ADMIRALTY JURISDICTION AND AMPHIBIOUS TORTS

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THE United States Supreme Court in 1865 decided against the inclusion within the jurisdiction of the admiralty of those torts in which "The origin of the wrong was on the water, but the substance and consummation of the injury on land";¹ wrongs which "for want of a better word" were once not ineptly designated by Mr. Justice Henry B. Brown as "amphibious torts."² Thus authoritatively sired the principle has come down to the present day, bringing with it the prestige of an imposing accumulation of concurring judicial opinion. In the converse situation, however, jurisdiction was early sustained³ and has never since been seriously questioned.⁴

In the decades that have followed that eventful decision, experience with the operation of the rule has forced upon some the uneasy conviction that it is not working satisfactorily under modern conditions—that, in fact, it has become a functional misfit and a hindrance to sensible adjudication. With the recent development of boards of Port Authorities in most important maritime centers, a body of experts have, through their national association, become articulate and importunate spokesmen for reconsideration. Through their representations, the question of the extension of admiralty jurisdiction to damages caused by vessels to land structures has been under serious consideration by the American Bar Association.⁵

The gravamen of the protest against retention of the rule can be briefly summarized. In the first place, some passing stress is placed upon the anomaly of granting relief in admiralty to the owner of a vessel damaged by a land structure,⁶ while denying all maritime jurisdiction when the situation is reversed. The crux of the complaint, however, ap-

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1. *The Plymouth*, 3 Wall. 20 (U. S. 1865), where a fire, which had negligently broken out on a vessel on navigable waters, was communicated to a wharf and superincumbent packing houses.

2. See Brown, *Jurisdiction of the Admiralty in Cases of Tort* (1909) 9 COL. L. REV. 1.

3. *The Superior*, 23 How. 209 (U. S. 1859).

4. See *Panama Rr. Co. v. Napier Shipping Co.*, 166 U. S. 280 (1896).

5. (1929) 54 A. B. A. REP. 103; (1930) 55 *id.* 303 *et seq.*; (1931) 56 *id.* 64-65, 311 *et seq.*

6. A remedy in rem, however, has been held not to exist against immovable structures. *The Rock Island Bridge*, 6 Wall. 213 (U. S. 1867).

pears to be more fundamentally serious and comes down to real questions of fairness and business convenience. At common law, no action is maintainable against the owners of a vessel for the fault of a compulsory pilot.⁷ While in admiralty it is held that a remedy exists in rem against the ship,⁸ the rule of responsibility in personam does not differ from that of the common law. The intolerable result is that for damages caused by vessels to bridges, wharves and other land structures, there exists no adequate remedy when the fault, as is quite usually the case, is attributable to the pilot. Furthermore, even if the offending vessel is not controlled by a pilot imposed by law, to attempt to hold the owners may, by reason of such circumstances as financial instability or non-residence, render a theoretical remedy a practical futility.

As recently put in the report of the Standing Committee on Admiralty and Maritime Law of the American Bar Association, "there is a real need to correct the present unfortunate condition of the law, if that can be done" and the whole "situation seems so anomalous that it seems there must be some way to remedy it."⁹ It appears to be admitted on all hands that the doctrine is too solidly entrenched under the weight of accumulated precedents to expect that the United States Supreme Court will undertake a complete reversal in attitude. Moreover, the remedy has not been thought to rest with the legislatures of the various states having maritime ports.¹⁰ Thus attention centers upon the question of the constitutionality of relief by an act of Congress extending the admiralty and maritime jurisdiction of the United States to cases of damages by ships to land structures. Such legislation would neither imply encroachment upon vested interests nor involve the violation of any guaranteed right or immunity of the individual, for the decisions which would be superseded "have not created a rule of property around which vested interests have clustered."¹¹ Any argument of unconstitutionality comes down to little more in substance than that, by tradition, logic and precedent, the subject-matter is definitely excluded from an artificial and arbitrary legal category. Even so put, there is a questionable concession as to tradition and a dubious assumption as to the unassailability of the logic. It is at this point that the imposition of constitutional limitations upon legislative action is least defensible.

7. *Homer Ramsdall Transportation Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406 (1901).

8. *The China*, 7 Wall. 53 (U. S. 1868).

9. (1930) 55 A. B. A. REP. 305.

10. "Mr. Ernest Bruncken, the Secretary of the Milwaukee Board of Harbor Commissioners, made it quite plain to the committee that the state court procedure was wholly inadequate." *Id.* at 304.

11. Brandeis, J., dissenting in *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 238 (1924).

Yet in an elaborate report to the American Bar Association in 1930, the maritime committee, after a review of the authorities, made the definite statement that they "leave no doubt that Congress has no authority to extend the Admiralty jurisdiction beyond torts committed on navigable waters."¹² The committee for the following year, though containing a majority of new members, adhered to this view, asserting that "The decisions of the Supreme Court above mentioned seem to indicate a clear view that admiralty jurisdiction does not and cannot be made to extend to land structures, even by act of Congress for the court has stated that Congress cannot enlarge the constitutional grant of power."¹³ The writer, though a member of both committees, was never fully in accord with the conclusions reached by his learned colleagues, and, while signing the reports because in an extreme minority, dissented strongly during committee deliberations.

It may be freely conceded that there are matters so alien to all past and present conceptions of maritime transactions that they are plainly and permanently without the constitutional grant "of admiralty and maritime jurisdiction." But it is equally indisputable that there are other matters wherein jurisdictional limits fixed by tradition, established by decision or prescribed by legislation, may be modified and extended. This latter thesis has rarely been more vigorously enunciated than in the opinion of Judge Groner in *The Oconee*,¹⁴ wherein among else he asserted:

"That Congress, under the grant of admiralty jurisdiction, has power and authority to alter and amend the maritime law and make substantive innovations therein cannot be doubted; for, if it were otherwise, this nation, whose coast line is more extensive and whose ocean-borne commerce is the greatest in the world, would be placed alone, of the nations of the world, in a position where legislation for the improvement, enlargement and protection of these great interests would be impossible. As was pointed out by Mr. Justice Bradley in *The Lottawanna*, *supra*, 21 Wall, 577, 22 L. Ed. 654:

"It cannot be supposed that the framers of the Constitution contemplated that the law [maritime] should forever remain unalterable.'" ¹⁵

It is the submission of the writer that, notwithstanding general statements of the courts, there is nothing inherently incongruous, either in logic or tradition, in treating torts originating on a vessel on navigable waters as possessing essential characteristics of a maritime transaction, though the damage is consummated on land. On the other hand, there is every reason, if the law is to find its justification in the measure in which

12. (1930) 55 A. B. A. REP. 307.

13. (1931) 56 A. B. A. REP. 314.

14. 280 Fed. 927 (E. D. Va. 1922).

15. *Id.* at 931.

it satisfies business needs and promotes public convenience and equity, to bring this field of wrongs within the cognizance of the admiralty courts. "The necessities of the business which makes the law are considerations ahead of all others, and this is more easily obvious in maritime affairs than in most other pursuits."¹⁶

As pointed out, the present hampering rule received its judicial baptism almost seventy years ago in *The Plymouth*.¹⁷ The question was conceded to be "one of first impression," there being "no case in the books like it." The decision was reached by taking certain broad and general enunciations of the locality test for delictual jurisdiction and applying them with punctilious logic to the facts. The wrong was split into its origin and its consummation. The maritime character of the former, both in respect to instrumentality and locality, was disregarded because of what the Court regarded a priori as "the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction."¹⁸

The decision has been characterized as erroneous.¹⁹ There is little to encourage such a categorical judgment in the many subsequent pronouncements of the courts in which the rule has been applied. Doubtless, on the whole, the approach was in an orthodox manner and the reasoning conventional. The Court had perhaps not emerged entirely from that formative period of judicial history in which its decisions were said to show "with what slowness and hesitation the court arrived at the conviction of the full powers which the Constitution and acts of Congress have vested in the Federal judiciary,"²⁰ and this though the source of that utterance was a decision announced only a year later than that in *The Plymouth*. Not unlikely, too, the uncompromising spirit of the old common-law judges in the tradition of Coke and Holt was still exercising at least a remote measure of influence. Still, the conclusion was not at that time inevitable. The argument of counsel seeking to support jurisdiction was supported by citation of cases "tending to show that under the ancient jurisdiction of the English admiralty courts before it was curtailed by prohibitions, all damage done to wharves, docks and the shores of public rivers was within its cognizance."²¹ A Court, constituted of members more liberally inclined

16. Hough, *Admiralty Jurisdiction—Of Late Years* (1924) 37 HARV. L. REV. 529, 535.

17. *Supra* note 1.

18. *Id.* at 34-35 (italics added).

19. Bruncken, *Tradition and Commonsense in Admiralty* (1929) 14 MARQUETTE L. REV. 16.

20. *The Hine v. Trevor*, 4 Wall. 555, 562 (U. S. 1866).

21. Brown, *supra* note 2, at 9-10.

toward admiralty jurisdiction, might thus have shaken off the shackles of those postulates and logical deductions that proved so compelling and decided otherwise.²² As asserted by Mr. Justice Holmes, "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history."²³ There has always been a large measure of eclecticism exercised by the courts in incorporating into our admiralty law the raw jurisprudential material from which its foundations have been wrought. In particular,

"... on the vital point of expounding the constitutional grant, and ascertaining and declaring what are and what are not 'cases of admiralty and maritime jurisdiction,' that Court [United States Supreme Court] for more than a century has pursued its own method of selection and exclusion, choosing what seemed suitable from the whole range of maritime law (or customs), whether English, Continental, or Colonial, sometimes throwing away its first choice, but authoritatively labelling its excerpts for the time being as the maritime law of the United States."²⁴

As late as 1904, so eminent an authority on admiralty as Mr. Justice Brown, concurring in *The Blackheath*,²⁵ unhesitatingly accepted that decision "as practically overruling the former ones, and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (sec. 7),²⁶ extending the jurisdiction of the admiralty court to 'any claim for damages by any ship.'"

There have not been lacking from time to time some indications that the tide has commenced, in a measure at least, to run against the narrow logic of the decision in *The Plymouth*. For while in its broad formulations the rule has been repeatedly approved, in practice its scope has been cut down through refinements in its application. In *The Blackheath*,²⁷ the Supreme Court, overruling contrary views entertained by the District Court, extended jurisdiction to embrace damages caused by a ship to a beacon which "stood fifteen or twenty feet from the channel of Mobile river, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom." In *The Raithmoor*,²⁸ jurisdiction was further extended to include damages to a beacon in the process of erection and to a temporary platform used in connection with

22. As late as 1909, it was asserted on eminent authority that "if the question were an original one and the true reason for the existence of an admiralty jurisdiction were examined *de novo*, the result might perhaps have been different," and that "the truth is, that of the many tests applied to define that jurisdiction, none is decisive." *Id.* at 10.

23. *The Blackheath*, 195 U. S. 361, 365 (1904).

24. Hough, *supra* note 16, at 529.

25. *Supra* note 23, at 368.

26. 24 & 25 Vicr. c. 10, § 7 (1861).

27. *Supra* note 23.

28. 241 U. S. 166 (1916).

the work. In his concurring opinion in *The Blackheath*, to which reference has been made, Mr. Justice Brown said of such fine distinctions: "To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."²⁹ And confusion and much further litigation there has been over the difficulty of differentiating between objects or structures which take their character from the land to which they are in some manner connected and those on the other hand which are deemed so related to navigation as to become subjects of maritime jurisdiction. No extended reference to these cases is required. In *The Panoil*,³⁰ the Supreme Court declined jurisdiction of damages to a spur dike extending into the Mississippi River, though the "special purpose" of it was stated to be "to slacken the current, induce deposits of sediment and eventually build out the shore; and in this way to improve the channel and aid navigation." Shortly thereafter, however, in *Doullut & Williams Co., Inc. v. United States*,³¹ the Court, overruling the decision below, held to be within the cognizance of an admiralty court injuries to clusters of river piles, entirely surrounded by water and used exclusively for vessels to tie up to for security.

A subject-matter which raises such issues cannot be so confidently relegated to assured non-maritime zones of the law. In this connection, the English Admiralty Court Jurisdiction Act³² cited by Mr. Justice Brown is not without significance. It is true, of course, that English legislation enjoys a freedom from constitutional limitations unknown in America.³³ Nevertheless, there are interesting implications underlying its enactment, particularly in connection with a commentary such as that proffered by Holdsworth, in which this statute is cited among others, to the effect that "Modern legislation has restored to the court of Admiralty many of the powers, and much of the jurisdiction of which it had been deprived in the seventeenth century."³⁴ The thesis might be indefinitely amplified, but the conclusion ventured is that damages caused by vessels on navigable water, wheresoever consummated, come reasonably within the ambit of that power conceded to Congress "to alter and amend the maritime law and make substantive innovations therein."³⁵

29. *The Blackheath*, *supra* note 23, at 369.

30. 266 U. S. 433 (1925).

31. 268 U. S. 33 (1925).

32. Note 26, *supra*.

33. *Cf. Detroit Trust Co. v. Barlum Steamship Co.*, 56 F. (2d) 455 (W. D. N. Y. 1932): "It seems to me that the power of Congress under the Constitution to assign to the courts certain duties under the head of admiralty and maritime jurisdiction, is not less than the power of Parliament under the English Constitution."

34. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 558.

35. See *The Oconee*, *supra* note 14, at 931.

This power has elsewhere been defined in terms of discretion of some amplitude. As put in *Panama Railroad Co. v. Johnson*,³⁶

"When all is considered . . . there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."

Having regard, among other things, to the origin, history and practical functioning of the rule discussed, and the character of the subject-matter to be regulated, it seems to the writer rather dogmatic to assert with finality that these "amphibious" transactions are "clearly without" the scope of the "wide discretion" that Congress is conceded to possess.

A reference to the history of maritime mortgages will, it is believed, supply some instructive, if not controlling, analogies. In 1854, in *Bogart v. The John Jay*,³⁷ the Supreme Court was confronted with the question of whether a court of admiralty could afford relief to a mortgagee of a ship. The jurisdiction was emphatically denied, the Court asserting of the underlying reason:

"Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, *is a contract without any of the characteristics or attendants of a maritime loan*, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. *Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction.* In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. *There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime.*"³⁸

But though the Court thus confidently asserted that the mortgage was "a contract without any of the characteristics or attendants of a maritime loan" and had "nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction," it concluded its opinion with the significant statement that "Until that [legislation as in England] shall be done in the United States, by congress, the rule, in this

36. 264 U. S. 375, 386 (1924).

37. 17 How. 399 (U. S. 1854).

38. *Id.* at 402 (italics added).

particular, must continue in the admiralty courts of the United States, as it has been."³⁹

The decision in *The John Jay* remained the unquestioned law until 1920,⁴⁰ when Congress enacted the Ship Mortgage Act.⁴¹ By this statute, upon the compliance with certain formalities, and subject to certain priorities, a mortgage on a vessel is given the status of maritime security enforceable in admiralty proceedings. The constitutionality of this measure has never come directly before the Supreme Court for adjudication. In a number of cases in the federal District Courts, however, the issue has been squarely raised and the validity of the Act upheld.⁴² The Act has, moreover, been incidentally involved in litigation before the Supreme Court, and rights asserted thereunder have been discussed and determined on the tacit assumption of constitutionality.⁴³ It is highly improbable that this legislation, now more than thirteen years on the books, and under which millions of dollars have doubtless been advanced in reliance upon the statutory security, will ever be impeached on constitutional grounds.

While perhaps less analogically persuasive than the case of ship mortgages, the manner in which the statutory limitation of a ship owner's liability has been extended to non-maritime torts is not entirely unconstructive. In *Richardson v. Harmon*,⁴⁴ the Supreme Court, upon a petition for limitation of liability on behalf of the owners of a vessel that had collided with and damaged the abutment of a railroad drawbridge, held the case within the statute,⁴⁵ and enjoined the further prosecution of a pending action against the petitioners at common law. Earlier, in *Ex parte Phoenix Insurance Co.*,⁴⁶ a case reminiscent of *The Plymouth*, it had been held that jurisdiction as to limitation of liability could not be extended to land damages caused by a fire originating on a ship. Yet in the later case the power of Congress to bring such claims within the jurisdiction was assumed, and discussion was confined to the construction of the statute.⁴⁷

39. *Id.* at 403.

40. 1 BENEDICT, ADMIRALTY (5th ed. 1925) 106, and cases there cited, n. 28.

41. Act of June 5, 1920, § 30, 41 STAT. 1000 (1920), 46 U. S. C. §§ 911-984 (1926).

42. *The Oconee*, *supra* note 14; *The Nanking*, 292 Fed. 642 (N. D. Cal. 1923); *The Lincoln Land*, 295 Fed. 358 (D. Mass. 1924); *Detroit Trust Co. v. Barlum Steamship Co.*, *supra* note 33.

43. *The Northern Star*, 271 U. S. 552 (1926); see *The President Arthur*, 279 U. S. 564 (1929).

44. 222 U. S. 96 (1911).

45. Act of June 26, 1884, § 18, 23 STAT. 57 (1884), 46 U. S. C. § 189 (1926), amending Act of March 3, 1851, § 3, 9 STAT. 635 (1851), 46 U. S. C. § 183 (1926).

46. 118 U. S. 610 (1886).

47. *Cf.* 1 BENEDICT, *op. cit.* *supra* note 40, at 48, referring to the Limited Liability Act "which, though in principle a restoration of the general maritime law, is, especially in the limitation of a shipowner's liability for non-maritime torts, an independent head of jurisdiction."

At least passing reference should be conceded in this general connection to the part played by legislation in breaking down the doctrine established in *The Thomas Jefferson*,⁴⁸ wherein, through its spokesman Judge Story, the Court held waters above the ebb and flow of the tide, though navigable, without the admiralty jurisdiction. The breach was effected two decades and a half later when in *The Genesee Chief*⁴⁹ an act of Congress,⁵⁰ extending maritime jurisdiction to the Great Lakes, was upheld. The complete demolition of the rule was soon to follow.⁵¹ Similarly, District Judge Partridge in *The Nanking*,⁵² wherein the constitutionality of the Ship Mortgage Act was upheld, referred to the Federal Maritime Lien Act⁵³ as "another clear case of a statute giving to admiralty jurisdiction of matters concerning which the Supreme Court had declared it had no jurisdiction." And in this connection Judge Hough wrote with certain rude vigor, "The well-known history of the Lien Law of 1910 is a perfect example of the way in which customs enlarge, the courts lag and Congress kicks them into legal harmony."⁵⁴

A cursory survey of a somewhat parallel situation in the field of maritime contracts should also suggest some interesting analogies in connection with the subject under discussion. "Whether rightly or wrongly," as put by Benedict,⁵⁵ it has been definitely ruled that contracts for the construction of a ship⁵⁶ or for its original equipment and outfitting⁵⁷ are without the jurisdiction of the admiralty. Though such an agreement was characterized as "clearly not a maritime contract"⁵⁸ and though the ruling has been acquiesced in since its original enunciation by the Supreme Court seven years before the decision in *The Plymouth*, there have not infrequently been indications in subsequent opinions that the Court in retrospect, though feeling constrained to follow the precedent as established, has lingering regrets for the severely narrow spirit in which this doctrine, in common with much of the formative

48. 10 Wheat. 428 (U. S. 1825).

49. 12 How. 443 (U. S. 1851).

50. Act of Feb. 26, 1845, 5 STAT. 726 (1845), 28 U. S. C. § 770 (1926).

51. *Fritz v. Bull*, 12 How. 466 (U. S. 1851); *The Magnolia*, 20 How. 296 (U. S. 1857); *The Hine v. Trevor*, *supra* note 20.

52. *Supra* note 42.

53. Act of June 23, 1910, 36 STAT. 604 (1910), incorporated with slight modification into the Merchant Marine Act of June 5, 1920, § 30, 41 STAT. 1005 (1920), 46 U. S. C. § 971 (1926).

54. Hough, *supra* note 16, at 536.

55. 1 BENEDICT, *op. cit. supra* note 40, at 91.

56. *People's Ferry Co. v. Beers*, 20 How. 393 (U. S. 1857); cases cited in 1 BENEDICT, *op. cit. supra* note 40, at 91-93.

57. *Thames Towboat Co. v. The Francis McDonald*, 254 U. S. 242 (1920); and cases cited note 56, *supra*.

58. *Roach v. Chapman*, 22 How. 129 (U. S. 1859).

work of laying the foundations of the American admiralty law, was evolved. Certainly there is little in the original reasons adduced in support of the rule that indicates a broad conception of the scope of the classic admiralty tradition or a receptive attitude toward the elaboration of a liberal maritime jurisprudence. Indisputedly, the building of ships was a subject with which the early English admiralty jurisdiction was not unacquainted. Early in the seventeenth century such a jurisdiction was conceded to the admiralty in an attempt by the Privy Council, under the commission of Charles I, "to reconcile the differences between the common law courts and the Admiralty."⁵⁹ Referring to the ultimate legislative settlement of the conflict, Holdsworth asserts that "It [the court of Admiralty] has been restored, as we have seen, to its ancient position of a court of record; and its judge has been given the powers possessed by the judges of the superior courts of common law. It has been given jurisdiction in cases of salvage, bottomry, damage, towage, goods supplied to foreign ships, *building, equipping* and repairing ships, disputes between co-owners."⁶⁰ Here, as in the case of the ruling in *The Plymouth*, the Supreme Court is seen deferring to the limited scope of the English admiralty jurisdiction after it suffered a serious impairment of its original powers as a result of its classic contest with the common-law courts and before the ultimate restoration of its ancient jurisdiction by modern legislation.

The growth of our waterborne commerce and the evolution of its instrumentalities, since the judicial launching of *The Plymouth*, have only served to make more clear the present-day ineptitude of a rule based upon a technical, albeit logical, bifurcation of a transaction into causative factors and place of consummation for the purpose of determining tort jurisdiction in admiralty. The development of the modern ship, not infrequently huge in bulk, usually of steel construction and generally equipped with engines capable of generating enormous power, has created instrumentalities of great potential destructive capacity. Collisions between such vessels and docks, wharves, bridges and other structures adjacent to navigable waters are not unlikely to cause extensive damage. Certainly the handling of ships in close proximity to land structures, with the added elements of wind, tide and current, not infrequently presents problems requiring for their solution the high degree of specialized knowledge and experience which is peculiarly that of an admiralty judge. On the other hand, as has been asserted, "it has become generally recognized by the profession that the inexpert jury is not the best tribunal to pass upon the delicate questions of mechanism in patent cases, or the manoeuvring of vessels in colli-

59. 1 HOLDSWORTH, *op. cit. supra* note 34, at 555.

60. *Id.* at 558-559 (italics added).

sion.”⁶¹ There is something paradoxical, to say the least, in excluding a field of adjudication from the cognizance of the only court that, through equipment and resources, is fully competent to deal with it, on the ground that litigation within this field possesses none of the essential characteristics of the type of cases with which this particular court was specially created to deal. That the rule, pragmatically speaking, may not have worked serious detriment in 1865 is a tenuous argument for its retention years afterwards in the face of extensive changes. If the number and continuity of the judicial repetitions of the locality-test formula have closed the door to a remedy through “creative action of the judge” in the “adaptation of rule or principle to changing combinations of events,”⁶² at least Congress should be conceded the power to effect the inclusion of these bipartite torts within the jurisdiction of the admiralty. There is nothing against it but a judicial pronouncement made in days remote from the present and under other conditions and circumstances, reiterated on the basis of *stare decisis*.

On the assumption, however, that Congress lacks such power, the maritime committee of the American Bar Association recommended in its 1931 report the enactment of a compromise measure creating a lien against the offending vessel to be enforced in any District Court of the United States with “the right to attach the vessel to obtain security.”⁶³ The proposed bill further provided that “The procedure in such cases and the rules concerning damages shall be the same as those prevailing in cases of admiralty and maritime jurisdiction and the action shall be tried by a judge without a jury, unless a jury is demanded by the defendant before or when answer is filed.”⁶⁴ Such a remedy had been suggested on behalf of the Milwaukee Board of Harbor Commissioners,⁶⁵ though its proctor had hinted that “The danger seems to be that the Supreme Court might hold that the introduction of this principle, of itself, makes the case one of admiralty.”⁶⁶ Apart from the grave objections to a jury in the trial of these actions and the fact that it leaves untouched the old uncertainties as to what are land structures,⁶⁷ reflection has convinced the writer that the construction of this hybrid legislative conception may not unlikely, in and of itself, raise some puzzling questions. It is time, rather, to rid our admiralty jurisprudence entirely of the rule in *The Plymouth*. Conditions call for a

61. Brown, *supra* note 2, at 14.

62. CARDOZO, *THE GROWTH OF THE LAW* (1924) 135.

63. (1931) 56 A. B. A. REP. 316.

64. *Ibid.*

65. (1930) 55 *id.* at 314, 315.

66. *Id.* at 314.

67. This would be the situation in those close cases involving a decision as to whether to proceed in admiralty or under this proposed statute.

decisive operation that will remove the very root of the difficulty. It is believed that this can be accomplished by legislation, simple in its formulation and complete in its effectiveness. Should the attempt fail through constitutional frustration, it will be time to think of compromising with the evils that are the reproach of the existing state of the law.