction in all of the situations previously mentioned, what are the principles on which the courts act in the exercise of their discretion to hear or dismiss a case? No general rule can be laid down in answer to this question. It seems to be a matter for the judge in each particular case to decide whether justice can better be done by hearing the case or by dismissing the suit and remitting the parties to another forum. Suits are frequently dismissed when the ship is libeled just as it is about to return on the home voyage and the libeling seamen are returning to the flag nation where they can, without special hardship, prosecute their suit in the home forum.[17] Courts usually place a dismissal of this sort on the ground of the "interests of navigation," the desirability of having commerce unimpeded. In modern practice, however, a libel in rem need cause little appreciable delay in the voyage, because a bond may be given, on which the ship is released. But if, in the instance mentioned above, there is evidence of cruelty or great hardship, and it seems reasonable to believe that the seamen would be subjected to further cruelty and hardship if they are compelled to return home in the ship, the court will probably take cognizance of the suit.[18] This is equally true when the seaman claims discharge on account of cruelty;[19] a fortiori when the seaman has already been discharged or compelled to desert because of the harsh or cruel treatment of the master.[20] Since, according to the modern view, a seaman is regarded as belonging for the time being to the nation of the ship's flag,[21] there can be no difficulty about remitting the parties to the home forum when the controversy is between the master and a member of the crew. But in cases of collision and salvage the parties are frequently not of the same nation and there can be no home forum to which they may be remitted. For this reason the court is unlikely to dismiss such a suit.[22]

The tendency towards refusing jurisdiction in the case of foreign libelants may well become more pronounced as the reasons for the parties not prosecuting their suits in the home forum vanish. Sailing vessels with their long voyages lasting sometimes two or three years are almost a thing of the past; and libelants who are remitted to their home forum ordinarily do not have to wait long before they

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[17] Gardner v. Thomas, supra, n. 4.
[18] The City of Carlisle (1889) 39 Fed. 807, 5 L. R. A. 52.
[19] See Bolden v. Jensen, supra, n. 16.
[20] See Weiberg v. Brig St. Olaff (1790) 2 Pet. Adm. 428, Fed. Cas. No. 17,357.
[21] In re Ross (1891) 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. Rep. 897.
[22] See The Belgenland, supra, n. 2.

can bring their suit before that court. The hardships to which sailors were formerly exposed have disappeared to a large extent; and cruelty and abuse which in earlier days furnished the basis for so many claims for discharge and wages have, through the pressure of public opinion and humane laws, ceased to be common occurrences.[23]

In most cases which are cognizable or not at the discretion of the court there must be some sort of hearing on the merits to determine whether the facts justify the court in taking jurisdiction. And whereas formerly it might have been said that strong reasons were required to be submitted against jurisdiction, the situation at present seems rather the opposite: the foreign libelant must present strong reasons to induce the court to take jurisdiction.[24]

Collision

In case of collision, jurisdiction would probably be assumed by the courts of most maritime nations if the collision took place in territorial waters, regardless of the nationality of the parties or the ship. The United States and England go farther than this, however, and will assume jurisdiction regardless of the place of collision or the nationality of the parties, provided the parties or the offending ship are before the court. It is not the locality of the tort but the presence of the parties or the res before the tribunal which gives the court jurisdiction.[25]

The rules in regard to the competence of tribunals in matters of collision are not well settled, particularly in the continental countries.[26] There many different views are held and a variety of theories of jurisdiction are advanced. The French will take cognizance of

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[23] But see The Rolph (1923) 293 Fed. 269, noted in 22 Michigan Law Review, 600.

[24] Compare Hay v. Brig Bloomer, supra, n. 14, and The Ester (1911) 190 Fed. 216.

[25] See Kaiser Wilhelm der Grosse (1909) 175 Fed. 215; The Johan Freidrich (1839) 1 W. Rob. 35, 166 Eng. Rep. R. 487; The Charkieh (1873) L. R. 4 A. & E. 59, 42 L. J., Adm. 17, 28 L. T. 513; The Evangelistria (1876) 46 L. J., Adm. 1, 35 L. T. 4, 10, 25 W. R. 255; In re Smith (1876) 1 P. D. 300, 45 L. J., Adm. 92, 35 L. T. 38; The Griefswald (1859) Swab. Adm. 430, 166 Eng. Rep. R. 1200; The Vivar (1876) 2 P. D. 29; 35 L. T. 782, 25 W. R. 433, 3 Asp. Mar. Cas. 308; The Invincible (1814) 2 Gall. 29, Fed. Cas. No. 7,054; The Huna Johnson, 23 Stuart's V. Adm. Rep. 43. See also Marsden's Collisions at Sea (4th ed.) pp. 188-189.

[26] See 4 Phillimore's International Law, p. 815; Bar's Private International Law (2d ed.) pp. 720, 928; Dicey, Conflict of Laws (3d ed.) pp. 700-703 and 819; Foote's Private International Jurisprudence (3d ed.) pp. 486-495; Westlake, Private International Law (3d ed.) pp. 266-269.

the case if the collision occurred in French waters, regardless of the nationality of the parties, by virtue of Article XIV of the French Civil Code. And the French courts claim jurisdiction if the damaged ship is French, even though the tort occurred outside French waters and on the high seas. It seems, however, that in the absence of the consent of the parties, the French courts could not try a suit for damage if the collision occurred outside French waters between vessels which are both foreign. But in such a case the court has the right to order urgent measures having a provisionary or conservatory character.[27]

The Italian practice seems to go on a somewhat different principle.[28] In a case coming before the Court of Cassation of Florence in 1870 the court laid down the rule that the tribunal competent to take cognizance of and decide the responsibility for a collision is that of the place where the damaged ship takes refuge, or where the crew alone debarks when the ship has gone to the bottom. It is difficult to see any logical basis for such a theory of jurisdiction; for to make jurisdiction effective there must be some physical power or control over the defendants or the offending ship. It is submitted that the English and American rule offers the simplest and most logical solution of this question of jurisdiction in cases of collision.[29]

SALVAGE

The rules governing salvage claims present less diversity than is to be found in the case of almost any other maritime claim. As the court said in The Belgenland,

> "Both, [salvage and collision] when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris,* and are *prima facie* subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties."[30]

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[27] Pradier Fodéré, 2363: "L'abordeur et l'abordé sont l'un et l'autre étrangers, l'abordage a eu lieu en dehors des eaux françaises, en haute mer; si les juges français sont saisis par l'arbordé, ils ne pourront juger le fond qu'autant qu'ils seront en fait juges du lieu du paiement, ou si les deux parties consentent à se soummetre a leur jurisdiction; mais ils auront le pouvoir, dans tous les cas, et le devoir d'ordonner, le cas escheant, les mesures urgentes, ayant un caracters provisoire ou conservatoire."

[28] See *Journal du Droit International Privé,* T. VIII (1881) p. 177 *et suiv.*

[29] Germany and the Scandinavian countries are not incompetent when the suit for collision is between foreigners. Belgium seems to follow the United States. See Ripert, *Droit Maritime* (1923) Vol. III, 2106.

[30] 114 U. S. 355, 362. See The Good Intent, 1 Rob. Adm. 286.

But, although jurisdiction is present in case the rescued ship or the parties are before the court, the matter is nevertheless discretionary, and under certain circumstances the case will be dismissed. This is not likely to occur, however, if the parties are of different nationality, and consequently cannot be remitted to a "home forum."[31]

In the case of One Hundred and Ninety-Four Shawls, the court said,

> "When salvage services are eminently meritorious, and the only inquiry to be made is the rate of award to be allotted, Admiralty Courts would be solicitous to give every practicable dispatch to suits by the salvors, and relieve them both from the delay and expense of obtaining their just award."[32]

This case, however, was one where the court refused to entertain jurisdiction. The facts were as follows: The crew of the Reliance, a British ship, found the Lady Kenedy, also a British ship, apparently a derelict. The crew of the Reliance went on board the Lady Kenedy and removed a number of shawls and other property. The goods were taken to New York where they were libeled for salvage. The English consignees and others intervened as claimants. The answer to the libel charged the libelants with wanton misconduct in obtaining possession of the property, and prayed for the right to contest the claim before the courts of the home forum.

In this case the facts above mentioned were considered, together with the fact that it would be necessary to bring witnesses from England; and further that if it should be decreed that the goods be sold, the shawls would be practically unsalable in this country, whereas they would be quite valuable in England, to which country they had been consigned. In view of these facts the court refused to take jurisdiction and remanded the parties to their home forum.

It has seemed to the writer that the unsalability of the shawls in this country was hardly sufficient as a ground for denying jurisdiction. The libelants do not seem to have complained of their slender prospects; and the owners could have paid the salvage award in money.

It was also suggested in this case that certain acts of Parliament might govern, and it was questioned whether certain statutes applied to the master. This troubled the court somewhat. It hardly seems

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[31] See the opinion of Deady, J., in The City of Carlisle, supra, n. 18. See also Bernhard v. Creene, supra, n. 16, and The Noddleburn (1886) 28 Fed. 855.

[32] (1848) Abbot Adm. 317, 323, Fed. Cas. No. 10,521.

that the application or interpretation of a foreign law should be beyond the power or ability of an admiralty court, but there is always a marked disinclination toward enforcing foreign municipal law.[33] The only really tenable ground for refusing jurisdiction in this case is the fact that witnesses would have to be brought from England, which would take considerable time and work a hardship on the defendant. But to send the parties back to England would also be a hardship, although on the other side. And presumably it would take as much time to go from America to England as from England to America.

While the decision in this case seems questionable on the facts, the case stands as authority for the proposition that the court, even in salvage cases, in the exercise of its discretion may refuse jurisdiction.

WAGES

In the absence of treaty stipulations there can be no question of the right of our courts to take jurisdiction in a suit to recover wages. But here again jurisdiction is discretionary; and whether such a case will be heard must depend largely on the circumstances. It seems well established that if the voyage has been completed the seaman may sue. This is also true if the voyage has been broken up, as for example, where the ship has been wrecked, or has been sold under a decree of the court.[34]

The seaman may sue in case he has been discharged; and, generally speaking, when he has a right to be discharged, whether under the contract, or by reason of other facts, such as unseaworthiness of the vessel, harsh and cruel treatment, deviation, or unusual hazards attendant upon the continuation of the voyage.[35] But it was held in Davis v. Leslie[36] that a foreign seaman is not entitled to demand as a matter of right that the court take jurisdiction. The court in this case said,

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[33] Madonna d'Idra (1811) 1 Dods. 37, 165 Eng. Rep. R. 1224; The Johannes Christoph (1854) 2 Spinks Adm. 93, 164 Eng. Rep. R. 325. This is the position taken by the court in The Johan and Siegmund, supra, n. 3. The court there said that it had the necessary jurisdiction but was unwilling to enforce foreign municipal law.

[34] See Burckle v. The Tapperheten (1826) Fed. Cas. No. 2,141, and Orr v. The Achsah (1849) Fed. Cas. No. 10,586, where the voyage was broken up; and The Gazelle (1858) 1 Spragne, 378, Fed. Cas. No. 5,289, where the ship had been sold under attachment.

[35] But the court will not grant relief when the seaman has left the ship without cause. See The Infanta (1848) Abbot Adm. 268, Fed. Cas. No. 7, 030; Gardner v. Thomas, supra, n. 4; The Belvidere, supra, n. 15.

[36] (1848) Abbot Adm. 123, Fed. Cas. No. 3,639.

> ". . . . I understand the weight of authority . . . . to be, that . . . . the foreign libellant is regarded as not entitled to invoke the powers of the Court as a matter of absolute right; yet where the Court is satisfied that justice requires its interposition in his favor, those powers may and will be . . . exercised in his behalf."[37]

It seems from the opinion in The Brig Napoleon[38] that an American can demand, as a matter of right, that his case be heard.

An agreement entered into between the seamen and the owners or master that they will not sue for wages except in the courts of their own country will ordinarily be sufficient to induce the court to refuse jurisdiction and remand the parties to the home forum.[39]

In the absence of such an agreement not to sue, there is little question of the seaman's right to sue when he has been discharged; but when his right to sue is based on an allegation merely that he is entitled to a discharge, some questions may arise. As previously stated, harsh and cruel treatment will ordinarily justify the seaman in leaving the ship, and will induce the court to hear the case. One of the earliest cases on that point, and one which still stands as authority, is Weiberg v. Brig St. Olaff.[40] Here the treatment of the seaman was so cruel that he was compelled to leave the vessel. He was apprehended and returned to the ship and confined there by the captain, even while his case was being considered by the court. The Swedish consul protested vigorously against the court's taking jurisdiction. The court ordered the seaman discharged with wages, saying, "Captain Holmstead's conduct with regard to the libellants, hath been so cruel and unwarrantable by the maritime law, as would of itself have dissolved the contract. . . ."[41]

There is some authority for the statement that discharge, and wages, of course, may be claimed on the ground of deviation.[42] But there is a dictum by Judge Betts in Bucker v. Klorgetter[43] that jurisdiction would not be taken where discharge was claimed solely on the ground of deviation.

Another ground for claiming discharge is that to continue the voyage will subject the seamen to unusual hazards not contemplated in the shipping articles. Such a case is the Palace Shipping Company

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[37] Davis v. Leslie, Abbott Adm. 123, 131.
[38] (1845) Olcott, 208, Fed. Cas. No. 10,015.
[39] See Bucker v. Klorgetter (1849) Abbot Adm. 402, Fed. Cas. No. 2,083, and The Infanta, supra, n. 35.
[40] Supra, n. 20.
[41] Weiberg v. Brig. St. Olaff, 2 Pet. Adm. 428, 437.
[42] Moran v. Baudin (1788) 2 Pet. Adm. 415, Fed. Cas. No. 9,785.
[43] Supra, n. 39.

v. Craine.[44] Here seamen on a British vessel carrying goods declared by Russia to be contraband, refused to leave Hong-Kong for a port in Japan. This was during the Russian-Japanese war. Several British ships had already been sunk for carrying contraband. The seamen were tried before the port-magistrate of Hong-Kong, and were imprisoned. On their release they brought suit against the vessel. The court held that the men had been wrongfully imprisoned; that they could not be compelled to proceed on a voyage attended with risks not contemplated in the shipping articles; and that they were entitled to their wages. The court said,

> "It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels and nicely weigh the chances of capture."[45]

A similar result was reached in The Epsom,[46] during the World War. A British vessel was loaded with contraband, and German cruisers were lying in wait. Part of the crew refused to continue on the voyage, and libeled the ship. The court held that the danger from the German cruisers was an unusual hazard, one not contemplated in the shipping articles, and that the libelant was entitled to a discharge.

Jurisdiction Under Treaties

Questions arising in regard to the internal order of merchant vessels, matters of discipline, and disputes over wages are regulated by treaties between the United States and most of the other maritime nations, with the exception of Great Britain. Typical of such treaty stipulations is Article XI of the consular convention of June 1, 1910 between Sweden and the United States, which is here set forth:

> "The respective consuls general, vice consuls, deputy consuls general, deputy consuls, and consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of any differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore or in port, or when a person of the country not belonging to the crew shall be concerned therein.

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[44] [1907] A. C. 386, 76 L. J., K. B. 1079.
[45] Palace Shipping Co. v. Craine [1907] A. C. 386, 391.
[46] (1915) 227 Fed. 158.

"In all other cases the aforesaid authorities shall confine themselves to lending aid to the said consular officers, if they are requested to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

The cases which have arisen in the federal courts under treaties are not in accord, and the Supreme Court has not been required to pass on the points of difference. The federal cases may be grouped under three classes.

First, those cases which hold that even in the face of treaty provisions apparently excluding jurisdiction, the court may, under special circumstances, take jurisdiction. The first case under this class is The Amalia.[47] The decision in this case was placed on the ground that there was no Swedish consul in the district who might hear and adjust the libelant's case. In the view of this court the purpose of the treaty was not to deprive the libelant of his remedy, but merely to change the procedure and the court where the injured party should bring his cause; and when the consular court is lacking and the circumstances are extreme, the libelant must bring his suit in the admiralty court or go remediless.

Another case which is often cited as standing for this proposition is The Salomoni.[48] The facts were as follows: The libelant, who was a seaman on an Italian vessel, had been assaulted by the master while the vessel was in port. There was a treaty with Italy with the usual provision reserving to the consul questions affecting the internal order of the ship, wages, etc. In his libel the seaman did not allege the assault, but asked for wages only. The court dismissed the libel, holding that the matter of wages came within the exclusive jurisdiction of the consul. The court added, however, that had the libelant based his case on the alleged assault and asked for a discharge, jurisdiction would have been assumed. The court did not think that the expression, "differences between master and crew" contemplated an unjustifiable and cruel assault on the seaman. The court quoted from The Amalia.[49] But in that case jurisdiction was assumed on the ground that there was no consul in that district who could hear the case, and that the treaty did not intend that the seaman should be without a tribunal to hear his claim. In The Salomoni[50] the matter of the absence of an Italian consul was not raised. It would seem that The Salomoni really stands for the

[47] (1880) 3 Fed. 652.
[48] (1886) 29 Fed. 534.
[49] Supra, n. 47.
[50] Supra, n. 48.

sole proposition that the treaty deprives the court of jurisdiction over wage claims. Whatever else that was said in the case is dictum.

In spite of the fact that what the court said in The Salomoni about the interpretation of the treaty was dictum, it would seem that there is a real point here which many of the cases overlook The phrases "discipline of the ship" and "differences between master and crew" ought not to cover everything that may occur on shipboard. This distinction is well brought out in an Hawaiian case, Enos v. Sowles.[51] The libelant here was a Portuguese boy who had signed articles on an American ship. The master was guilty of repeated acts of sodomy against the boy. On one or two occasions the boy escaped from the vessel, but was always apprehended and returned, and subjected to further cruel treatment. A libel was ultimately filed in Hawaii in 1860. By treaty with that country the United States was entitled to the privileges of the most favored nation, which both countries seemed to admit included the right of our consuls to take jurisdiction over questions affecting the discipline of the ship.[52] Our consul in Hawaii protested vigorously, but the court took jurisdiction, the Supreme Court of Hawaii holding that this act of cruelty was not one coming within the purview of the treaty, not being a part of the discipline of the ship.[53]

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[51] (1860) 2 Hawaii, 332.

[52] This treaty provision received an interpretation in the case of The Baker (1907) 157 Fed. 485. In this case a foreign seaman libeled a German ship for an injury received through the alleged negligence of the master, while the ship was on the high seas. The court held that the word "differences" in the treaty did not cover a tort of this nature.

The Baker was cited and discussed in The Ester, supra, n. 24, but the court refused to follow it. The two cases arose in different districts, so The Baker cannot be considered as overruled.

It would seem that the strict construction of The Baker is more logical and more reasonable, since these treaties are in derogation of a rule of international law previously well established.

[53] Whether the "most favored nation" clause in treaties confers the benefits of consular jurisdiction over disputes between master and crew has been a matter of some difference of opinion. The attitude of our government has not been consistent on this and related points. In 1846 we find Mr. Buchanan denying to Austria that such a clause conferred consular jurisdiction. In 1853 Attorney-General Cushing held that the stipulation for the restitution of deserting seamen in our treaty with Norway and Sweden did not extend to Denmark by virtue of the most favored nation clause. But in Enos v. Sowles, supra, n. 51, in 1860 we find the American consul protesting that such a stipulation in our treaty with Hawaii conferred jurisdiction upon the consul in disputes between master and crew. In 1866 the Attorney-General advised that the American consul had this authority; and his opinion was adopted by Mr. Seward in his instructions of July 3, 1866 to the American minister-resident at Honolulu. See on this point Crandall, Treaties, Their Making and Enforcement (2d ed.) pp. 414-415.

A second class of cases dealing with the effect of treaty provisions holds that such treaties cannot deprive the libelant, if he is an American citizen, of his right of access to our courts. This is the rule laid down in Bolden v. Jensen,[54] The Falls of Keltie,[55] The Troop,[56] and The Neck.[57] All of these cases were decided in the same district, the district court of Washington. The last three were all decided by Judge Hanford. The federal courts of the other districts do not seem to have taken this view; and it is submitted that these cases from the Washington district are in direct conflict with the well established principle that a seaman duly enrolled on a foreign vessel is for the time being and with regard to his employment on that vessel, a citizen of the country to which the vessel belongs.

This question of the control over the crew and the nationality of the members of the crew is really more of a political than a judicial question. It has been the subject of frequent correspondence between this country and Great Britain and was one of the causes which led up to the War of 1812. The position which we took at that time has not been departed from, so far as the attitude of our government has been concerned; and it has not, I believe, been questioned since 1842, when our state department through Mr. Webster, then secretary of state, dispatched a communication to Lord Ashburton, British special minister to this country, as follows:

> "That rule announces, therefore what will hereafter be the principle maintained by their [the United States] government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them."[58]

It would seem, then, that the decisions of Judge Hanford ignore this important and well established principle that a member of the crew is to be treated for the time being as a citizen of the nation to which the ship belongs. The holding in The Albergen[59] is more in accord with the logic of the situation. In this case the federal district court held that the treaty with Holland had effectively deprived that court of jurisdiction in a suit for wages, and this even though the libelant was an American citizen.

The case of The Albergen is really representative of the third

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[54] (1895) 70 Fed. 505.
[55] (1902) 114 Fed. 357.
[56] (1902) 117 Fed. 557.
[57] (1905) 138 Fed. 144.
[58] In re Ross, supra, n. 21.
[59] (1915) 223 Fed. 443.

class of cases, which take the position that where the existing treaties upon their face exclude the jurisdiction of the court, such treaty stipulations are to receive faithful observance, and the court cannot take jurisdiction.[60] This class of cases represents the weight of authority on this point, not only in numbers but in the reason and logic of the rule laid down. The rule is broad and sweeping, and easy of application. It must be admitted that such a rule may frequently work a hardship on our own citizens, who, finding no consular court where they can obtain relief, or being unable to obtain satisfaction in the consular court, must resort to the courts of the flag nation. In Ex parte Anderson[61] the court held that it was without authority by virtue of our treaty with Norway to hear a suit by seamen, even though such seamen had been discharged from the ship. There is frequently little chance of the seaman being able to go to a foreign country and there prosecuting his suit successfully; and all the reasons which impelled the judges to act in the earlier cases apply here with equal force. But it must be assumed that these disadvantages have been anticipated by our nation in return for other advantages guaranteed under the treaty—advantages such as increased facility in the movement of ships, etc. And it may be worth mentioning that by all these treaties the advantages and disadvantages are reciprocal. As the court in The Ester pointed out,

> "It would not appear to be in the power of any court to disregard the law as embodied in the treaty stipulation because of the court's opinion that under the peculiar circumstances of the case the applicant will go bereft of justice unless this court awards it to him. The responsibility for such consequences rests upon the lawmaking, not the judicial department of the government."[62]

The question of the effect of such treaties has entered into the interpretation and construction to be placed on the Act of Congress of December 21, 1898,[63] which forbids the prepayment of wages to seamen, and provides certain penalties for the violation of the Act. The courts early held in Keney v. Blake[64] that this statute applied

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[60] The Marie (1892) 49 Fed. 286; The Elwine Kreplin (1872) 9 Blatch. 438, Fed. Cas. No. 4,426; The Burchard (1890) 42 Fed. 608; The Welhaven (1892) 55 Fed. 80; The Bound Brook (1906) 146 Fed. 160; Tellefsen v. Fee (1897) 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481. For a discussion of the constitutionality of such treaties see The Koenigin Luise (1910) 184 Fed. 170.

[61] (1910) 184 Fed. 114.

[62] 190 Fed. 216, 226.

[63] 30 U. S. Stats. at L. 763, U. S. Comp. Stats. (1918) § 8323, 9 Fed. Stats. Ann (2d ed.) 74.

[64] (1903) 125 Fed. 672.

to American seamen shipping in the United States on a British vessel. The proposition that the statute was applicable to seamen shipping in the United States on a foreign vessel was upheld in Patterson v. Bark Eudora.[65] As was to be expected, the federal court in the Washington district, consistent with its previous holdings, had no difficulty in The Neck,[66] in holding that this statute applied to foreign vessels, treaty or no treaty. The act contained the stipulation "provided no treaty conflicts"; but the Washington court took the view that the treaty did not deprive that court of jurisdiction, first, on the ground that admiralty has jurisdiction over such cases by the constitution, and that such jurisdiction cannot be abrogated by treaty or act of congress so as to deprive an American citizen of his right to sue in our courts; and second, that by the terms of the statute a contract entered into with a seaman, by which contract wages were to be prepaid, was void, and being void, the libelant had the right to leave the ship at any time. He was never legally bound to serve as a member of the crew; and having exercised his right to leave the ship, the libelant cannot be said to be a member of the crew at the time the action was brought.

With equal consistency the courts of the other federal districts had adopted a "hands-off" doctrine when such cases arise against a ship of a nation with whom we have a treaty providing for consular jurisdiction over such maritime disputes. Such is the case of The Bound Brook.[67] The holding in this case would render ineffective the Act of Congress under discussion, so far as foreign vessels are concerned, if we have a consular jurisdiction treaty with the flag nation. It is not conceivable that the foreign consul would apply our statute or enforce our law in such a case. As a consequence our own ships, and those of England (with whom we have no consular jurisdiction treaty) will be at considerable disadvantage. The theory on which The Neck[68] was decided, namely, that the contract being void, the seaman was never legally bound to serve as a member of the crew, but was nevertheless entitled to sue under the statute, would make possible the application of this wholly salutary provision of the statute to all foreign vessels shipping seamen in this country. It must be admitted, however, that it seems like stretching a point to say that even though the contract was void or unenforceable as far as the ship was concerned, that when

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[65] (1903) 190 U. S. 169, 47 L. Ed. 1002, 23 Sup. Ct. Rep. 821.
[66] Supra, n. 57.
[67] Supra, n. 60.
[68] Supra, n. 57.

the seaman had entered upon the performance of the contract and completed the voyage, he was not a member of the crew.

It is interesting to note the application and interpretation that has been placed on the Seaman's Act of 1915.[69] This act in brief contains provisions against the prepayment of wages, and requiring the payment on demand of the seaman of a certain part of the wages after part of the voyage has been completed. The court in Strathhearn Steamship Company v. Dillon[70] held that the section of the act in regard to payment of wages on demand applied to seamen of whatever nation who were on ships which came into and were in ports of the United States; and this notwithstanding any contracts entered into elsewhere between the ship and the seamen. But in Sandberg v. McDonald[71] the court held that the provision against prepayment of wages could not apply to a foreign vessel shipping seamen in a foreign port, if the advances were made in that place; and that the seamen could not, when in this country, take advantage of the statute. Justice Holmes dissented in this case, holding to a strict grammatical interpretation of the statute, and insisting that the rule should apply to all vessels which come to our ports, regardless of where the advances were made.

Contracts aside from those of seamen do not present a great deal of difficulty in the matter of enforcement, so far as jurisdictional questions are concerned. The rule seems to be well established that any contract which gives rise to a maritime lien can be enforced in an admiralty court. This is on the principle of the civil law that in proceedings in rem the proper forum is the *locus rei sitae.* The leading case on this point is The Jerusalem.[72] This was a suit on a bottomry bond. The parties were subjects of the Sublime Porte. It did not appear that the parties ever intended that the vessel should come to the United States. Justice Story held this immaterial, and in upholding jurisdiction said,

> "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts, where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy."[73]

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[69] Act of Mar. 4, 1915, ch. 153, § 11, 38 U. S. Stats. at L. 1168, U. S. Comp. Stats. (1918) § 8323, 9 Fed. Stats. Ann. (2d ed.) 174.

[70] (1920) 252 U. S. 348, 64 L. Ed. 607, 40 Sup. Ct. Rep. 350.

[71] (1918) 248 U. S. 185, 63 L. Ed. 200, 39 Sup. Ct. Rep. 84.

[72] (1814) 2 Gall. 191, Fed. Cas. No. 7,293.

[73] The Jerusalem, 2 Gall. 191, 197.

Possessory Suits

Admiralty courts will ordinarily refuse to take jurisdiction in possessory suits between foreigners. The necessary jurisdiction exists, but there is the unwillingness to enforce foreign municipal law which was discussed earlier in this article. In the case of The See Reuter[74] the court was asked to enforce a decree ordering the master of the ship to deliver up possession of the vessel. The decree had been issued by a court of the country to which the ship belonged. The court enforced the decree, but added,

> "The court is very unwilling to enter upon such questions; and has never, I believe, entertained suits of this kind, unless the case has been referred to its decision by the consent of the parties, or by the intervention of the representative of the foreign state, devolving jurisdiction of his own country on this court."[75]

The phrase about devolving jurisdiction, in the above quotation, is obviously open to the same criticism expressed by Dr. Lushington in The Golubchick.[76]

Jurisdiction Over Crimes and Misdemeanors

Just how far a foreign ship is subject to the criminal jurisdiction of the territorial state is, as a matter of international law, a point much controverted by the cases and the authorities. There are two opposing views, the British and the French.[77] The former holds to the principle of international law that jurisdiction exists over all persons and things physically present within a nation's territory, unless they are excepted by treaty or universally accepted immunity. So Great Britain claims jurisdiction over crimes committed on all ships in British ports, and on British ships in foreign ports, recognizing, however, a concurrent jurisdiction on the part of the flag state in the first case, and of the territory where the act occurred in the second.[78]

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[74] (1811) 1 Dods. 22, 6 Eng. Adm. Rep. 21, 165 Eng. Rep. R. 1219.

[75] The See Reuter, 1 Dods. 22, 23.

[76] Supra, n. 11.

[77] For a somewhat fuller discussion of the general question, see Charteris, Legal Position of Merchantmen in Foreign Ports aud National Waters, British Year Book of International Law, 1920-1921, p. 45.

[78] In The Queen v. Anderson (1868) L. R. 1 Crown Cas. Res. 161, the facts were as follows: An American was serving on a British vessel. He committed murder while the vessel was lying in the river Garonne, within the territorial boundaries of France. He was indicted in the Central Criminal Court in England, where objection to the jurisdiction was taken.

It was held that the defendant was amenable to the laws of France and

France in the *Avis du Conseil d'Etat* of 1806 adopted the principle of non-interference with the internal order of foreign ships, embracing crimes and offenses committed on board between members of the crew, and matters of discipline. The right to intervene, however, was reserved where one of the parties was not connected with the ship, or where the peace or good order of the port was disturbed, or the interference of the local authorities was invoked.

The *Avis* of 1806 was provoked by the cases of The Newton and The Sally, which arose under a treaty with the United States, containing provisions substantially the same as the *Avis*. French officials had intervened where acts of violence had been committed by members of the crews of American ships. Jurisdiction was claimed by the United States consul under the treaty, and it was held that jurisdiction properly belonged to the consul, because the acts committed did not compromise the peace and tranquility of the port.

This doctrine received a stricter interpretation in the case of The Jally, which came before the Cour de Cassation in 1859. In this case the crime was murder. It was held that jurisdiction would be assumed if the crime committed were a very grave one, which no nation should permit to go unpunished. This is said still to be the practice in France.

The United States in Wildenhus's Case[79] adopted the principle that "peace and tranquility of the port" did not necessarily mean actual disturbance in the port at the time of the act. It is sufficient that the gravity of the crime, when it becomes known, awakes public interest and affects the community at large. This is sufficient "disorder" to warrant the local authorities in taking jurisdiction.

The attitude of the United States seems to have shifted several times during the course of its history;[80] but the present view is

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at the same time to the laws of England, for he was under the protection of British law and hence subject to its provisions. Chief Justice Bovill in his opinion said, "There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle, that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation." L. R. 1 Crown Cas. Res. 161, 165-166. Justice Blackburn in the same case at page 170, said, "Where a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag. . . ."

[79] (1887) 120 U. S. 1, 30 L. Ed. 565, 7 Sup. Ct. Rep. 385.

[80] See 2 Moore, International Law Digest, pp. 269-362.

undoubtedly that in the absence of treaty the local jurisdiction takes precedence over the consul's authority, the latter being only recognized in disputes on board not affecting the peace of the port. And the interpretation of "peace of the port" stands as stated in the Wildenhus case.[81]

It is difficult to say that either the French or the British view is the international rule. The British rule is founded on the well established theory of territorial jurisdiction; the French on motives of policy and convenience. In the absence of treaty the United States follows the British view as does Russia—and possibly Germany, although the authorities in the latter country seem to be conflicting.

Austria Hungary, Chile, and Ecuador do not seem to follow the French view. Argentine follows the British theory, as does Holland.

It must be admitted that the French view forms the basis for a great many treaties entered into by the United States and other maritime countries. But England has never been a party to any such treaty, adhering rigidly to the view that the French rule was in derogation of international law, as indeed the French seem to admit in the case of The Tempest, decided by the Cour de Cassation in 1859.

Hobart Coffey.

University of Michigan.

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[81] Supra, n. 79.