

Statement of the case.

regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.*

Contracts for shipbuilding are held not to be maritime contracts, and, of course, they fall within the same category, but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District Courts of the United States, as provided in the ninth section of the Judiciary Act.†

Respective decrees REVERSED, and the several causes remanded, with instructions to

DISMISS THE RESPECTIVE LIBELS.

WHITE'S BANK *v.* SMITH.

1. Under the act of Congress of July 29th, 1850, enacting—

“That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled,”

a recording of a mortgage in the office of the collector of the home port of the vessel has the effect, by its own force and irrespective of any formalities required by a State statute to give effect to chattel mortgages, to give the mortgagee a preference over a subsequent purchaser or mortgagee.

2. The home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, &c., should be recorded; not the port of last registry or enrolment when not such home port.
3. The act is constitutional.

ERROR to the Circuit Court for the Northern District of New York.

The case was this:

An act of Congress, “providing for the recording of con-

* The General Smith, 4 Wheaton, 438; The St. Lawrence, 1 Black, 529.

† Ferry Company *v.* Beers, 20 Howard, 402.

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veyances of vessels and for other purposes," and passed July 29th, 1850,* thus enacts:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of customs where such vessel is registered or enrolled."

And a statute of the State of New York thus enacts:

"Every mortgage of chattels which shall not be accompanied, &c., shall be *absolutely void* as against the creditors of the mortgagor, and as against *subsequent purchasers and mortgagees in good faith*, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this act."

The "succeeding section" above referred to directs where the mortgage shall be filed. And a third section proceeds:

"Every mortgage filed in pursuance of this act, shall *cease to be valid* as against the creditors of the person making the same, or against *subsequent mortgagees in good faith*, after the expiration of one year from the filing thereof, unless within, &c., a true copy of such mortgage shall be again filed in the office of the clerk or register aforesaid of the *town or city where the mortgagor shall then reside*."

With these two acts, one of the United States and the other of the State of New York, in force, one Hoyt, then a resident of Buffalo, Erie County, New York, executed, on the 22d May, 1863, a mortgage to White's Bank, of Buffalo, upon the schooner Emmett, of which he was owner. This mortgage was recorded, on the 12th of the June following, *in the collector's office at Buffalo, where the Emmett was duly enrolled, and where, as just said, Hoyt, her owner, resided*. The mortgage was filed, also, in the office of the clerk of the county of Erie, on the 5th June, 1863, according to the re-

* 9 Stat. at Large, 440.

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quirement of the above-quoted law of New York, *but it was not refiled at the end of a year.*

Subsequently to the date of this mortgage of Hoyt to White's Bank, the vessel became the property of one Zahn, residing at Sandusky, Ohio; and on the 2d June, 1865, he mortgaged her to one Smith. The mortgage to Smith was recorded in the collector's office, at the port of Sandusky, Ohio, on the 17th of June, 1865, where the Emmett was duly enrolled, and at which place, as above stated, the then owner, Zahn, resided. The vessel having been sold subsequently to the date of both the mortgages, under a paramount lien for seamen's wages, and a remnant of the proceeds of sale, after payment of such wages, remaining, but being insufficient to pay either mortgage, the question was, to which of the mortgages it should be applied,—to the first mortgage, that of the bank? or to the subsequent one, Smith's? Smith set up that the lien of the mortgage to White's Bank was lost on account of the omission to refile it in the clerk's office of Erie County at the end of the year, and this position it was which raised the material question in the case; the question, namely, whether or not the recording of the mortgage in the collector's office at Buffalo had the effect, *by its own force, and irrespective of the filing in the clerk's office*, to give a preference to it over any subsequent purchaser or mortgagee?

The court below decreed that the fund should be appropriated to Smith's mortgage; and White's Bank appealed.

Mr. Haddock, for the appellant, contended that the act of the legislature of New York, so far as it required chattel mortgages upon vessels to be recorded, was a regulation of commerce, and therefore repugnant to that clause of the Federal Constitution which provides that *Congress shall have power to regulate commerce with foreign nations, and among the several States.* In *Steamship Company v. Portwardens*,* where a statute of Louisiana, imposing a tax upon

* 6 Wallace, 31.

Argument for the appellee.

vessels, was declared repugnant to the Constitution of the United States, the court says: "The power to regulate commerce was given to Congress in comprehensive terms. It was thus given with the obvious intent to place that commerce beyond interruption or embarrassment, arising from the conflicting or hostile State regulations." So here the subject-matter, having been acted upon by Congress, was placed beyond the reach or control of the States.

Mr. Rogers, contra:

The act of Congress did not supersede the necessity of a compliance with the statute of New York. It is not repugnant to, nor in any manner in conflict with that law. There is no difficulty in complying with both. To regulate commerce was not the purpose of the State act; and if it does affect commerce, it does so only by acting *incidentally* on one of its instruments. But if the two acts are inconsistent, which should give way?

The act of Congress is, in some sort, a recording or registry act, having in view, apparently, the protection of the interests of *bonâ fide* purchasers, as well as those of the United States, in the enforcement of its revenue and navigation laws. In so far as it thus assumes to regulate the transfer of the title of parties in such property, is the act constitutional? Can Congress enter the domain of property and assume in all cases to regulate the transfers thereof? We submit that it cannot. The clause of the Constitution which gives to Congress power to "regulate commerce," contains nothing *in terms* giving to that body the power to enter the domain of private property, and to enact what shall be, and what shall not be, a valid transfer thereof. Nor does any such power arise from implication from the power actually given. The rights of property as well as of person are carefully left to the several States, which, according to the theory of the Constitution, were better fitted to regulate them properly than any general government could possibly be. An owner who obtains the enrolment of his vessel because he cannot otherwise engage her in commerce, cannot

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be deemed thereby to resign his right to sell or dispose of her, by the observance of such formalities as the laws of his State alone prescribe.

If Congress have power to enact this registry law for the protection of creditors, purchasers, &c., simply because a ship is a vehicle of commerce, they have also the power to enact a similar law in relation to all locomotives, cars, wagons, sleighs, and other vehicles used in the carrying on of commerce between the States or with foreign nations; and in fact to regulate the transfer of title to all property which is the subject of commerce.

[A question was also made as to whether the record of the vessel under the act of Congress should be in the vessel's home port, or, as was decided by the Supreme Court of Massachusetts, in *Potter v. Irish*,* and afterwards by the Supreme Court of Maine, in *Chadwick v. Baker*,† in the port of the last registry or enrolment, though not the home port?]

Mr. Justice NELSON delivered the opinion of the court.

The act of Congress, July 29, 1850, on this subject, of the present case, is as follows:

"That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of customs, where such vessel is registered or enrolled."

The next section provides for recording these bills of sale, &c., and also certificates of discharge and cancellation in a proper book. No provision was made for any authentication of these instruments preparatory to their being recorded. They were received by the collector from the parties delivering them, and were recorded, with no proof of their verity, except from the execution of the same, as appeared on their face; and this, both as it respects the bills of sale, mortgages,

* 10 Gray, 416.

† 54 Maine, 9.

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&c., and the discharge and cancellation of the same. And the law thus stood for some fifteen years. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage, or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds."

Previous to this act of 1850, providing for the recording of bills of sale, mortgages, &c., of vessels, they were required to be filed, by the laws of many of the States, in the clerk's office, or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interest of the vendee or mortgagee against subsequent *bonâ fide* purchasers or mortgagees. And this practice continued in many places after the passage of the act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording act, from the very imperfect provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office, at the home port of the vessel, furnishes a much readier opportunity to persons dealing in this species of property, to obtain a knowledge of the condition of the title, than by the former mode under the State law. We say the home port, because it is quite apparent from the language of the act, "be recorded in the office of the collector of customs, where such vessel is registered or enrolled," means the permanent registry or enrolment, which is at the port, "at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of said ship or vessel usually resides. And the name of the said ship or vessel, and the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length," and, if found without such name and the name of the port, the owner is subject to a penalty of fifty dollars.*

* Act 31st December, 1792, § 3.

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The same act provides for a temporary registry, when the owner acquires her in a different district from that in which he resides; but this is to enable him to bring the vessel within the home district or port, where she can obtain her permanent registry. The character of this temporary registry is expressed on the face of it, and is delivered up to the collector on the issuing of the permanent registry, whose duty it is to return it to the collector that granted it.*

So a registered vessel may be enrolled, or an enrolled vessel registered, on the master giving up to the collector the registry or enrolment, as the case may be; and if such vessel shall be in any other district than the one to which she belongs, the collector of such district, upon the master taking an oath that, according to his best knowledge and belief, the property remains as expressed in a registry or enrolment proposed to be given up, and on giving the bond required, shall make the exchanges above mentioned; but the collector to whom the registry or enrolment is given up, shall transmit the same to the Register of the Treasury, and the registry or enrolment granted in lieu thereof, shall, within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled.†

This exchange of registry or enrolment may occur in any part of a voyage or voyages, and the temporary registry or enrolment continues till the vessel, in the regular course of her employment, arrives at the port to which she belongs, where she may again obtain a renewal of her permanent documentary title. As we have said, we think it apparent that the collector's office in the district in which this temporary registry or enrolment is made, is not the office contemplated by the act of 1850. The temporary papers are made in the office where the vessel happens to be at the time of the sale or exchange of the documentary title, and continues only till her arrival at the port to which she belongs. Her name, and the name of her home port, remains painted on

* Act 31st December, 1792, § 11.

† 1 Stat. at Large, 288, § 3.

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her stern, notwithstanding this temporary document, and satisfies the requirement of the act in that respect, and both continue until a new home port is acquired by a change of ownership, requiring a permanent registry or enrolment on account of the different residence of the owners, when the name of that port is substituted. And, confining the record to the home port, there is great propriety and convenience in requiring bills of sale, mortgages, &c., of the whole, or parts of a vessel, to be made matters of record in this office, as in the registries there are the names of all the owners under oath, together with their residences; and since the act of 1850, containing also the part or proportion of such vessel belonging to each owner (§ 5). And in this same section it is provided that, "in all bills of sale of vessels registered or enrolled, shall be set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing." And in this connection we may also mention, that in case of the sale of a vessel, which can only be to a citizen or citizens of the United States, and a new permanent registry becomes necessary, the former certificate of registry must be delivered to the collector to whom application is made for the new registry, to be transmitted by him to the Register of the Treasury to be cancelled; and in every such sale or transfer of a vessel, there shall be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of the former registry, otherwise the ship or vessel shall be incapable of being registered anew.* And as this bill of sale is recorded in the collector's office in which the new permanent registry is made, it affords information to any person examining it as to the former home port and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage, or other incumbrance, upon or against the vessel.

It will be seen, therefore, as the law now stands, there can be very little difficulty on the part of a purchaser or

* 1 Stat. at Large, 294, § 14.

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mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidences of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refers to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry. In this respect, the system of recording in the collector's office possesses very great advantages over the filing of these instruments in the clerks' offices where the vendor or mortgagor happened to reside at the time, as no means exist, under this practice, by which the subsequent purchaser or mortgagee, by any diligence, could obtain a knowledge of the actual condition of the title.

We are aware that in the case of *Potter v. Irish*,* the court came to the conclusion, upon an examination of the acts on this subject, that bills of sale, mortgages, &c., under the act of 1850, in order to protect the title of the purchaser or mortgagee, should be recorded in the office of the collector of customs at the port of the last registry or enrolment, though not the home port of the vessel. And the court in the case of *Chadwick v. Baker*,† followed this decision. Our respect for the courts rendering these decisions has led us to examine the several statutes upon which this question depends with more than usual care, and after the best consideration we have been able to give, we are obliged to differ with them. We think the better construction of these statutes leads to the conclusion that the home port was the one in the contemplation of Congress at which these instruments were to be recorded, and is the more appropriate one in furtherance of the object for which the act was passed.

The temporary registry or enrolment is at a collector's office in a district where the owners do not reside, and is made without any reference to such residence. It is made at any collector's office, and at any port within the limits of the United States where the vessel may happen to be at the time this temporary document is registered.

* 10 Gray, 416.

† 54 Maine, 9.

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While the home port may be at the city of New York, the temporary registry or enrolment may be made at New Orleans or San Francisco, or Portland, in Oregon, where it would be as inconvenient for the vendee or mortgagee to make a record of the bill of sale or mortgage as it would be for a person dealing in this species of property to acquire any notice of such record; whereas a record at the home port is within the district where the owners reside, and where negotiations or dealings in respect to this species of property would naturally be conducted.

Some question is made as to the power of Congress over the title and property of vessels of the United States to such an extent as to enable it to pass a recording act.

But, after the regulation of this species of property by the several acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent *bonâ fide* purchasers and mortgagees therein.

Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen, or citizens of the United States, and to be commanded by a citizen of the same.*

And none can be registered or enrolled unless built within the United States before or after the 4th of July, 1776, and belonging wholly to a citizen, or citizens, of the United States, or, not built within said States, but on the 16th of May, 1789, belonging, and thence continuing to belong, to a citizen or citizens thereof; or ships or vessels captured from the enemy, in war, by a citizen, and lawfully condemned as prize, or adjudged to be forfeited for a breach of the laws of

* 1 Stat. at Large, 287.

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the United States, and being wholly owned by a citizen or citizens thereof.*

Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction.†

DECREE REVERSED, and a

DECREE ENTERED FOR THE APPELLANT.

THE NICHOLS.

1. Sailing ships are "meeting end on," within the meaning of the eleventh article of the act of Congress of April 29, 1864, fixing "Rules and Regulations for Preventing Collisions on the Water," when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins; a condition which always depends, to a certain extent, upon the state of the navigation, and the circumstances of the occasion.
2. The expression, "meeting *nearly* end on," in the same article, includes cases where two sailing ships are approaching from nearly opposite di-

* 1 Stat. at Large, § 2, 288.

† The *Martha Washington*, 25 Law Reporter, 22; *Fontaine v. Beers*, 19 Alabama, 722; *Mitchell v. Steelman*, 8 California, 363; *Shaw v. McCandless*, 36 Mississippi, 296.