

DECISIONS
IN THE
SUPREME COURT OF THE UNITED STATES,
DECEMBER TERM, 1870.

PROPERTY OF
UNITED STATES SENATE
LIBRARY

INSURANCE COMPANY v. DUNHAM.

1. The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

First. The *locus*, or territory, of maritime jurisdiction where *torts* must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide.

Secondly. As to *contracts*, the true criterion whether they are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as, whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

In view of these principles it was held that the contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts.

2. The case of *De Lovio v. Boit* (2 Gallison, 398), affirmed.
3. This court has jurisdiction, under the act of 1802, of a certificate of division of opinion between the associate justice of the Supreme Court and the Circuit judge, together holding the Circuit Court, under the act of 1869, as well as between either of the said judges, and the District judge.

On certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts.

Statement of the case.

The act of Congress of April 29th, 1802,* provides that

“Whenever any question shall occur before a *Circuit Court*, upon which *the opinions of the judges shall be opposed*, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided.”

At the time when this statute was passed the Circuit Court, when consisting of more than a single judge, was composed of a judge of the Supreme Court of the United States and the District judge of the district sitting together, and this organization remained until April 10th, 1869.

By act of that day,† “to amend the judicial system of the United States,” it was enacted:

“That for each of the nine existing judicial circuits there shall be appointed a *Circuit judge*, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit. The *Circuit Courts* in each circuit shall be held by the justice of the Supreme Court allotted to the circuit; or by the Circuit judge of the circuit; or by the District judge, or by the justice of the Supreme Court and Circuit judge sitting together, . . . or, in the absence of either of them, by the other . . . and the District judge.”

In this state of enactment a libel *in personam* had been filed in the District Court for the District of Massachusetts, by one Dunham against the New England Mutual Marine Insurance Company, on a policy of insurance, dated at Boston on the 2d day of March, 1863, whereby the insurance company, a corporation of Massachusetts, agreed to insure Dunham, the libellant, a citizen of New York, in the sum of \$10,000, for whom it might concern, on a vessel called

* 2 Stat. at Large, 159.

* 16 Id. 44.

Statement of the case.

the Albina, for one year, against the perils of the seas and other perils in the policy mentioned; and the libellant alleged that within the year the said vessel was run into by another vessel on the high seas, through the negligence of those navigating the said other vessel, and sustained much damage, and that the libellant had expended large sums of money in repairing the same, of which he claimed payment of the insurance company.

The question was whether the District Court, sitting in admiralty, had jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

The Constitution ordains, it will be remembered, that

“The judicial power shall extend . . to all cases of admiralty and maritime jurisdiction.”

And the Judiciary Act of 1789, which established the District Courts, declares that they shall have

“exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.”

The District Court decreed in favor of the libellant, and the insurance company appealed to the Circuit Court. The judges of that court were opposed in opinion on the point raised, and it was accordingly certified to this court. Two questions were thus before this court:

1. Whether since the reorganization of the Circuit Courts under the act of 1869, a difference of opinion between a judge of the Supreme Court and “the Circuit judge,” created by that act, sitting as the Circuit Court, could be certified to this court under the act of 1802.

2. If it could, what was the proper answer to be returned to the question certified? Had the District Court, sitting in admiralty, jurisdiction to entertain the libel in this case, the same being a libel *in personam* on a policy of marine insurance to recover for a loss?

The latter question was the one to which the briefs of counsel were directed.

Argument in support of the jurisdiction.

Mr. F. C. Loring, for the libellants and in support of the jurisdiction :

By the universal and unanimous foreign practice and authorities, with one exception only, the contract of marine insurance is considered to be maritime, and a proper subject for the cognizance of a court vested with jurisdiction over maritime cases. It might, therefore, have been anticipated, that when the question came before the admiralty courts of the United States, vested with jurisdiction over all maritime cases, the decision would be in favor of the jurisdiction. This does not seem to have happened for more than twenty years after the adoption of the Constitution. As the courts of common law exercise concurrent jurisdiction over contracts of insurance, and as the plaintiffs in suits thereon would naturally prefer not to waive the benefit of a trial by jury, and of a trial in their own courts; and as the lawyers of that day were brought up according to and by the common law, this is not surprising. No case is found, in the reports of any of the courts of the United States, of an action in the admiralty on a policy of insurance until the year 1815, nor on a charter-party, nor for freight, till 1829.*

At the October Term of the Circuit Court for Massachusetts, in 1815, the question was first presented by a libel on a policy of insurance. A plea to the jurisdiction was interposed, and the result was the opinion of Story, J., in *De Lovio v. Boit*,† deciding in favor of the jurisdiction.

How this decision was received at the time is not now known. As this court was then constituted, it is probable that the jurisdiction would have been maintained on appeal. Marshall, C. J., affirmed, in *The Little Charles*,‡ in 1819, that

* No report of a suit in the admiralty on a charter-party or bill of lading has been found before the case of *The Spartan* (Ware, 149), which was decided in 1829. In 1834, the jurisdiction was denied, and was sustained by Story, J., in *The Volunteer* (1 Sumner, 551). The question cannot be considered as having been finally settled till the decision of this court in this case of *The New Jersey Steamboat Company v. The Merchants' Bank*, in 1848 (6 Howard, 344).

† 2 Gallison, 398.

‡ 1 Brockenbrough, 380.

Argument in support of the jurisdiction.

"The courts of the United States have never doubted their right to proceed under their general powers as courts of admiralty, where they are not restrained from the use of these powers by statute."

That Washington, J., would have sustained the jurisdiction, cannot be doubted. In *The Seneca*,* he says:

"I not only admit, but insist, first, that the judicial power of the United States under the Constitution, and the jurisdiction of the District Courts under the ninth section of the Judiciary Act of 1789, embrace all cases of maritime nature, whether they be particularly of admiralty cognizance, or not.

"Second. That this jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime law of nations, and are not confined to that of England, or of any other particular maritime nation."

He afterwards speaks of the ordinances of Louis XIV, as generally adopted, as evidence of the maritime law of nations.

Difference of opinion as to the extent of the admiralty jurisdiction has occurred only of late date. It first appears eminently in *Ramsay v. Allegre*, in 1827, in the dissenting opinion of Johnson, J., with whom have concurred, at different times, Baldwin, and Daniel, and Campbell, JJ., and others to a less extent; but the majority of the court have uniformly held that the practical jurisdiction of the English admiralty affords no rule for the jurisdiction vested in the courts of the United States by the Constitution and by Congress, and that that embraces all maritime contracts.

In the reports of this court, and of other courts of the United States, no other reference has been found to the contract of insurance as a matter of admiralty jurisdiction, except in *Taylor v. Carryl*,† where Taney, C. J., expressed a doubt upon the subject, which had not been presented, or referred to in the argument, and which evidently he had not examined.

Considering the authorities apart from the repeated decla-

* 18 American Jurist, 486.

† 20 Howard, 585.

Argument in support of the jurisdiction.

rations of this court, that the admiralty jurisdiction of the District Court extends generally over maritime contracts, and the universal admission that marine insurance is a maritime contract, we have in favor of the jurisdiction three decisions of Story, J., in point.* The opinion of Woodbury, J.,† that insurance is clearly a contract within the admiralty jurisdiction. The fact that Curtis, J., sustained the jurisdiction as a settled practice in the first circuit,‡ and, as counsel, took no exception to it.§ The decisions of Sprague, J.,|| and Ware, J.,¶ of the District Court, and the opinions of Mr. Dunlap,** Mr. Benedict,†† Conkling, J.,‡‡ and Chancellor Kent.§§

The weight of authority is in favor of the jurisdiction. Indeed, there is an absence of authority against it, even in England. There is no case on record known, in which the Court of Admiralty has refused to entertain jurisdiction over the subject, or in which the courts of common law have prohibited it. In admiralty commissions, insurance is usually mentioned as a matter over which jurisdiction is to be exercised; and in Scotland, the Court of Admiralty, under similar commissions, constantly entertains such jurisdiction. All that can be said about the exercise of the jurisdiction by the English court is, that, practically, it has not been resorted to. This is no argument against the jurisdiction of the courts of another nation, having jurisdiction over all maritime contracts, which they have exercised for more than fifty years over contracts of insurance. The only

* *De Lovio v. Boit*, 2 Gallison, 398; *Peele v. Merchants' Insurance Co.*, 3 Mason, 27; *Hale v. Washington Insurance Co.*, 2 Story, 176.

† *Dean v. Bates*, 2 Woodbury & Minot, 88.

‡ *Gloucester Insurance Co. v. Younger*, 2 Curtis, 322.

§ *Hale v. Washington Insurance Co.*, *supra*, *.

|| *Younger v. Gloucester Insurance Co.*, 1 Sprague, 243.

¶ *The Spartan*, Ware, 152.

** Admiralty Practice, 43.

†† Admiralty Practice, 8, 50, 147, 166.

‡‡ Admiralty Practice, 13.

§§ See note, 1 Kent, 370, in which "Insurance" is mentioned as a matter of settled admiralty jurisdiction.

Argument in support of the jurisdiction.

question then, is, whether or not marine insurance is a contract concerning matters of navigation, trade, commerce, &c.; or in other words, a maritime contract. There can be only one answer; and the jurisdiction follows of course.

An argument in favor of a general jurisdiction of the United States courts in admiralty, over maritime cases, may be drawn from the power vested in Congress to regulate commerce. By virtue of this, Congress may legislate on all commercial matters; it may enact a code of commerce, regulating all affairs of navigation, affreightments, averages, marine insurances, and other maritime matters, and has exercised this power to some extent in those acts which limit the liability of ship-owners, provide for the registration of ships, regulate the carriage of passengers, establish rules for the carrying of lights, the navigation of vessels, &c., &c. It would seem that the jurisdiction of the maritime courts of the United States should be coextensive, and should embrace all commercial and maritime matters which Congress has the power to regulate. The remedies afforded by the United States courts of common law and equity are not adapted to all maritime cases, especially where a lien exists; and as their jurisdiction generally depends on the residence of the parties, it is doubtful whether they could exercise it in all cases; and there might be the anomaly of a government with power to make laws and no tribunals to administer them; and this without remedy; for Congress has vested in the courts it created all the admiralty jurisdiction which the Constitution authorized it to confer. The power is exhausted, and if the United States courts have not jurisdiction over all maritime cases, they cannot acquire it, except by an amendment of the Constitution. If this were attempted, it would be difficult to find words sufficient to create a more ample jurisdiction than those used in the Constitution and consequent act of Congress. If these courts have not jurisdiction over all maritime contracts and cases, it is not for want of certainty and distinctness in the law, but by reason of judicial construction and legislation, limiting the general terms used in the Constitution and statute.

Argument in support of the jurisdiction.

The question of admiralty jurisdiction is in a measure historical, and to be determined by the jurisdiction actually exercised by the Vice-Admiralty colonial courts before the Revolution; inasmuch as such practical jurisdiction must have been known and contemplated by the framers of the Constitution. Now it is a matter of history that the commissions issued by the crown to the judges of the colonial courts of admiralty, conferred, in terms, unlimited jurisdiction over all maritime cases, and usually specified "*policies of assurance*,"* and that these courts, or some of them, exercised this jurisdiction over all maritime cases, without limit or qualification. Until lately not much was known about the jurisdiction actually exercised by these courts. There is little in the books to show what it was.

The Province of Massachusetts Bay, which comprised Massachusetts, Maine, and Nova Scotia, was, before the Revolution, probably more largely engaged in commerce than any other, and the records of the Court of Admiralty held in it would be likely to contain more maritime decisions than would be found elsewhere. Under the first charter of the Colony of Massachusetts Bay, admiralty jurisdiction was not reserved to the crown. It was exercised by the Court of Assistants. In Ancient Charters,† will be found a code regulating the rights and duties of mariners, owners, masters, freighters, contributors, &c.; and the last article of the chapter provides that:

"All cases of admiralty shall be heard and determined by the Court of Assistants . . . without jury, unless the court shall see cause to the contrary. Provided, always, this act shall not be interpreted to obstruct the just plea of any mariner or merchant impleading any person in any other court, upon any matter or cause that depends upon contract, covenant, or other matter of common equity, in maritime affairs."

In other words, the Court of Assistants was vested with

* See the commissions quoted in *De Lovio v. Boit*, and in *Benedict's Admiralty Practice*, pp. 82, 90. He states that he has seen nine commissions.

† Appendix, 716.

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admiralty jurisdiction over all *maritime* cases of contract, covenant, or other matter of equity, reserving to the courts of common law concurrent jurisdiction, as is done by the Judiciary Act. This act was passed in the year 1673, and shows what was considered to be the proper jurisdiction of the admiralty at that time. No allusion is made to the English practice, though that must have been well known; but the Court of Assistants was vested with the fullest jurisdiction over all maritime contracts, and other matters of (maritime) equity. The act seems to be a code or compilation of rules for the regulation of commerce, navigation, freight, and wages, &c., similar to those to be found in the marine ordinances and other sea-codes, besides appointing a tribunal for their administration. It is quite long, containing thirty sections, of the last of which a part has been quoted. It was probably annulled when the first charter was vacated in 1684.

When the charter of the Province of Massachusetts Bay was granted, in 1691, all "*admiral court, jurisdiction, power, or authority,*" was reserved to the crown, to be exercised by virtue of commissions to be issued under the great seal.* Some of the commissions issued to the judges of the Admiralty Court provinces may be found in the books, and they confer jurisdiction over all maritime causes and cases in the most unqualified terms.† But until lately, little was known as to what jurisdiction was actually exercised by the judges under these commissions. In the office of the District Court for Massachusetts there was only one imperfect volume of the records of the Vice-Admiralty Court of the province. This is not half filled, and contains only a few cases which relate to matters of prize, revenue, and wages. The other

* Ancient Charters, p. 36.

† A commission is quoted at length in Benedict's Admiralty, 83, which is stated to be a translation of one issued to Roger Mompesson in 1703, as judge of Vice-Admiralty in the provinces of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, the Jerseys, New York, and Pennsylvania. In this commission, among other contracts specified, are "*policies of assurance.*"

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volumes were supposed to have been taken to Halifax, at the time of the evacuation of Boston, and to have been lost or destroyed. Lately, two volumes have been found among the papers of a former registrar of the court, and have been deposited in the library of the Boston Athenæum; they are the second and third volumes, beginning in 1718, and extending to 1733. The first is missing. The one in the clerk's office extends from 1740 to 1744 only; and the rest are also missing.* An examination of these two volumes discloses that the court exercised jurisdiction over all maritime cases. Besides numerous suits for wages, and liberations, and assaults, they contain records of over fifty cases of libels on maritime contracts. There may be found libels for contribution, both *in rem* and *in personam*; on charter-parties, on contracts of affreightment for freight, for non-delivery or damage to goods; between owners for an account; by masters *in rem* for wages and disbursements; against a mate for non-performance of his contract; for surveys, condemnations, and sales; of material-men, for supplies in home port *in rem*; against mate, for error in making a bill of lading; by builder of a ship, for its price *in rem*, after it had been delivered; by passengers, and various other cases. In one case, a consignee sued a master for non-delivery: he answered that the goods were thrown overboard for the common safety; the court found that the jettison was justifiable, and sent the case to commissioners to adjust the average. This decision anticipated that of *Dupont v. Vance*† more than a century. Another case resembles *Taylor v. Carryl*.‡ It was a suit *in rem*, by an assignee of a master and mate, for wages, &c. The libel alleged that the vessel had been attached by a creditor at common law. The court ordered the marshal to take possession and sell; and, after satisfying the claim of the libellant, to pay the residue into the registry, to answer the claim of the attaching creditors. In

* It is not known that any of the records of the other Vice-Admiralty courts are in existence. They were probably carried off or destroyed at the time of the Revolution.

† § 19 Howard, 162.

‡ 20 Id. 583.

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Taylor v. Carryl, a divided court held that an attachment at common law could not be so subjected to a maritime lien. If a similar jurisdiction was exercised in the admiralty courts of the other colonies, there would be no doubt as to what the framers of the Constitution had in mind.* There is one case reported in Pennsylvania, *Talbot's Case*,† which shows that the Court of Admiralty of that province exercised jurisdiction over all maritime cases. An act of Assembly gave the judge of admiralty cognizance of all suits of maritime jurisdiction not cognizable at common law. Literally construed, this would have limited the jurisdiction to matters of prize. But the Supreme Court held that it could not have been so intended, and that the true construction was, that the jurisdiction embraced all suits of a maritime nature not properly cognizable at common law, and, consequently, all those relating to maritime matters over which the common law had usurped or otherwise obtained jurisdiction; thus extending the jurisdiction to the largest limit ever claimed for it. That the framers of the Constitution, and the lawyers of that day, were familiar with a different and more extensive jurisdiction in the colonies than was practiced in the English Court of Admiralty, is asserted by Wayne, J., in his opinion in *Waring v. Clarke*, and the authorities cited by him maintain the assertion. It will be found, on examining the records referred to, that no objection was made to the extensive jurisdiction exercised. It seems to have been considered a matter about which there could be no doubt. In one case only was there a plea to the jurisdiction. A master sued *in rem*, in the home port, for wages and disbursements. Such a plea was interposed and overruled.

Thus it appears that the jurisdiction claimed by Story, J., Ware, J., and others, for the admiralty courts of the United States, is not anything new and before unknown, but only that it is not so extensive as that which was actually exercised by the colonial courts.

If the jurisdiction, known to have been exercised by the

* Opinion of Mr. Justice Wayne, 5 Howard, 454.

† 1 Dallas, 95

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admiralty courts before the Revolution, is to be taken as the rule, it must be admitted that every case which can properly be defined as maritime, is a proper subject for the jurisdiction of the United States District Court; and, of course, marine insurance.

The same conclusion must be drawn from the fact that admiralty jurisdiction was exercised by the Vice-Admiralty Court of Massachusetts, over all maritime contracts and cases. The judge who presided in that court was at the same time the judge of the Vice-Admiralty Courts of New York, Pennsylvania, the Jerseys, New Hampshire, Connecticut, Maine and Nova Scotia,* and it must have been that he held and exercised the same jurisdiction, when holding court in the other colonies or provinces included in his commission, that he did when sitting in Massachusetts.

The argument, to be derived from *history*, is conclusive in favor of a literal construction of the words of the Constitution and statute giving the courts of the United States jurisdiction over all admiralty and maritime cases. For it appears that the commissions, issued to the judges of the Vice-Admiralty courts, before the Revolution, conferred jurisdiction over all maritime cases without restrictions, sometimes specifying "*policies of assurances*," and that this jurisdiction was exercised to its fullest extent, without any regard to the practice of the English Court of Admiralty, in most, if not in all, of the colonies or provinces which afterwards became the United States. It is impossible to suppose that this practice was not known to the statesmen and lawyers who framed the Constitution, or that they contemplated any limit to the jurisdiction which the Court of Admiralty they created might exercise over maritime contracts and cases. It appears from *The Federalist*, that, in the Convention, no disposition was shown to deny the National judiciary the cognizance of maritime cases; and it does not appear that any

* Benedict, Admiralty Practice, 88, note, contains a memorandum of a commission to Roger Mompesson, dated April, 1703, appointing him judge of admiralty in these colonies. Maine and Nova Scotia then were parts of the Province of Massachusetts Bay.

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objection was made to this grant in the State conventions which adopted the Constitution.*

Another argument in favor of the exercise of a large jurisdiction over maritime contracts, and contracts of marine insurance especially, is that it tends to promote uniformity of principle and practice throughout the different States in the administration of law. The practical reasons in support of such a jurisdiction generally, are stated by Taney, C. J., in *Taylor v. Carryl*. Of all maritime contracts, that of insurance is probably the one most extensively in use. It is known and practiced in all civilized countries. It is important that the rules, practice, and laws which relate to it should be the same throughout the world, so far as is possible. That they vary in different places is a source of much confusion and embarrassment, and has been greatly lamented by jurists. This court cannot, of course, influence courts of other countries directly, but it can do much towards establishing uniformity of law and practice in the construction and administration of the law of insurance in this country by exercising jurisdiction over the subject. It can, by so doing, establish rules and principles for the regulation of this contract, which will bind all the other courts of the United States. Now, the contract and the rights and liabilities of the parties to it, are construed differently in almost every State. Probably in no two States are the laws and practices, concerning insurance, the same. In Massachusetts, an insurer may take a vessel into his possession and repair it, without being held to have accepted an abandonment. This court, and some State courts, hold that he cannot. This court holds that if a ship be voluntarily stranded and lost, and the cargo saved thereby, it and its insurers are subject to a contribution for the loss. In Massachusetts, until lately, and in other States, a different rule prevails. This court holds that an insurer is not liable for the damage which the offending vessel in a collision is obliged to pay. The contrary is the rule in the courts of

* See Elliot's Debates.

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Massachusetts. Numberless illustrations might be adduced to show the want of uniformity and chaotic state of the law and practice of insurance; but it is, unhappily, too notorious. If a suit on a contract of insurance can be maintained in the admiralty, it must be decided according to the rules and principles of this court, and that would establish absolute uniformity in one court in every State in the Union, and have a strong tendency to establish it in the State courts, because of the great dignity of the court, the respect paid to its decisions, and its controlling influence over all matters over which it exercises jurisdiction. If the admiralty cannot exercise this jurisdiction, it must be left principally to the State courts, and the differences of opinion and practice, so much deplored, will remain and increase. The jurisdiction of the Federal courts, at law and in equity, being generally dependent on the citizenship of the parties, cannot often be invoked; and the decisions of these courts, however highly respected, are not conclusive and binding on the State courts in matters depending on private contracts. If, on the other hand, the jurisdiction of the admiralty over insurance should be established, the great advantage of its process, the celerity of its proceedings, and its other advantages, will cause it to be largely resorted to, and the thirty-seven District Courts, and all the Circuit Courts, being subject to one rule, uniformity of principle and decision will be established through all the States, the advantages of which in a nation of such commerce as this, and where contracts of insurance are made, a thousand or more every day, cannot be overstated.

The libellants therefore submit, that to exercise jurisdiction over policies of marine insurance is the established law and practice of the Circuit Court for the first circuit held by justices of this court; that such practice is in conformity with the universal maritime law and usage; with the decisions of this court affirming jurisdiction over charter-parties, and maritime contracts generally; with the jurisdiction exercised by the Vice-Admiralty courts before the Revolution, which must have been known to the makers of the Constitution; and is imperatively required to carry into effect the

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provisions of the Constitution touching the jurisdiction of its courts and the regulation of commerce, and to establish uniformity of principle and practice throughout the Union in one of the most important branches of commercial law.

It cannot now be questioned that the framers of the Constitution intended to vest in Congress the power to establish courts to exercise admiralty jurisdiction over all admiralty and maritime cases.

Congress, in the exercise of its discretion, might have conferred upon the courts it was to create such jurisdiction as it should see fit, and limit it to certain cases, but nothing of the kind was done. The Judiciary Act confers on the District Courts unqualified jurisdiction over all civil admiralty and maritime cases.

If, then, the contract of marine insurance is "*maritime*," it is a subject over which the District Courts of the United States must exercise jurisdiction.

Mr. H. C. Hutchins, contra, against the jurisdiction:

A policy of marine insurance is not a *maritime contract* within the meaning of that clause of the Constitution which delegates to the judicial power of the United States cognizance of "all cases of admiralty and maritime jurisdiction."

1. Because this clause is to be construed with reference to the restricted jurisdiction of the admiralty as recognized both in this country and England at the time when the Constitution was adopted. And admiralty has never claimed jurisdiction over insurance in England.

2. The decisions of the American courts at the period of the Revolution, and immediately after, conclusively prove the restricted jurisdiction of admiralty as fixed by the Constitution.

In *L'Arina v. Manwaring*,* A. D. 1803, Bee, J., said:

"Bills of lading, *policies of insurance*, and bottomry bonds, where the vessel is not hypothecated according to the marine law, are all *suable at common law only*. Yet these contracts are all more or less connected with a voyage."

* Bee, 200.

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So in *Dean v. Angus*,* per Hopkinson, J., as early as 1785, the same is intimated. So in *The Two Friends*,† per Bee, J. (A. D. 1786), it was held that admiralty extended only to maritime causes, and did not embrace “*any transactions or contracts which arise on land.*” So again in 1784, it was held in Pennsylvania that admiralty jurisdiction was confined to “*things done upon the seas.*”‡ A shipwright cannot sue in the admiralty.§ Material-men could not sue there either.|| Nor could contracts for necessities be sued, if furnished before the voyage was begun. Nor ransom bills. Nor charter-parties.¶ Nor was there any jurisdiction over cases of hypothecation, where the hypothecation took place before the commencement of the voyage, not even if the ship was hypothecated for necessities without which the ship could not proceed to sea.** Nor could a master sue for his wages; nor a physician, for his services on a voyage.†† This last case limits the jurisdiction to such claims as are either of themselves, or in their origin, *liens* on the ship; and this was the rule which Judge Peters said he always observed in determining whether a given case was within the jurisdiction. Certainly such a rule could not apply to policies of insurance; for they create no lien.

The cases cited above are the decisions of Judges Bee, Hopkinson, and Peters, all men of the revolutionary era, who were well acquainted with the limits of the admiralty jurisdiction as understood by the jurists and statesmen who framed the Constitution. They furnish the most trustworthy means for construing the admiralty powers as conferred by the Constitution.

3. No case can be found in the history of the admiralty of this country prior to the case of *De Lovio v. Boit*, in 1815, that

* Bee, 375, 376. † *Ib.* 435. ‡ *Talbot v. The Commanders*, 1 Dallas, 98.

§ *Clinton v. The Brig Hannah and Ship General Knox*, Bee, 419, per Hopkinson, J. (A. D. 1781).

|| *O'Hara v. Ship Mary*, Bee, 100, per Bee, J. (A. D. 1798).

¶ *Ib.* 345, per Hopkinson, J. (A. D. 1785).

** *Turnbull v. The Ship Enterprise*, Bee, 345, 375 (A. D. 1785).

†† *Gardner v. Ship New Jersey*, 1 Peters, Admiralty, 223 (A. D. 1806).

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affirms the jurisdiction of admiralty over a policy of insurance before or after the Revolution. The only one from which jurisdiction in admiralty over insurance may be even inferred, is *Stevens v. Sandwich*,* in the District Court of Maryland, which holds that a shipwright may sue in admiralty, making no distinction between home and foreign ports. But this decision may be considered as overruled in *People's Ferry Co. of Boston v. Beers et al.*† It decides nothing with reference to insurance.

4. The extension of admiralty jurisdiction is in abridgment of trial by jury, so carefully guarded by the Constitution. The encroachments of the admiralty were among the grievances of our revolutionary fathers.‡ Is it reasonable, therefore, to suppose, that, after they had achieved their independence, they would have formed a Constitution which guaranteed the very thing they before complained of?

5. The doctrine of *De Lovio v. Boit* has never been affirmed outside the first circuit, but has frequently been questioned in the Supreme Court of the United States, and by some of the judges expressly denied. It should also be remarked that Davis, J., who had a large experience as an admiralty judge, dismissed the libel in the District Court for want of jurisdiction, as appears by the record, although this is not stated in the decision. In *Ramsay v. Allegre*,§ Johnson, J., in referring to the case, said, that a contrary decision had been made in the sixth circuit, and that they must both fall together, as *nisi prius* decisions were of no weight in the Supreme Court. In *Waring v. Clarke*,|| the question of jurisdiction came up, and Justices Woodbury and Daniel dissented in favor of a *limited jurisdiction*. In *Jackson v.*

* *Gardner v. Ship New Jersey*, 1 Peters, Admiralty, 233, note, per Winchester, J.

† 20 Howard, 393.

‡ See address by the Continental Congress, Oct. 21, 1774, to the people of Great Britain, drawn by John Jay, afterwards Chief Justice of the United States; also *Waring v. Clarke*, 5 Howard, 484; *Bains v. Schooner James et al.*, 1 Baldwin, 544, 550, 551.

§ 12 Wheaton, 614, 622, 638.

|| 5 Howard, 461, 467.

Argument against the jurisdiction.

Steamboat Magnolia,* Campbell, J., says he thinks he speaks the universal opinion of the legal profession in saying that the judgment in *De Lovio v. Boit* was "erroneous." So also in *Taylor et al. v. Carryl*,† Taney, C. J., in pronouncing his opinion in regard to admiralty jurisdiction, and referring to a note in 1 Kent, 371, 372, said :

"I think it is stated too broadly, broader than this court has sanctioned; for, as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first, and certainly it has never been brought here for adjudication."

And in *Cutler v. Rae*,‡ the case is virtually overruled. In *Gloucester Insurance Co. v. Younger*,§ Curtis, J., refers to the case of *Cutler v. Rae*, last cited, and says it goes pretty far towards overruling *De Lovio v. Boit*; and although he adhered to the latter case in deciding the case before him, for special reasons, yet he intimated a doubt whether the doctrine would be sustained in the appellate court.

6. Aside from the authorities, it is submitted, from the reason of the thing, that a policy of insurance is not a maritime contract. It is an agreement to indemnify the owner of the ship, cargo, or freight, against loss by perils of the seas. The suit is an action for damages for breach of the agreement. There is no lien, and the contract is in no sense maritime. It begins and ends on land. A maritime contract is where the thing to be done is itself, and in its essence, maritime.

Suppose a policy upon a vessel upon the stocks, or after she is launched, and while waiting for her equipments or for a harbor risk, and the vessel is burnt by negligence or design, would admiralty take jurisdiction? Here is no voyage, no perils of the sea. The parties are the same, the subject-matter the same. What is the real distinction between such a policy and the present one? Is it said that the distinction is in the fact, that, in one case the vessel is water-borne or afloat, and in the other not? Suppose a policy upon a cargo

* 20 Howard, 335.† *Ib.* 615.‡ 7 *Ib.* 729.

§ 2 Curtis, 333.

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temporarily landed by reason of a disaster to the ship, and, while on shore, is destroyed by fire, or plundered. In such a case, the policy still attaches.* But would admiralty take jurisdiction?

7. It is not enough that as good a remedy may be afforded in admiralty as at common law. Such a rule would open the door of admiralty to suits of every kind, and end in confusion. So long as a master cannot sue for his wages in admiralty;† nor part owners, for matters of account between them;‡ nor a mortgagee, to enforce payment of his mortgage;§ nor a shipbuilder, for building a ship;|| nor material-men who furnish supplies, for a vessel in a home port;¶ nor any owner, for contribution by way of general average,**—it is not easy to see how, or on what principle, a policy of insurance can be regarded as within the limits of admiralty jurisdiction. It is against law, precedent, and reason.

If these libels are dismissed, no harm comes to the plaintiff; for he is only sent to other tribunals of admitted jurisdiction.

Reply: The decisions in Bee's Reports of an early date, to the effect that the admiralty courts have no jurisdiction over matters suable at common law, and a few more found elsewhere, are entitled to no consideration now, and it would be a waste of time to examine them in detail. They are opposed to the decisions of this court. The jurisdiction exercised by the colonial courts of admiralty before the Revolution, was, as has been shown, liberal and comprehensive, and gives no support to the construction for which the respondents contend. If the existence and contents of the records lately found had been earlier known, the courts would have been saved the necessity of considering arguments against the admiralty jurisdiction, based on the practical jurisdiction

* *Bryant v. Com. Ins. Co.*, 13 Pickering, 543, 558.

† 11 Peters, 175.

‡ *Ib.*

§ 17 Howard, 399.

|| *People's Ferry Co. v. Beers*, 20 Id. 393.

¶ *Pratt v. Reed*, 19 Id. 359.

** *Cutler v. Rae*, 7 Id. 729.

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exercised in England and in the colonies, and much litigation have been prevented.

Again, it is urged that the extension of admiralty jurisdiction was one of the grievances which led to the Revolution, and therefore it is not reasonable to suppose that the framers of the Constitution would have perpetuated the very evil of which they complained. But it is matter of history that the extension complained of related exclusively to revenue and criminal cases, that the evil was the taking away of trial by jury in cases where it previously existed. The civil jurisdiction was exercised under the King's commission, always, without a jury. It never was matter of legislation or of complaint, nor extended by statute.

It is said that a cargo insured might be destroyed while ashore; and it is asked if the Admiralty Court would then exercise jurisdiction. The answer is, that undoubtedly it would, if insurance is a maritime contract. The accident of the loss happening on land, does not alter the nature of the contract, if the cargo is covered by the policy.

It is said that the doctrine of *De Lovio v. Boit* is unsound, has not been approved of by the profession generally, and that it has been overruled by this court. It may be admitted that it has been sometimes questioned and sometimes denied by individual justices of this court, but never by the court or a majority of it. It has not been approved of by Daniels, Baldwin, Campbell, or Woodbury, Justices; but it may be said to have had the support of Marshall, Chief Justice, and Washington, Wayne, McLean, Justices, not to mention others now living; and the principles on which it is founded have been repeatedly affirmed in the decisions of this court sustaining jurisdiction over charter-parties, averages, and other maritime cases.

It is insisted that the case is *virtually overruled* by the decision in *Cutler v. Rae*. But we now know that *Cutler v. Rae* was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the court, and was not alluded to in conference; that the decision was made by a divided court, Catron, J., not giving an opinion,

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because he was "not satisfied either way," "that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction, than from a close and searching scrutiny into the practice and jurisdiction of courts of admiralty."*

Mr. Justice BRADLEY delivered the opinion of the court.

This case comes before us on a certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts on appeal from the District Court of that district. When this division of opinion occurred the Circuit Court was being held by the associate justice of this court allotted to the first circuit and the circuit judge of that circuit, sitting together. It becomes necessary, therefore, in the first place, to decide whether a difference of opinion between these judges sitting in the Circuit Court may be certified to this court under the act of April 29, 1802. The language of the act is broad enough to include the case. It is as follows: "Whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter, and shall by the said court be finally decided." But it has been suggested that, although the case is included in the terms of the act, it is not within its meaning, because the constitution of the circuit has been changed by the recent act creating circuit judges, passed April 10, 1869. There is nothing in this act which alters the powers of the court, or obviates the difficulty which a certificate of division was intended to meet. That difficulty arose from

* See the statement by Wayne, J., in the Appendix to 8 Howard; also *Dike v. The St. Joseph* 6 McLean, 573; *Taylor v. Carryl*, 20 Howard, 583.

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the fact that the court was constituted of two judges, between whom a difference of opinion would be likely often to occur, and thus block the wheels of justice. Other things being equal, a division of opinion is far more probable between *two* persons than is an equal division between any other even number of persons. This renders it desirable, when a court consists of the former number, to have some method provided for overcoming the intrinsic difficulty. Such a method was provided by the act of 1802 to meet the then constitution of the court, which consisted of a justice of the Supreme Court and the district judge. The act of 1869 has created a new circuit judge, it is true, but he is invested with precisely the same power and jurisdiction in his circuit as the justice of the Supreme Court has therein, whilst the powers of the latter, as judge of the circuit, are the same as before, and the court is to be held either by one of them or the district judge, or any two of the three. Thus the same necessity exists as before for the power to certify questions to the Supreme Court. As the mischief remains the same, and the terms of the act of 1802 are general and adequate to continue the remedy, such a construction of it as will have that effect seems to be fairly warranted.*

We, therefore, conclude that the case is properly brought before us by certificate.

The case, as thus brought before us, presents the question, whether the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the District Courts in admiralty and maritime cases has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

* See *Ex parte Zellner*, 9 Wallace, 244.

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The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the Judiciary Act passed at its first session, 24th of September, 1789, established the District Courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject.

Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes

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committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney,* "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." "Courts of admiralty," says the same judge in another case,† "have been found necessary in all commercial coun-

* The Steamer St. Lawrence, 1 Black, 527.

† The Genesee Chief, 12 Howard, 454.

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tries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the *locus* or territory of maritime jurisdiction; that is, the place or territory *where* the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide. "Are we bound to say,"—says Justice Wayne, delivering the opinion of the court in *Waring v. Clarke*,*—"Are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that *sea* always means *high sea* or *main sea*? . . . Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? . . . We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

* 5 Howard, 462.

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It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The Judiciary Act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burden as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of *The Genesee Chief*,* decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney,† "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to *contracts*, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty juris-

* 12 Howard, 443.

† Id. 457.

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diction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In *Menetone v. Gibbons*,* Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on *the subject-matter*." Had these views actuated the common law courts at an earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of *The New Jersey Navigation Company v. Merchants' Bank*,† which was a libel *in personam* against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer *Lexington* on Long Island Sound, Justice Nelson, delivering the opinion of the court, says:‡ "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." [The last distinction based on tide, as we have seen, has since been abrogated.] Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship-carpenters and material-men on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England.§ In the subsequent case of

* 3 Term, 269.

† 6 Howard, 344.

‡ Ib. 392.

§ See cases cited by Justice Nelson, 6 Howard, 390, 391.

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Morewood v. Enequist,* decided in 1859, which was a case of charter-party and affreightment, Justice Grier, who had dissented in the case of *The Lexington*, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of *The Lexington*, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*." The case of *The People's Ferry Co. v. Beers*,† being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is *not a maritime contract*;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of *The Moses Taylor*,‡ it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in ad-

* 23 Howard, 492

† 20 Ib. 401.

‡ 4 Wallace, 411.

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miralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of *The Belfast*,* it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: † “Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality.”

It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various District and Circuit Courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

* 7 Wallace, 624.

† 7 Ib. 637.

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It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not, maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce,—jet-

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tison, abandonment, average, salvage, capture, prize, bottomry, &c.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in her majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the court of admiralty, in prohibiting its cognizance of policies of insurance half a century before,* the

* 4 Institutes, 139.

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latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent."* The contrivances to which Lord Mansfield resorted to remedy in a measure these difficulties are stated by Mr. Justice Parke in the introduction to his work on insurance.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a previsional division of risk; first, amongst those engaged in the same enterprise; and, next, amongst associations of ship-owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier,

* Evans's Statutes, vol. ii, p. 226, 3d ed.

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and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship-owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur.* The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century,† and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A.D. 1435; of Venice, A.D. 1468; of Florence, A.D. 1523; of Antwerp, A.D. 1537, &c.‡ Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV, issued in 1681, it forms the subject of one of the principal titles.§ As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every

* 2 Pardessus, Lois Maritimes, 369; 6 Id. 303.

† Id. vol. 2, pp. 369, 370; vol. 4, p. 566; vol. 5, pp. 331, 493.

‡ Id. vol. 5, pp. 493, 65; vol. 4, pp. 598, 37.

§ Lib. 3, title 6.

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one of those collected by Pardessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts.* The French Ordinance of 1681 touching the Marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea."† The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and principles laid down in the book called 'The Consulate of the Sea,' printed at Barcelona in the year 1592."‡

It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the Admiral.§ Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom."|| But the intolerance of the common law courts prohibited the exercise of it. In the early case of *Crane v. Bell*, 38 Hen. VIII, A. D. 1546, a

* See Benedict's Admiralty, § 294, ed. 1870.

† Roccus on Insurance, note 80.

|| 2 Browne's Civil and Admiralty Law, 82.

‡ Sea Laws, 256.

§ Benedict, § 48.

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prohibition was granted for this purpose.* Mr. Browne says, very pertinently: "What is the *rationale*, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings."†

Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the Convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them.‡

The discussions that have taken place in the District and Circuit Courts of the United States have not been adverted to. Many of them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of *De Lovio v. Boit*,§ affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit.|| In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know.¶ Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the Circuit Court will be, that the District Court

* See 4 Institutes, 139.

† 2 Civil and Admiralty Law, 88.

‡ Benedict, chap. ix.

§ 2 Gallison, 398.

|| Gloucester Insurance Co. v. Younger, 2 Curtis, 332-333.

¶ Hale v. Washington Insurance Co., 2 Story 183.

Statement of the case.

for the District of Massachusetts, sitting in admiralty, HAS JURISDICTION to entertain the libel in this case.

ANSWER ACCORDINGLY.

PARMELEE v. LAWRENCE.

1. To authorize the re-examination of a question brought here as within the 25th section of the Judiciary Act, the conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record. And the question must have been necessarily involved in the decision, so that the State court could not have given a judgment without deciding it. (*Railroad Company v. Rock*, 4 Wallace, 177, affirmed.)

Accordingly, where no question of such conflict was made in the pleadings, nor in the evidence, nor at the hearing in the court where the suit was brought; and the question was first made in the Supreme Court where the certificate of the presiding judge showed only that it was taken in argument and overruled, the writ was dismissed.

2. The office of the certificate from the Supreme Court, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question within the true construction of the 25th section.

ON motion to dismiss a writ of error to the Supreme Court of Illinois, brought here on the assumption that the case was shown to be within the 25th section of the Judiciary Act; the idea of the plaintiff in error having been that a statute of the State of Illinois, on the subject of interest, was brought in question in this suit, and was upheld by the court below, though repugnant to the Constitution of the United States, as impairing the obligation of contracts.

It appeared by the record that Parmelee & Co. filed their bill in chancery, in the Superior Court of Chicago, against one Lawrence, in which they sought to enforce the specific performance of what they alleged to be a contract, by Lawrence, to convey to them certain lots in Chicago for the consideration of \$50,000, and interest at 10 per cent., free and clear of incumbrance. The bill set forth that they were