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The Lingering Influence of Richard II and Lord Coke in the American Admiralty

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Cease the reason; cease the rule¹

I INTRODUCTION

Admiralty, in its broad and historic sense, is a national regime of control and protection in territorial waters and limited rights and powers in international and foreign waters, generally asserted and acknowledged by maritime nations for centuries. While it is recognized to be a feature of customary international law,² each nation organizes its operation domestically according to its own situation and institutions. In Britain, France, and other European nations with which we were most familiar, admiralty was a jurisdiction conferred on an admiral as control of the navy and of navigable waters and maritime matters in their military, regulatory and judicial respects. The law administered by the admirals was the civil law of maritime and international commerce, rather than the common law of England ashore. That system existed at the time of American independence.

Until then, the American colonies had operated within the English regime, in which the admiralty regulatory and police power was limited to avoid conflict with the sheriffs ashore, and the judicial admiralty power for the same reason and further by the antipathy and jealousy of common law lawyers and judges. Independence enabled us to shed some of that baggage

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¹Prof. William Warren Ferrier, Jr.'s rendition of the maxim in classes at Boalt Hall.

²See, e.g., 2 HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE*, bk. II, ch. III, §§ XIII, XIV, XV & nn., pp. 212-16 (Francis W. Kelsey et al. trans. Oxford 1925). (citing ancient sources); THOMAS WEMYSS FULTON, *THE SOVEREIGNTY OF THE SEA* 555-66 (Edinburgh & London 1911) (territorial seas according to Bynkershoek, Puffendorf, Vattel and others); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* §§ 106, 113, 124, 192-194 (8th ed. with Dana notes, Boston 1866) (enforcement on high seas; territorial seas).

as we moved forward through Confederation and under the Constitution. The vastly important regulatory and police power passed from the navy mainly to what ultimately became the Coast Guard, still a (specialized) naval force, and the judicial power was allocated to the federal courts, still practicing civil law in admiralty and equity cases (anticipating similar devolutions in other countries).³

Although the principal English restrictions were pointless here, discarding them was a slow process. The restriction of contracts made on land was put down by Story in 1815⁴ and afterward disregarded for most purposes but curiously preserved in some respects to this day. It was the mid-19th century before it was clearly recognized that the geographical restrictions to tidal waters outside the counties were neither obligatory nor convenient.⁵ In the early 20th century, by legislation, we breached the barriers to equity in respect of mortgages only,⁶ and to contracts performed in part on land as to longshoremen and harbor workers only.⁷ Only in the last few years have we discovered that the competition of admiralty and equity and of their benches and bars was dissolved when they were joined in the same court.⁸

It must be fair to say that a useful commercial and legal regime should be spread as wide as its usefulness, with as few artificial and irrelevant barriers as possible. All of our irrelevant barriers have been discredited in various situations, but two of them, *viz.* as to contracts made on land or to be performed in part on land, remain anomalously in two irrational and inconvenient applications. As they have no statutory sanction, they can be corrected by the courts, just as they have nullified them both in other situations and rationalized the jurisdiction in other respects.

If you already agree, you may skip to the Conclusion, unless you might enjoy some confirmatory history.

II

THE CAUSES AND MEANS OF THE INHERITED RESTRICTIONS

In ancient times and for centuries, there were “admirals” but no “admiralty,” as we came to think of it. I have written elsewhere of examples and

³See generally, Graydon S. Staring, *The American Admiralty: Division and Devolution*, 21 U.S.F. MAR. L.J. 75 (2008-09).

⁴*De Lovio v. Boit*, 7 F. Cas. 418 (No. 3776), 1997 AMC 559 (C.C.D. Mass. 1815).

⁵*Waring v. Clarke*, 46 U.S. (5 How.) 441, 461-62, 2006 AMC 2646, 2659 (1847); *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451, 1999 AMC 2092, 2094 (1851).

⁶Ship Mortgage Act, of June 5, 1920, ch 250 § 30, 41 Stat. 1000, now as amended 46 U.S.C. §§ 31321 et seq.

⁷Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424.

⁸See II, A, 4, *infra*.

of the seas they dominated, such as *mare nostrum* of the Romans, which they ruled, by virtue of their dominance of the lands around the Mediterranean, and the continuance of this pattern in Europe and Britain into the Middle Ages, and the origin and development of the English admiralty,⁹ which has so much influenced ours, and will state it summarily here.

The English admiralty can be said to have taken form in the 14th century as the King's government of the immodestly broad oceanic province claimed by him to project his power seaward for the military and commercial protection of the kingdom and especially in opposition to the similarly immodest claims of the King of France.¹⁰ The admiral's authority was defined by his royal commission and certain regulations, rather than by statute, and was a plenary authority to govern and defend the king's waters.

The Lord High Admiral's authority is described in the late 17th century, the time of greatest relevance to the American colonies, by a distinguished statesman and judge, to be "the Jurisdiction over the Seas of *England* and *Ireland*, and the Dominions and Isles of the same, as a Province . . . committed to his Custody and Tuition, as to a President, to defend the same, as in the Dominion of the King."¹¹ And he is described by another learned judge of the period as "concredited with the management of all Marine Affairs, as well in respect of Jurisdiction as Protection . . . that high Officer or Magistrate to whom is committed the Government of the King's Navy, with power of Decision in all Causes Maritime as well Civil as Criminal."¹² The French admiralty had developed along the same lines, embracing substantially the same legal powers.¹³ The admiralties of Spain, Denmark and Scotland are reported to have developed similarly.¹⁴ Such jurisdictions, with varying details, undoubtedly became customary features of sovereignty.

But the province of the English admiral was not intended to supplant or interfere with the King's government ashore, which was implemented by the

⁹See Graydon S. Staring, *The Admiralty Jurisdiction of Torts and Crimes and the Failed Search for its Purposes*, 38 J. Mar. L. & Comm. 433, 436-45 (2007).

¹⁰*Id.*, at 439-40.

¹¹Richard Zouch, *Jurisdiction of the Admiralty*, in GERARD MALYNES, *LEX MERCATORIA* 91-92, Ass. 2 (London 1686).

¹²JOHN GODOLPHIN, *A VIEW OF THE ADMIRAL JURISDICTION* 26 (2d ed. London 1685).

¹³See 1 RENÉ-JOSUÉ VALIN, *NOUVEAU COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE*, Tit. 1, p. 32; Tit. 2, arts. 1-3, pp. 105, 112, 119 (various torts and contract matters), arts. 5 and 6, pp. 121, 128 (fish and fisheries); art. 10, p. 134 (crimes and offenses) (La Rochelle 1760); see also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 106 n. 23 (1820) (Marshall, C.J.): "The person who filled this high station had jurisdiction by himself or his deputies, of all crimes and offenses committed on the sea, its ports, harbours, and shores." (citing 1 VALIN, *supra*, Tit. 2. *De la Compétence*, art. 10.); compare admiral's commission, text at note 19.

¹⁴Zouch, *supra* note 11, at 91, Ass. 1.

sheriffs of the counties,¹⁵ who would not have had facilities for enforcement of peace and law in the waters offshore. The short and narrow inland waters presumably carried only local commerce and were manageable from shore. Hence the ancient limits to tidal waters, no doubt an early understanding, as it is found in the early commissions of the admirals reviewed and translated by Justice Story.¹⁶

In the reign of Richard II in 1389 and 1391, two statutes were enacted in response to complaints that the admirals had thrust their jurisdictions and activities too far inland, as the statutes recited. The first declared “that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea . . .”¹⁷ The second, reciting encroachments on “divers jurisdictions, franchises, and many other profits, pertaining to our lord the King, and to other lords, cities and boroughs,” declared that “of all manner of contracts, pleas and quarrels, and all other things rising within the body of a county, as well by land as by water, and also of wreck of the sea, the Admiral’s Court shall have no manner of cognizance . . .”¹⁸ These words made more explicit the exclusion of *infra corpus comitatus* (where the sheriff’s authority prevailed); further words fixed a bright-line limit at the first bridge.

The enforcement of these restrictions was accomplished by writs of prohibition to the High Court of Admiralty from the King’s Bench, which claimed superiority as a “court of record,” in the 16th century, and notoriously under Lord Coke in the 17th. The effects of the geographic terms of the Ricardian statutes on jurisdiction of torts and crimes are fairly obvious. Less obvious are the effects of the second one on commercial matters such as charters, purchase and sale, chandlery, and construction and repair because “things rising within the body of a county” were interpreted by the King’s Bench to include contracts made on land for services on the sea. This was a serious limitation on the grants of authority in the admirals’ commissions continuously from earliest times and onward, which included these or similar words (as translated from Latin):

to hold consuance of pleas, debts, bills of exchange, policies of insurance, accounts, charter parties, contractions, bills of lading, and all other contracts which any ways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business, or injury whatsoever, had or done in, or upon, or through

¹⁵See 1 SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW*, 532-34 (2d ed. 1899); 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 328 (1765) (“the sheriff does all the king’s business in the county”).

¹⁶De Lovio, *supra* note 3, 7 F. Cas. at 421, 1997 AMC at 556-57.

¹⁷13 Rich. II, ch. 5.

¹⁸15 Rich. II, ch. 3.

the seas, or public rivers, or fresh waters, streams, and havens and places subject to overflowing, whatsoever, within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them or either of them, from any the said first bridges whatsoever, towards the sea, . . .¹⁹

At their heights, the vehemence of these controversies between the courts led to certain compromises, apparently mediated by the Crown and not very favorable to admiralty. For example, “a prohibition is not to be granted” against a suit for breach of charter unless “the question be, whether the charter-party were made . . . or . . . release[d] . . . within the realm;” or against a suit “for building, amending, saving, or necessary victualling of a ship, against the ship itself and not against any party by name.”²⁰ Noteworthy, however, is the acknowledgement of admiralty jurisdiction in rem in ship-building suits, having exclusive jurisdiction of in rem actions provided they were not joined with a personal claim. The history of this strife and the idiosyncrasies of the rules and exceptions and evasions; and the consequent embarrassment of commerce, both before and afterwards, have been discussed critically in a classic work by Dr. Arthur Browne, a distinguished professor of the 18th century.²¹

The disputes through that period were fueled by a seemingly implacable jealousy, financial, professional and perhaps ethnic. The Normans had brought to England the civil (Roman) law and applied it, not only in the ecclesiastical courts, but in a number of others including the admiralty. The common law bench and bar resisted the encroachment of the civilians and considered the common law superior.²² The learned civilians established themselves in an elite, exclusive bar as members of Doctors’ Commons, practicing only in the admiralty and ecclesiastical courts and certain others where the civil law prevailed. They were thus in financial as well as cultural competition with the common law until mid-19th century and “The Fall of Doctors’ Commons,” as Dr. Wiswall has entitled his discussion of the institution.²³

¹⁹1 ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY* ch. II § 23 (7th ed.1958 —) (hereinafter 1 BENEDICT).

²⁰Council Table Register of Causes, Feb. 18, 1632 (before the King and Privy Council) quoted in 2 ARTHUR BROWNE, *A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF ADMIRALTY* 78-79 (2d ed. London 1802) (hereinafter 2 BROWNE); 1 BENEDICT, ch. III § 44.

²¹2 BROWNE, *supra*, at 72-98; see also 1 BENEDICT, ch. III.

²²See, SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (trans. Francis Gregor, with notes of Amos Ross, Cincinnati 1874) (Latin text written ca. 1464-70 (?) and first printed London 1537) chs. XLVII-XLVIII on Norman introduction of civil law; chs. XIX-XLI comparing civil unfavorably to common law).

²³See F.L. WISWALL, JR., *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800*, ch. 3 (pp. 75-95) (London 1970).

We do not see it argued that the public was benefitted by forcing the cases into the common law courts. According to Dr. Browne, the High Court of Admiralty was much more flexible and accommodating in its procedures and far more expeditious in its business and therefore enjoyed the favor of merchants.²⁴ “[A]ll causes were determined with the utmost expedition, according to the style of the court, not from term to term, but from day to day, and tide to tide, all the year around.”²⁵ William Prynne, a learned and courageous critic, contemporaneous with the disputes, also wrote against a fiction of the Common Pleas that contracts really made at sea or abroad were not so made but at Cheapside in London or Islington:

But these fictions are meerly invented to deprive merchants, marriners, and others, of their ordinary speedy, legal suits, remedies for such foreign contracts, Bargains made, and things done beyond the Seas, in the Admirals Court, by the Law of *Merchants, Oleron*, and *Civil Law* appointed to decide them with all expedition; and to put them to an extraordinary, extrajudicial way, and more costly, dilatory tryal in the Courts at Westminster. . . whose delays and Termes they and their Witnesses cannot attend; to their great prejudice, vexation, expense, and disappointment of their Voyages.²⁶

One more line of development needs to be mentioned to bring us to the stage existing at American independence. Vice admiralties were established by the Crown in all the American colonies and the governors were commissioned vice admirals. Their responsibilities and powers as such were defined by their commissions in somewhat broader terms than those of the admirals. The broad terms of vice admiralty power were filled out with occasional details; the commission as vice admiral of Lord Cornbury, Governor of New York, Connecticut, and New Jersey, which appears to cede him the king’s maritime powers, is illustrative; it grants him “our power and authority in and “through. . . all and every the sea shore, public streams, ports, fresh water rivers, creeks, and arms, as well of the sea, as of the rivers and coasts . . . of our said provinces and colonies.”²⁷ The particulars of authority that follow reiterate the reference to contracts and the jurisdiction of “banks or shores.”²⁸

These and similar features tended to define and limit our understanding of admiralty in 1776 and still in 1789. The States had succeeded to these powers upon their independence and exercised them as characteristic of

²⁴2 BROWNE, at 76-77.

²⁵Id., at 77.

²⁶WILLIAM PRYNNE, ANIMADVERSIONS ON COKE’S FOURTH PART OF THE INSTITUTES 95-96 (London 1669).

²⁷1 BENEDICT, ch. V § 65, [in translation from the Latin].

²⁸Id., at 5-7 to 5-8.

Admiralty until 1789,²⁹ when the Constitution was adopted, allocating them to the federal government.

III CORRECTION AND RESTITUTION BY COURT AND CONGRESS

A. Practice at the Outset

As lawyers and political scholars are aware, the relatively short Constitution of the United States omits mention of many matters it is now considered to refer to. Such are historical and technical matters unknown when it was adopted, matters ignored or neglected, and implications later perceived. Some of these are patched up by the courts, and some extensions or inclusions (not contractions, I think) are adopted by Congress and considered reasonable interpretations. The admiralty power has had to be extensively redefined by these means.

The maritime States had admiralty courts, mostly exercising without interruption the jurisdictions of their former vice-admiralty courts,³⁰ while State governments also exercised their considerable other colonial maritime powers. The Articles of Confederation gave Congress exclusive power to conduct foreign affairs and maintain a navy,³¹ reserving to the States certain rights to maintain war vessels to protect them or their trades.³² The judicial jurisdiction was split between the States and the Confederation, which had certain criminal jurisdiction and the power to make prize rules and decide

²⁹See CHARLES MERRILL HOUGH (ED.) REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK 243 (1925); Frederick Bernays Wiener, *Notes on the Rhode Island Admiralty, 1727-1790*, 46 HARV. L. REV. 44, 59–60 (1932) (Rhode Island state court established 1776 and granted instance jurisdiction 1780); DAVID R. OWEN & MICHAEL G. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA 219–20 (1995) (Maryland state court established 1776); Jonathon M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. MAR. L. & COM. 361, 379–80 (1999) (“[S]tates with a good deal of maritime business—New York, Maryland, Virginia, Rhode Island, Massachusetts, and Pennsylvania—provided that special admiralty courts would hear all sorts of private maritime litigation.”).

³⁰See HOUGH, *supra*, at 243 *et seq.* (1925); Wiener, *supra*, at 59–60 (R.I. State court established 1776 and granted instance jurisdiction 1780); OWEN & TOLLEY, *supra*, at 219–20 (Maryland State court established 1776); Gutoff, *supra*, at 379–80 (N.Y., Md., Va., R.I., Mass. and Pa. retained instance causes in their admiralty courts).

³¹Articles of Confederation, art. IX.

³²*Id.*, art. VI.

appeals in prize cases,³³ leaving to the States the rest of admiralty. The leaders of the admiralty bar in New York were the same before and after the Revolution,³⁴ and probably this continuity was true in other colonies. When the judicial jurisdiction was allocated to the federal courts, they went on practicing the maritime law they were used to, with the restraints the English courts had placed on the historic jurisdiction; this is shown by the lack of any indication to the contrary in the early reports. It remained for the pressures of growing commerce and industry later to call those restraints in question, one by one.

B. Expanded Construction by the Court

1. Correction of Omitted Reference to the Maritime Law

A single great oversight required correction; the framers had left uncaulked a large seam in the admiral's vessel, through which much brackish jurisprudence was admitted, making her tender and cranky. With little or no discussion disclosed by the record, they had allocated to the federal courts the admiralty jurisdiction that then belonged to the States in virtue of their sovereignties,³⁵ and said nothing about the law. Thus they gave the courts the power to render judgments based on the customary law as it might be understood or amended in the relevant State, but no apparent authority to amend or supplement it. Over the following decades States enacted various and dissonant bits of maritime law.³⁶ In 1867 the Court held that State vessel lien laws were unconstitutional insofar as they granted the State courts the power to enforce the liens,³⁷ but allowed that the State liens could be

³³Id., art. IX ("rules for deciding ... what captures ... shall be legal ... courts for the trial of piracies and felonies ... on the high seas ... courts for ... appeals in all cases of captures ..."); see also *United States v. Flores*, 289 U.S. 137, 147-48, 1933 AMC 649, 651-52 (1933).

³⁴See HOUGH, *supra* note 29 (indicating continual appearances of same few proctors); Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in ABA, *POLITICAL SEPARATION AND LEGAL CONTINUITY* 3, 22, 24 (1976) (same names leaders of later N.Y. bar).

³⁵See JAMES MADISON, *RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787*, H. DOC. NO. 398, 158 (G.P.O. 1927) ("James Wilson ... said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen;" see also *United States v. Flores*, *supra* note 33, 289 U.S. at 147-48, 1933 AMC at 651-52 and nn. 2 and 3 (1933).

³⁶See, e.g., *Hine v. The Trevor*, 71 U.S. (4 Wall.) 555, 561, 2009 AMC 263, 266 (1866) ("Nearly all the States ... have statutes authorizing their courts, by proceedings in rem, to enforce contracts or redress torts, which, if they had the same relation to the sea that they have to the waters of those rivers, would be conceded to be the subjects of admiralty jurisdiction."

³⁷Id. (Ia. passenger injury lien); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867) (Calif. passenger contract lien).

enforced in admiralty.³⁸ In 1875, the tension between the general maritime law and State legislative and judicial deviations culminated in *The Lottawanna*³⁹ where the Supreme Court declared:

The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.”

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The doctrine of Uniformity under federal control was thus established, as against deviant State law, between private parties. It was later reconfirmed against an unsuccessful challenge by Holmes, J. in *Southern Pacific Co. v. Jensen*.⁴⁰

2. Extension to Inland Waters; Ricardian Statutes Renounced

History shows that the familiar English jurisdiction was framed in general terms, very pragmatically, not to conflict with the jurisdictions of the sheriffs, which within their counties ashore was very broad,⁴¹ and was also restrained by the Ricardian statutes, broadly interpreted and strictly enforced by the King’s Bench. The American limitation of Admiralty to tidal waters outside the body of any county, continuing the practice under English law, ended in time as a result of the Louisiana Purchase and the consequence that maritime commerce pushed much farther into the interior of the country than in England. In 1847 in *Waring v. Clarke*,⁴² the Court held that the Ricardian statutes excluding admiralty from jurisdiction *infra corpus comitatus* were not in force here and upheld jurisdiction of a collision within the ebb and flow of the tides but also within the body of a county. Four years later, in *The Genesee Chief*,⁴³ the Court, considering the constitutionality of

³⁸See *Perry v. Haines*, 191 U.S. 17 (1904) (N.Y. repair lien).

³⁹88 U.S. (21 Wall.) 558, 574-75, 1996 AMC 2372, 2379-80 (1875).

⁴⁰244 U.S. 205, 218, 1996 AMC 2076, 2086 (Holmes, J. dissenting) (1917).

⁴¹See *Staring*, supra note 9, at 439-40 and authorities cited.

⁴²Supra note 5, 46 U.S. at 461-62, 2006 AMC at 2659.

⁴³53 U.S. (12 How.) 443, 451, 1999 AMC 2092, 2094 (1851).

an act of Congress extending admiralty jurisdiction to the Great Lakes and their connecting waters, which were not tidal, said that its past decisions seemed to imply that the constitutional jurisdiction was limited to tide-waters, while “the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western states.” It upheld the act on the strength of the geographic and commercial distinctions, finding that geographical restrictions of admiralty waters suitable in England were less suitable here, and holding that Congress had the power to adjust the jurisdiction within the reasonable scope of the constitutional allocation. Thus limitation to navigable waters connecting with the sea or between States became and remained the only maritime restriction.

In *Waring*, in order to reject the *infra corpus comitatus* restriction, the Court considered the force of the Ricardian statutes and prohibitions by the Common Pleas and declared that the United States did not adopt them and that there was an “unanswerable constitutional objection” to the notion of having inherited limitations imposed on the jurisdiction in England.⁴⁴ That was clearly a holding and it should have followed that the statutes were invalid not only for the immediate issue but for any other that might arise. The entire web that Lord Coke and his colleagues wove from those statutes should have followed them into oblivion at once but did not. This would have included the exclusions of contracts made on land and contracts not to be performed entirely at sea, which were spun from the words of the statutes: “anything done within the realm” (1389) and “things rising within the bodies of the counties” (1391). They remained in force, however, weakened from time to time, and not completely renounced to this day.

3. *Extension to Acts Done on Land*

The contest that led to the narrow restriction of admiralty waters had led also to the exclusion of torts consummated and transactions concluded ashore. These resulted by the time of the American Revolution in admitting a very limited class of contract cases, excluding most familiar commercial transactions for the maintenance, provisioning and operation of vessels, and even salvage if the property had been cast on shore,⁴⁵ presumably because performance would be partly on land. While torts consummated on land remained outside until the late 20th century, the courts began earlier to correct and extend the commercial jurisdiction. Their first and major impetus

⁴⁴Waring, *supra* note 5, 46 U.S. at 457-58, 2006 AMC at 2654.

⁴⁵See 1 BENEDICT, ch. III § 51 (“salvage where the property was not cast on shore”).

was undoubtedly Story's classic opinion in *De Lovio v. Boit*, where he explored the broad early English jurisdiction, declared that the Ricardian statutes did not have force in the colonies, and that the jurisdiction extended to "all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea."⁴⁶

In 1848 the Supreme Court upheld admiralty jurisdiction of a contract of affreightment made on land. The ground of the objection was traced to the Ricardian statutes and the Court discussed it as though ignorant of *Waring* decided the year before. Concluding that jurisdiction was not limited to that of the English court obtaining at the time of the Revolution, it pointed out that in the Judiciary Act of 1789 Congress had included in the admiralty jurisdiction seizures on navigable waters under the revenue and navigation laws, and that it had already upheld the jurisdiction to enforce liens for supplies of repairs and necessaries to vessels, none of which had been in the jurisdiction of the English admiralty. The Court summarized the rule to be that jurisdiction depended on "the nature and subject matter of the contract — whether it was a maritime contract and the service maritime service . . . , to be substantially performed upon the sea or tidewaters . . ."⁴⁷ There were dissents in that case; the issue continued to be raised, and in 1871 the Court, considering a marine insurance policy, rejected the objection that it was made on land, and held unanimously that jurisdiction depended on "whether the contract was or was not a maritime contract . . . [and] whether maritime or not maritime depended, not on the place where the contract was made, but on the subject-matter of the contract."⁴⁸ And if there was ever an American denial of admiralty jurisdiction of salvage because the vessel was stranded, it is inconspicuous.

4. Further Relaxation of Contract Barriers

In 1855 the Court, in *Minturn v. Maynard*, affirmed the dismissal of a claim by a ship's agent for money owed by a shipowner briefly for the reason that: "There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of assumpsit, in a common law court, is the proper remedy."⁴⁹ No further premises are stated but it appears

⁴⁶*De Lovio*, supra note 4, 7 F. Cas. at 444, 1997 AMC at 604.

⁴⁷*New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 392, 2009 AMC 2320, 2337 (1848).

⁴⁸*New England Marine Ins. Co. v. Dunham*, 78 U.S. (7 Wall.) 1, 29, 1997 AMC 2394, 2403 (1871).

⁴⁹*Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855).

to have borne Lord Coke's fingerprints, since account was a subject for equity, and *indebitatus assumpsit* arising on land without a hypothecation of the vessel would have been for the common law. This was taken until 1991 to apply to all agency contracts. In 1974 the Ninth Circuit broke ranks and decided that the services provided by a husbanding agent were maritime and, as the agent supervised them, its contract was maritime, and that *Minturn* and its followers were out of date.⁵⁰ In 1991, the Court resolved the circuit conflict by overruling *Minturn*, rejecting its somewhat uncertain premises, observing that in 1956 the Court had held that "admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided the unjust enrichment arose as a result of the breach of a maritime contract."⁵¹ The issue was "whether the nature of the transaction was maritime" and that test was satisfied by an agency to supply fuels to vessels.⁵²

In 2004, the Court appears to have driven a stake through the corpse of part performance on land. For many years, mixed contracts calling for performance both on navigable water and land had been entertained in admiralty only if the performance on land were merely "incidental." By far the most of such mixed contracts were bills of lading calling for some land transportation at the end of the voyage. Courts allowed jurisdiction only where the *terrene* performance was subjectively judged incidental to the whole. In the *Kirby* case, the Court abandoned that test, declared that "the true criterion is whether [a contract] has 'reference to maritime service or maritime transactions,'"⁵³ and that the exception in the case of maritime carriage of goods would now be where the "sea components are insubstantial, [and] then the bill is not a maritime contract."⁵⁴ Taking "insubstantial" in its proper sense of lacking substance, it is a very much more objective exception than the former one. The specific result was to recognize jurisdiction of a bill of lading for a voyage across the Pacific followed by a 3000-mile railroad journey.

5. *Expansion of Remedies*

The adoption of equitable remedies in the last two centuries has been remarkable. The English rules did not admit the entertainment of equitable claims and so that restriction was long observed here, although it was often

⁵⁰*Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 414, 1974 AMC 1379 (9th Cir. 1974).

⁵¹*Archawski v. Hanioti*, 350 U.S. 532, 536, 1956 AMC 742, 745 (1956).

⁵²*Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 611, 1991 AMC 1817, 1823 (1991).

⁵³*Norfolk Southern Ry. Co. v. J.N. Kirby, Pty Ltd.*, 543 U.S. 14, 24, 2004 AMC 2705, 2711 (2004) (citations omitted) (hereinafter *Kirby*).

⁵⁴*Id.* 543 U.S. at 27, 2004 AMC at 2713.

said that the admiralty court decided cases on equitable principles. Justice Story observed in 1822 that admiralty “cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud.”⁵⁵ In 1890 the Supreme Court, recited several examples of equitable remedy that admiralty could not give:

While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake. . . ; or declare or enforce a trust or an equitable title. . . ; or exercise jurisdiction in matters of account merely. . . ; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. . . (citations omitted).⁵⁶

In 1924 the Court held arbitration clauses valid in maritime contracts, and that their enforcement would be instances of “specific performance”, which admiralty did not have in its arsenal for lack of equity jurisdiction but could be obtained in State courts.⁵⁷ After the passage of the Federal Arbitration Act in the following year, the power to grant specific performance of arbitration was recognized as consistent with historic maritime practice and constitutionally within the power of Congress to provide it.⁵⁸ In 1950 the Court said, “We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction.”⁵⁹ And in 1962 it said, “Equity is no stranger to admiralty; admiralty courts are indeed, authorized to grant equitable relief.”⁶⁰

It would be strange if the unification of admiralty and other civil actions in 1966 did not resolve any remaining restraint. Recognizing that, the admiralty courts began to award injunctions,⁶¹ and specific performance of forum clauses,⁶² as agreements not to bring suit in any but the agreed court, extending to the issuance of injunctions against bringing suit elsewhere.⁶³ Of course, the English rule would have barred from admiralty quasi-contract

⁵⁵Andrews v. Essex Fire & Marine Ins. Co., 1 Fed. Cas. 885, 888, No. 374 (C.C.D. Mass. 1822).

⁵⁶The Steamer Eclipse, 135 U.S. 599, 608, 2009 AMC 2691, 2700 (1890).

⁵⁷Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123-24, 1924 AMC 418, 419-22 (1924).

⁵⁸Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277-78, 1932 AMC 161, 167 (1932).

⁵⁹Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 691, 1950 AMC 1089, 95 (1950).

⁶⁰Vaughn v. Atkinson, 369 U.S. 527, 530, 1962 AMC 1131, 1133 (1962).

⁶¹Pino v. Protection Maritime Ins. Co., 599 F.2d 10, 1979 AMC 2459 (1st Cir.), cert. denied 444 U.S. 900 (1979); Farrell Lines Inc. v. Ceres Terminals Inc., 161 F.3d 115, 116, 1999 AMC 305, 307 (2nd Cir. 1998) and authorities cited.

⁶²E.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 1972 AMC at 1407 (1972); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 1991 AMC 1697 (1991).

⁶³Farrell Lines, Inc. supra note 61 and authorities cited.

cases for recovery of money paid for maritime services under the influence of fraud or mistake and this continued in America until the Supreme Court's allowance of recovery of overpaid freight in 1935,⁶⁴ followed in 1955 by acceptance of a claim of unjust enrichment to recover passage money obtained by an egregious fraud for a voyage that never began.⁶⁵ These and similar decisions amount to a general recognition that the admiralty court has the powers of equity when the subject lies within its jurisdiction.

C. Expanded Construction by Congress

Congress also lost no time in addressing the extent of admiralty jurisdiction. Its first of a series of major addresses provided in 1789 for the inclusion of seizures on navigable waters for violations of impost, navigation or trade laws.⁶⁶ By the Great Lakes Act in 1845, mentioned above, admiralty jurisdiction was extended to those lakes and their connecting waters.⁶⁷ Its constitutionality was challenged by opponents of enlarged federal authority and upheld in *The Genesee Chief*, supra.⁶⁸

The Maritime Lien Act of 1910,⁶⁹ gave admiralty exclusive jurisdiction of maritime liens within its scope. The refusal of admiralty to take cognizance of mortgages of vessels⁷⁰ also created problems in the financing of vessels because of the diversity of state laws and the difficulty of reconciling common law mortgages with the maritime lien system. Congress responded in 1920 with the Ship Mortgage Act,⁷¹ creating a system of preferred mortgages related to maritime liens generally and within admiralty jurisdiction. Upholding the constitutionality of the Act, the Court reiterated that the jurisdiction was "subject to power in Congress to modify or supplement it as experience or changing conditions might require."⁷²

By the Longshore Act of 1927, as amended, Congress reasserted the former admiralty jurisdiction over harbor workers, which was repeatedly explicit in early documents,⁷³ to provide for their compensation for injuries. In doing so it designated harbor workers "including a ship repairman, ship-

⁶⁴Krauss Bros. Lumber Co. v. Dimon S.S. Co., 290 U.S. 117, 1933 AMC 1578 (1935).

⁶⁵Archawski, supra note 51.

⁶⁶Judiciary Act of 1789, § 9, 1 Stat. 76, 77.

⁶⁷Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.

⁶⁸Supra note 43.

⁶⁹Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604.

⁷⁰Bogart v. The John Jay, 58 U.S. (11 How.) 399 (1855).

⁷¹Ship Mortgage Act, supra note 6.

⁷²Detroit Trust Co. v. Barlum, 293 U.S. 21, 45, 1934 AMC 1417, 1429 (1934) (citing Panama Railroad Company v. Johnson, 264 U.S. 375, 385-387, 1924 A.M.C. 551, 555 (1924)).

⁷³See note 87 infra.

builder, and ship-breaker” along with longshore workers as persons “engaged in maritime employment,” and defined the situs of maritime employment to include “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used . . . in loading, unloading, repairing, or building a vessel.”⁷⁴

The Motor Boat Acts of 1940 and 1958⁷⁵ expressed and reconfirmed the Congressional understanding that pleasure boating is within the jurisdiction. And in 1948 came the Extension of Admiralty Jurisdiction Act,⁷⁶ a major expansion bringing in damage on shore by vessels on navigable waters, the constitutionality of which was upheld on appeal five years later as “both reasonably and historically within the concept of maritime affairs,”⁷⁷ and has not been seriously questioned since.

Throughout the long period covered by these acts, Congress has passed numerous others adjusting the jurisdiction and regulating the exercise of it.⁷⁸ Thus the jurisdiction has been greatly expanded and clarified by Congress in changes invariably held constitutional, as conforming with changed conditions and within the reasonable scope of the constitutional allocation.

IV

OUR REMAINING VESTIGES OF RICHARD II AND LORD COKE

Thus, we started in America with an assumption of “inheritance” of the limitations described and I have written above how we ridded ourselves of the restriction to tidal waters, those arising from admiralty’s overlap of coastal land and most of those others springing from the Ricardian statutes, by recognition that those statutes had never been in force in America.⁷⁹ We have here nothing left of the 18th century restrictions on admiralty’s authority in torts and crimes by geography or locale. We have broadened its jurisdiction of most maritime contracts, no longer requiring them to be made at sea, but have done this with a capricious selectivity. We have left contracts

⁷⁴33 U.S.C.A. §§ 901 et seq., § 902(3) (“any person engaged in maritime employment, including . . . any harbor-worker including a ship repairman, shipbuilder, and ship-breaker”); (4) (“upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

⁷⁵Motorboat Act of 1940, Act of Apr. 25, 1940, ch. 155, 54 Stat. 163, § 16; Federal Boating Act of 1958, Act of Sept. 2, 1958, 72 Stat. 1754 § 8; Federal Boat Safety Act of 1971, 46 U.S.C.A. §§ 4301 et seq., § 4311.

⁷⁶Act of June 19, 1948, ch. 526, 62 Stat. 496.

⁷⁷United States v. Matson Navigation Co., 201 F.2d 610, 615, 1953 AMC 272, 279 (1953).

⁷⁸See Detroit Trust Co. supra note 72, 293 U.S. at 44-46, 1934 AMC at 1429-31.

⁷⁹Waring supra note 5, 46 U.S. at 461, 2006 AMC at 2659.

historically and practically maritime, notably contracts for the construction and sale of vessels, outside in irrational and incongruous relationships with their close relatives.

A. Shipbuilding

Our distinction between shipbuilding and ship repair and modification, done in the same yards by the same workers, derives from the English restriction of contracts made on land, and is sustained by citation of *Peoples Ferry Co.*, where a maritime lien was claimed by the builders for work and materials in construction and denied in 1857 by the denial of admiralty jurisdiction. The court framed the question as a matter of states' rights to be ascertained by "reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now" (a doctrine repeatedly refuted since 1847 by the examples cited above). It described the contract as made on land "to be performed on land" (although it is very doubtful that it is performed before the vessel is launched and completed afloat) and applied a test of "contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation,"⁸⁰ (also doubtful today).⁸¹ It would have been sound and sufficient to deny the lien on the ground that admiralty does not bestow liens on everything it touches and the underlying policy does not justify a lien in the case of construction, as the Court indeed also pointed out.⁸²

The doctrine is bolstered by an essay of dicta in support of the scarcely relevant proposition that a ship is not a ship until launched, in a decision that by terms of a treaty a foreign seaman accused of desertion had become a member of the crew of an uncompleted vessel.⁸³ A paragraph of it has been mainly invoked since to argue against the creation of new secret liens, an objective better argued by the fact that there is no business justification for them in the circumstances of the case. The dicta lead to the conclusion that persons injured on a vessel being first built in the yard, and before launching, are beyond admiralty jurisdiction, although within it once she has been launched for further work afloat.⁸⁴ There seems to be no doubt of jurisdiction in the case of a vessel returned to dry dock for repairs,⁸⁵ or even drawn

⁸⁰*Peoples Ferry Co. v. Beers*, 61 U.S. 393, 401-02 (1857).

⁸¹*Cf. Kirby*, *supra* note 53.

⁸²*Peoples Ferry Co.*, *supra* note 80 at 402.

⁸³*Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902).

⁸⁴*See id.* at 438-39; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

⁸⁵*Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171, 172, 1924 AMC 1539, 1539 (1924) (repairs in floating dry dock; "In *The Robert W. Parsons*, 191 U.S. 17, 33, [2010 AMC 542, 552] (1903), this Court held that repairs to a vessel while in an ordinary dry dock were not made on land.").

out on land; the Court said in 1919 that “there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. . . admiralty jurisdiction extends to all.”⁸⁶

The jurisdiction was repeatedly referred to in centuries past as extending to “shipwrights,”⁸⁷ as construction workers were formerly always called, and sometimes are today.⁸⁸ Also, as noted above, the admiralty jurisdiction was recognized explicitly by the Court of Kings Bench and the King to extend to “shipbuilding.”⁸⁹ Workers in the construction yard were ultimately recognized to be in maritime employment in the Longshore Act.⁹⁰ The Act was passed to resolve the constitutional problem of dis-uniformity of admiralty created by attempted application of state laws to injuries of longshore and harbor workers, who were considered clearly to be within admiralty jurisdiction.⁹¹ The Supreme Court had suggested such an act as an exercise of the admiralty power⁹² and afterwards upheld it in all respects as such.⁹³ Congress chose ultimately to include shipbuilders explicitly⁹⁴ and thereby declared them and their workplaces to be subjects of admiralty. By defining their maritime situs to include areas adjoining navigable waters “customarily used by an employer in loading, unloading, repairing, or building a vessel” the Act reoccupied the ancient admiralty jurisdiction “upon the shores and banks whatsoever adjoining” or similar words⁹⁵ in the admirals’ and vice

⁸⁶North Pacific S.S. Co. v. Hill Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 128 (1919).

⁸⁷See, e.g., *Inquisition at Quinborough, 1376*, “III. Offenses Against the Admiral, [etc.] . . . 6. Of shipwrights taking excessive wages.” Zouch, *supra* note 11, 90, 96, Ass. 1, 3, quoted in I BENEDICT, ch. II § 31; Lord Cornbury’s commission as Governor and Vice Admiral of New York, etc., 1701, “shipwrights, and other workmen and artificers”, quoted in 1 BENEDICT, ch. V, § 65.

⁸⁸See e.g., *Exxon Corp. v. Chick Sam Choo*, 817 F.2d 307, 309, 1988 AMC 923, 924 (5th Cir. 1987); *Markel American Ins. Co.* 528 F. Supp.2d 1010, 1011, 2008 AMC 387, 388 (S.D. Cal. 2007); *Reliance National Ins. Co. (Europe) v. Hanover*, 2002 AMC 2892, 2892 (D. Mass. 2007).

⁸⁹See text at note 20 *supra*.

⁹⁰33 U.S.C.A. §§ 901 et seq., § 902 (“any person engaged in maritime employment, including . . . and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker”).

⁹¹See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917).

⁹²*Washington v. W.C. Dawson & Co.*, 264 U.S.219, 227, 1924 AMC 403, 409 (1924) (“Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers’ liability law or general provisions for compensating injured employees . . .”)

⁹³*Crowell v. Benson*, 285 U.S. 22, 39, 1932 AMC 355, 358 (1932) (the Act “deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (citations omitted) and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute.”) (Citations omitted.)

⁹⁴Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, 86 Stat. 1251.

⁹⁵See wording at note 19 *supra*; Lord Cornbury’s commission as Governor and Vice Admiral of New York, etc., 1701, 1 BENEDICT, ch. V § 65 (“upon the shores and banks”); commissions of Lewis Morris and his son Richard as judges in New York, I BENEDICT, ch. V § 67 (“upon any of the shores, or banks adjoining”);

admirals' commissions. But for others not employed by the builder, admiralty presumably remains oblivious of the nascent vessel.

B. Ship Sales

The exclusion of vessel sales contracts is closely related to, and even more conflicted with, other issues concededly within the jurisdiction. The Supreme Court has never passed on the question generally but the exclusion is the prevailing rule in the circuits.⁹⁶ It is applied both directly and obliquely. The direct application is simple enough; it bars suits for breach of contract between seller and buyer, whether for damages⁹⁷ or specific performance,⁹⁸ a remedy likely to be unavailable in any case for lack of showing the inadequacy of damages, as equity ordinarily requires.⁹⁹ The oblique applications are more serious because they complicate what are unquestionably admiralty claims when they affect an ancillary feature of the transaction or a foundation of the claim of title.

A frequent instance of the first sort is the lease purchase contract, which grants a charter for a period of years with an option to buy at the end. The dispute is likely to involve the lease or charter. Courts sometimes deal with this by "severing" the lease from the sale and dealing with the issue in admi-

⁹⁶See, e.g., *The Ada*, 250 F. 194, 195-96 (2nd Cir. 1918); approved in *International Shipping Co. S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391, 1989 AMC 1701, 1705 n.5 (2nd Cir. 1989); *Magnolia Ocean Shipping Corp. v. M/V Mercedes Maria*, 644 F.2d 880, 1982 AMC 731 (4th Cir. 1981) (rule criticized but reluctance to differ from other circuits); *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98, 1993 AMC 2993 [DRO] (5th Cir. 1992) (suits where substantive rights flow from contract to sell); *Cary Marine, Inc.*, 872 F.2d 751, 1990 AMC 828 (6th Cir. 1989); *Magallanes Invest. Co. v. Circuit Sys., Inc.*, 994 F.2d 1214, 1217, 1993 AMC 2301, 2304 (7th Cir. 1993) (charter and sale not divisible); *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 804, 2001 AMC 2064, 2066 (9th Cir. 2001) (sale of vessel; no supplemental jurisdiction of related claims where no actual jurisdiction); *Chase Manhattan Financial Services, Inc. v. McMillan*, 896 F.2d 452, 460 (10th Cir. 1990); *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988) (neither construction nor sale contracts maritime).

⁹⁷See, e.g., *Gerard Construction, Inc. v. Motor Vessel Virginia*, 480 F. Supp. 488k, 1981 AMC 115 (W.D. Pa. 1979) (balance of sale price); *Camper & Nicholsons, Ltd. v. Yacht Fontainebleau II*, 292 F. Supp. 734, 1969 AMC 105 (S.D. Fla. 1968) (misrepresentation and fraud); *Grand Banks Fishing Co. v. Flota Maritima Browning de Cuba*, 11 F. Supp. 1, 1953 AMC 2172 (S.D. Me. 1953) (breach of warranty); *Williams v. The Atte-Wode*, 1941 AMC 1428 (N.D. Ill. 1941) (non-payment under conditional sale contract).

⁹⁸See *The Steamer Eclipse*, 135 U.S. 599, 608, 2009 AMC 2691, 2700(1890) (Admiralty "has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance . . ."); *Flota Maritima Browning de Cuba, S.A. v. The Ciudad de Habana*, 181 F. Supp. 301, 1960 AMC 496 (D. Md. 1960), *aff'd* 363 F.2d 733, 1966 AMC 1999 (4th Cir.), *cert. denied* 385 U.S. 837 (1966) (severing lease-purchase claim for consideration of lease only, criticizing rule on sale).

⁹⁹See *RESTATEMENT OF CONTRACTS (SECOND)* § 359.

rality,¹⁰⁰ but are sometimes unable to disentangle the two.¹⁰¹ The other common instances arise in petitory and possessory actions, both old and unique to admiralty, to quiet title to vessels or recover possession of them.¹⁰² They are sometimes dismissed when they depend on the validity of a sale contract by which the plaintiff claims title or right of possession.¹⁰³

Although the decisions are not uniform, that very fact aggravates the problem by uncertainty. The Fifth Circuit, without direct confrontation, appears to have deftly steered around the doctrine that involvement of an underlying issue of sale would balk jurisdiction. It declared that the district court undoubtedly had admiralty jurisdiction of a petitory and possessory action and then dealt with the issues presented as an apparent matter of course, distinguishing a “simple dispute between a vessel manufacturer and buyer concerning a contract for construction and delivery . . . [without] an allegation . . . of ownership, right to immediate possession, an unlawful taking and detention by defendant . . . as in this case.”¹⁰⁴ In the same year that court heard a collision case raising the issue of title of a tug sold while en route from New Orleans to a collision at Tampa; it affirmed the admiralty court’s decision in the collision suit as to when title changed under the sale contract (and state law). Apparently no one made the unreasonable objection that the court could not decide whether a party charged was a proper defendant.¹⁰⁵

While the “rule” is enforced, it has been called “anomalous and much criticized” by a court of appeals collecting authorities and criticisms and applying it with apparent reluctance.¹⁰⁶ More recently, the “rule” has been boldly confronted and convincingly rebutted by District Judge Scheindlin of New York.¹⁰⁷ Against a background of criticism of the rule and her own circuit’s adherence to it, following its decision in *The Ada*¹⁰⁸ in 1922, she finds that the Supreme Court’s *Kirby* case in 2004, approving admiralty jurisdiction of

¹⁰⁰E.g., *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 1986 AMC 490 (1st Cir. 1985); *Flota Maritima Browning de Cuba*, supra note 98.

¹⁰¹E.g., *Cary Marine Inc. v. M/V Papillon*, 872 F.2d 751, 756, 1990 AMC 828, 832 (6th Cir. 1989).

¹⁰²1 BENEDICT, ch. XIII § 201 and authorities cited.

¹⁰³See, e.g., *McCorkle v. First Pennsylvania Banking & Trust Co.*, 459 F.2d 243, 1972 AMC 1596 (4th Cir. 1972) (title of good faith purchaser without notice of bank financing claim); *Kynoch v. The S.C. Ives*, 14 F. Cas. 888 (No. 7958) (N.D. Ohio 1856) (possession).

¹⁰⁴*Jones v. One Fifty-foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47, 1981 AMC 1005, 1008 (5th Cir. 1980).

¹⁰⁵*S.C. Loveland, Inc. v. East West Towing, Inc.*, 415 F. Supp. 596, 1978 AMC 2293 (S.D. Fla. 1976), aff’d 608 F.2d 160, 1980 AMC 2947 (5th Cir.) , cert. denied 446 U.S. 918 (1980).

¹⁰⁶*Magnolia Ocean Shipping Corp.* supra note 96.

¹⁰⁷*Kalafrana Shipping, Ltd. v. Sea Gull Shipping Co.*, 591 F. Supp.2d 505, 2008 AMC 2409 (S.D.N.Y. 2008)

¹⁰⁸Supra note 96.

the land carriage under multimodal ocean bills of lading,¹⁰⁹ and the Second Circuit's subsequent embrace of a mixed policy of marine and non-marine insurance, represent a departure from the older rules of mixed contracts.¹¹⁰ *Kirby* had announced that the "true criterion is whether [a contract] has 'reference to maritime service or maritime transactions,'"¹¹¹ and *Folksamerica* read *Kirby* as focusing "on whether the principal objective of the contract is maritime commerce."¹¹² She explained the application of these standards to a ship sale contract, saying, inter al., that maritime commerce "requires a vessel, sailors, and ship fuel, and there is simply no justification for including contracts for the latter two requirements in admiralty jurisdiction while excluding contracts for the former."¹¹³ She concluded that "the rule of *The Ada* is no longer viable."¹¹⁴ While she did not reach the point, it may be remarked that the same reasoning would apply to a contract for construction and sale of a ship.

This decision met with prompt and repeated dissent in the same court. Less than three months afterward, a fellow judge disagreed with it and vacated a seller's attachment in connection with arbitration of a claim of breach of contract to purchase, holding that *The Ada* still controlled, not having been expressly overruled.¹¹⁵ Another judge followed suit two months later and dismissed a seller's action for breach of contract, pointing out four intervening decisions to the same effect by other members of the court.¹¹⁶ After resting his decision on *The Ada*, he pointed out that the vessel was not "to continue to ply the seas" but to be demolished at Chittagong, and stated that, even if *The Ada* had been implicitly overruled, "[a] contract for the sale of a vessel that is to be beached and demolished does not have maritime commerce as its 'primary objective,'" (citation omitted),¹¹⁷ ignoring the factual prospect of a voyage to Chittagong and the law that navigation is itself maritime commerce.¹¹⁸ There, at five to one, the matter rests in the district reports as of this writing. To be sure, there are other decisions exercising

¹⁰⁹Kirby, supra note 53.

¹¹⁰Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307, 2005 AMC 1747 (2nd Cir. 2005).

¹¹¹Kalafrana, supra note 107, 591 F. Supp.2d at 508, 2008 AMC at 2414, citing Kirby, supra note 53, 543 U.S. at 24, 2004 AMC at 2711 (internal citations omitted).

¹¹²Id. 591 F. Supp.2d at 509, 2008 AMC at 2415, citing Folksamerica, supra note 110, 413 F.3d at 315, 2005 AMC at 1755, citing Kirby, supra note 53, 543 U.S. at 15, 2004 AMC at 2707.

¹¹³Id. 591 F. Supp.2d at 509, 2008 AMC at 2416.

¹¹⁴Id. 591 F. Supp.2d at 510, 2008 AMC at 2417.

¹¹⁵Unicorn Bulk Traders Limited v. Fortune Maritime Enterprises, Inc., 2009 AMC 90 (S.D.N.Y. 2009) (Gardphe, J.).

¹¹⁶A. Elephant Corp. v. HiFocus Group Limited, 2009 AMC 983, 987 (S.D.N.Y. 2009) (Baer, J.).

¹¹⁷Id. at 988.

¹¹⁸Gibbons v. Ogden, 22 U.S. (9 Wheat.) 180, 190 (1824).

jurisdiction, and it sometimes does not appear that the issue has been raised.¹¹⁹ As it stands, the application of this irrational, alien, much-criticized rule may depend on what court the claimant is in and which judge is assigned the case.

In the English controversy of the 17th century contracts made beyond the seas presented a separate question from that of contracts made or to be performed in the counties. In 1611 the common law judges evidently prevailed in their contention that “[b]argains or contracts made beyond the seas wherein the common law cannot administer justice. . . do belong to the constable and marshal: for the jurisdiction of the Admiral is confined to the sea . . .”¹²⁰ And Dr. Browne in 1802 understood that “it is generally held that that prohibition would go, if the admiralty were to attempt to try such foreign contracts . . .”¹²¹ It is interesting therefore to note that in 1809 Sir William Scott, one of the most respected judges ever to ornament the admiralty, decided a possessory claim that depended entirely on the validity of a contested sale in complex circumstances and validated the sale without hesitation.¹²² If this was because the contract was made in Spain rather than England it was either a relaxation of the rule prevailing earlier or recognition that the rule on contract actions did not apply in possessory actions. In either case, it shows that an old doctrine on jurisdiction of foreign contracts had been abandoned in England long before it was announced here and blindly followed.¹²³

V

THE RESTRICTIONS SERVE NO RATIONAL PURPOSE TODAY

The exclusion of shipbuilding and sale contracts has a continuous documented history of descent from the English rule enforced by Lord Coke and the Common Pleas against contracts made on land or to be in any degree performed there. This formulation does not call to mind any rational legal or

¹¹⁹E.g., *Northern Ins. Co. of New York v. 1996 Searay Model 370DA Yacht*, 453 F. Supp.2d 905, 2006 AMC 1570 (D.S.C. 2006) (possessory with contract issue); *Offshore Express v. Bergeron Boats, Inc.*, 1978 AMC 1504 (E.D. La. 1977) (possessory against builder holding on claim of pending charges); *Miller v. Tietjen & Lang No. 2*, 53 F. Supp. 459, 1944 AMC 518 (D.N.J. 1944) (possessory by seller with claim for further charges).

¹²⁰*Articuli Admiralitatis*, COKE, FOURTH PART OF THE INSTITUTES, 134, 2d Objection, Answer, reprinted in 1 BENEDICT, ch. III § 43.

¹²¹2 BROWNE 83.

¹²²*The Victoria*, EDWARDS ADMIRALTY 97 (High Court of Admiralty 1809).

¹²³See *Flota Maritima Browning de Cuba*, supra note 98 (contract made in Havana; lease purchase contract severed); *New York, Chesapeake & Rio Grande Steamship Co. v. Steamship Guayaquil*, 1939 AMC 1294 (E.D.N.Y. 1939) (possessory suit; contract made in Havana; court said to lack equity power to order possession).

practical consideration, as does at least the restriction as respects torts and crimes based on the sheriffs' settled jurisdiction within the counties. It is not hard to find the root of it. It is plainly based on a jealousy of turf that has no modern American counterpart.

The determination of the common law judges to curb the admiralty jurisdiction has been laid to greed by Prynne, a contemporary critic, as pursued "out of ambition of more jurisdiction, or for gain, not for the publick good, or Subjects ease or benefit."¹²⁴ The judges' dependence on their fees for income in those earlier days was plainly a powerful motive to compete for jurisdiction. A modern Crown publication describes it:

The recovery of the cost of running the courts in England and Wales has a very long and complex history dating back to the 13th century. . . . Originally, fees were paid directly to the judges of the courts, who kept them personally The most significant shift in court fees . . . came during the 19th Century.¹²⁵

We have long since abandoned that system, which spawned and perpetuated the economic competition of courts in the 17th century. The additional motives of professional antipathy do not exist here where we have a unitary bar under a consolidated court.

As the cited literature shows, ship construction takes place not only on the "shores adjoining" but on the navigable waters that they adjoin, where the incomplete vessels fall within the admiralty jurisdiction. In both situations they are under the regulatory supervision of the United States Coast Guard, a prominent branch of the admiralty and inheritor of its ancient police and regulatory power, in which it rules, no doubt, on far more maritime rights and duties than the admiralty courts themselves, in proceedings many of which are enforced or reviewed by those courts.

The capriciousness of our meandering boundaries may be illustrated by a very realistic hypothetical case of a major vessel casualty resulting from defective ship construction. The vessel owner who had the vessel built, the charterer, the cargo owners, and the injured seamen, a typical group of plaintiffs in such a case, all sue the builder in admiralty, where jurisdiction may be claimed without regard to citizenships and a concourse will permit all to proceed in a single trial of the facts. They assert grounds of negligence and strict liability, and the owner of breach of contract also. The owner will be denied a tort claim and required to rely on his contract warranty, while all

¹²⁴PRYNNE, *supra* note 26, at 96.

¹²⁵Her Majesty's Courts Service, A history of court fees, 30 July 2008, <http://www.hmcourts-service.gov.uk/infoabout/fees/whywecharge.htm>

others may proceed in tort.¹²⁶ Such co-plaintiffs abound in the persons of cargo owners and insurers and the P&I clubs that have paid the crew claims, all of whom may recover for negligence or strict liability, as in a recent case of faulty steel work, where the owner had settled with the yard and so was involved only as co-defendant. The case presents the further irony that the yard that had extended the vessel was held to be the “seller” of the vessel’s defective mid-section, a characterization that founded strict liability, without evidently raising a jurisdictional issue.¹²⁷

One would scarcely imagine that large vessels are built for speculation or otherwise than by contract for the owners. Thus construction and sale are linked in a single contract and common sense would treat them the same in respect of jurisdiction. By contrast, we do not suppose that the many small pleasure craft displayed for sale present the construction issue, as subjects of construction contracts. As respects sales, however, they are much involved in liens, titles, possession and casualties within the admiralty jurisdiction, in which sale is an underlying issue.¹²⁸

It has never been shown that the old English common law prohibitions’ survival on these shores is supported by any practical circumstance or other consideration in the past. To the contrary, there has been a remarkable evolution in the general rubric of contract jurisdiction clearly affecting these questions and, regardless of the views formerly taken, they should properly now be considered under the present standard. That standard is announced in the *Kirby* case: “the true criterion is whether [a contract] has ‘reference to maritime service or maritime transactions,’”¹²⁹ Of course, the Court’s use of “maritime” properly restricts the reference to waters within admiralty jurisdiction. A vessel (as legally defined)¹³⁰ fitted and intended for service in those waters is built and sold for maritime service. It is nonsense to deny that the contracts for building and sale of ships have reference to maritime service, since there can rarely be any other reason for building or buying them.

VI

CONCLUSION: A REALISTIC VIEW

The reasons for denying admiralty jurisdiction of contracts for the building and sales of vessels are traceable directly and exclusively to the

¹²⁶See *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986).

¹²⁷*In re Rationis Enterprises, Inc.*, 325 F. Supp.2d 318, 2004 AMC 2211 (S.D.N.Y. 2004), rev’d on grounds of Korean statute of repose, 426 F.3d 580, 2005 AMC 2516 (2d Cir. 2005).

¹²⁸See cases cited supra notes 96, 103, 119.

¹²⁹*Kirby*, supra note 53, 543 U.S. at 24, 2004 AMC at 2711 (citations omitted).

¹³⁰1 U.S.C.A. § 3.

Ricardian statutes and their interpretations by the Common Pleas. They were expressly declared by the Supreme Court in *Waring* to be of no effect in the United States. Although not all their restrictions were the subjects of *Waring*, they were declared invalid when their sole foundation was so declared. They are now in the United States also unreasonable and commercially unrealistic. The Court should expressly discard the bar of shipbuilding, as it has discarded others of the same provenance that were unsuited to the American situation, and overrule the ship sale rule followed in some of the lower courts. Better yet, without waiting for cases on building and sales to make their way onto the rarefied docket of that Court, the districts and circuits can and should treat the restrictions as (doubly) overruled by the doctrine of the *Kirby* case, with confidence that the Court will not disagree.

It is not after all the fault of King Richard and Lord Coke that they have appeared to intermeddle in our law; they were shanghaied and after a long illicit voyage should have permanent shore leave.