ANSWERS OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, TO QUESTIONS I. AND II. PROPOSED BY THE INTERNATIONAL COUNCIL.

The questions are as follows:

I.—THE LAWS COMPARED.

In what cases can the Courts of your country exercise their jurisdiction in the event of collisions occurring in foreign waters when one or both vessels are under foreign flag?

II.—REFORMS.

What are the best rules to adopt as regards the territorial competency of the Courts and Tribunals as to collisions occurring abroad, either between foreign vessels or between a national vessel and a foreign vessel?

Should competency be specially attributed:

1. To the judge of the district where the collision took place?

2. To the judge of the home port of the defendant vessel?

3. To the judge of the district where the colliding vessel may be arrested?

4. To the judge of the district in which another vessel belonging to the same owner or incoming assets due to him may be seized?

5. To the judge of the place where the defendant has been served with a summons, although the defendant may have neither domicile nor residence in that place?

6. To the judge of the nation of the plaintiff?

7. In the event of there being several defendants—to the judge competent with regard to one of them?

8. Should the judge who is competent to exercise his jurisdiction on the principal action exercise the same jurisdiction on the cross-demands made by the defendant against the plaintiff as well as the demands in guarantee against third parties?

I.

By the Constitution of the United States, the Federal judicial power embraces "all cases of admiralty and maritime jurisdiction" (Art. III., Sec. 2). Congress, by the Judiciary Act of 1789, enacted that the Federal District Courts should have jurisdiction, among other things: "Of all civil causes of admiralty and maritime jurisdiction." It has, accordingly, always been held that our District Courts have original jurisdiction of all civil causes of an admiralty or maritime nature, without reference to the *place* where the cause of action arose, the *residence* of any of the parties, or the *home* of the ship.

The competency of the Federal Courts to hear and adjudicate all such causes is subject. however, to the same conditions that by our jurisprudence attach to the hearing of all other causes, viz.: the court must have jurisdiction of the *subject matter* (which is here satisfied by the maritime nature of collisions); and also, if the action be *in personam*, of the *person* of the defendant, or of some of his property. If the action be *in rem* the court must acquire jurisdiction of the *res* by its arrest within the district.

Jurisdiction of the person, if the defendant does not voluntarily appear, can only be acquired by service of process upon the defendant personally, within the geographical limits of the district. If the defendant is an incorporated company, personal service is made upon an officer or agent having business transactions of the company within the district. A suit *in personam*, may, however, proceed to judgment, without personal service or appearance, provided some of the defendant's property be found and attached within the district; but in that case the judgment operates only upon the property attached, and has no further validity.

Our answer to the first inquiry of the International Council, therefore, is that the Courts of the United States having admiralty jurisdiction exercise jurisdiction in cases of collision occurring in foreign waters when one or both vessels are under foreign flags:

1. Whenever the defendant vessel is within the territorial

limits of the jurisdiction of the particular court so that she can be arrested in a suit against her *in rem*.

2. Whenever the owner or master is within those territorial limits so that he can be personally summoned to appear and answer in a suit against him *in personam*.

3. Whenever the property of the owner or master is within the territorial limits of the jurisdiction so that it can be attached in a suit *in personam*, though he himself is not within reach of the process of the court; but as above stated, the judgment in a suit wherein jurisdiction is thus acquired, unless the owner appears and submits to the jurisdiction, binds only the property attached and has no further force.

Neither the fact that the collision was in foreign waters, nor the fact that both vessels are foreign, deprives the court of jurisdiction. But if all the parties to the suit are foreigners, the court may, in its discretion, decline to exercise jurisdiction. It thus declines only when special circumstances exist to show that justice will be better subserved by declining jurisdiction than by exercising it.

One of the most common objections in such cases is the inconvenience or impossibility of producing the necessary witnesses. Next to this the most material circumstance affecting the trial of collision causes arising abroad between vessels of different countries is the difference in the principles of the law applicable to the same state of facts in the courts of different nations. If such differences exist it may be very important to the parties where the cause is heard. But this difficulty is unavoidable so long as the present diversity exists in the maritime law of different nations. It cannot be wholly obviated except by making the law in all countries uniform. The evil is remedied in our courts by comity so far as possible. If the vessels in collision, or the parties to the cause, belong to the same country, or to different countries having the same law, our courts apply that law to the case, though our law be different; but if they belong to different countries, with different laws, since neither is entitled to a preference over the other, our own law is in such cases applied as the law of the forum.

II.

To the second inquiry as to the best rules to adopt regarding the territorial competency of courts, etc., it is the opinion of the Association that the rules in force in the United States, as above stated, are the best rules to adopt: In other words, that competency should be attributed (1) to any court having jurisdiction of maritime affairs within the district where the colliding vessel may be arrested; (2) to any such court within whose district the property of her owner or master (whether another vessel belonging to the same owner or owners, or other property) may be attached; (3) to any such court within whose district the defendant, though having neither domicil nor residence there, may be personally served with summons.

These rules, administered as above described, seem to furnish only reasonable opportunities for the redress of injuries by collision, and at the same time to secure to the offending vessels and to their owners all reasonable legal protection. The liability to suit in different jurisdictions for the same tort, is more a theoretical than a practical objection. It should be, and we believe mainly is, remedied by the universal comity of courts. If a prior suit is pending abroad, the additional suit will be stayed, or the plaintiff put to his election between the two. On the other hand, the restriction of jurisdiction to any single local court would often work extreme inconvenience and hardship to the injured parties, and give an inequitable advantage to the wrongdoer.

We think that no rule should be adopted which would oblige the courts of any country to refuse jurisdiction of any suit in which a citizen of that country, or an alien friend, seeks redress according to its law, provided the defendant is personally served, or his property arrested under the process of the court; but that the offending vessel and her owner should be each held to answer for their wrongs, wherever they may be found, and duly served with process.

We are of opinion, therefore, that competency should not be restricted to either of the courts mentioned in the first six subdivisions of the second question, but that either one of

them should be entitled to exercise jurisdiction, provided arrest of the vessel or service on the defendant is made within the territorial limits of the court; and that without personal service of the defendant, or arrest of his property or of the vessel, no suit for collision should be entertained in any court, except upon a voluntary appearance of the defendant.

The cases in which neither party is a citizen, and the question involved depends solely on foreign law, may safely be left to the discretion of the court, whether to undertake to deal with them or not.

As respects subdivision 7, we think jurisdiction should be taken of an action *in personam* against several foreign owners, defendants, provided personal service can be made on either one or more of them within the district, or provided property of one or more of them can be attached within the district; but any judgment in such action should be limited to the proportion of the damage chargeable against their vessel that the ownership of the defendant or defendants served bears to the whole ownership of the vessel.

The court having jurisdiction of the principal action (sub. 8) should, we think, also have jurisdiction of all counterclaims arising out of the same transaction.

In what has been said above reference has been mainly had to suits in the Federal District Courts, in which collision actions are almost exclusively brought. But, by the Judiciary Act of 1789, above cited, there is reserved to suitors "in all cases the right to a common law remedy, where the common law is competent to give it." This remedy may be sought in the state courts. It is confined to actions *in personam*. It excludes any right to enforce a lien or privilege upon the vessel, and it is subject to the common law rule, that in cases of mutual fault the suit must be dismissed by reason of the plaintiff's negligence, as there can be no division of damages. These circumstances, and the ill-adaptation of a jury trial to collision causes, make such trials in the state courts very rare; though other maritime causes, such as suits upon charter parties, bills of lading, marine insurance, etc , are not uncom-

mon. Any revision looking to uniformity in the law, or in the jurisdiction of the courts, would, in this country, call for the action of Congress as well as of the treaty-making power.

The opinion of the Association as to conflicts of law relating to cases of ownership, mortgage and other maritime liens, beg to report:

The first question, whether these rights should be governed by the law of the vessel's flag, seems to us to admit of a distinction. We consider it preferable that the law of the flag should regulate ownership, and the lien, if any, of the ship builder, documents of title, mortgages and hypothecations of vessels, such transactions being usually completed in the home port. The formality requisite for the proof of such titles and the requirements as to recording, and the satisfaction of such liens, should be regulated by the law of the place where these acts are performed. The same domestic law is also competent to determine the extent of the subject-matter to be hypothecated, and whether or not, and under what conditions, the freight moneys as appurtenant to the ship are to be included in such a mortgage.

But, in our view, the law of the flag cannot be allowed to determine the rank and priority in general of maritime liens, which are to be settled by the *lex fori*. The courts which administer the proceeds of the vessel and freight can ascertain by the provisions of the law of the flag whether the documents produced are regular in form and amount to a valid hypothecation, but must still determine independently the relative rank of these rights as against other competing liens. While merchant vessels at sea may for some purposes be regarded as forming part of the territory of the nation to which the ship belongs, there are certain general rights which we believe may not be abridged by the local law. As to collisions and other wrongs committed at sea or in foreign waters, the right to proceed against the offending vessel should not be limited by the local law of the ship's flag; but a just liability against the offending *res* should be enforceable abroad,

even if denied by the law of the flag of the culpable vessel. In the interests of public security, a lien upon the ship and freight should attach to the colliding vessel. Even if the law of the home port should discharge the ship owner from all liability for reparation, still the law of the forum, enforcing the collision lien, can be rightly applied in the interests of public safety and to secure an equality of all before the law.

The same is true as to salvage liabilities, and we think, also, as to certain necessary indebtedness incurred by the master in the course of the voyage.

Thus limiting the scope of the law of the flag to matters of the registration and like documentary formalities in the home port, it follows that the unification of the maritime law on these subjects is mainly to be sought by securing greater harmony in the different countries as to the rank and priority of liens, when these questions arise in foreign tribunals.

We believe that it is not practicable at this time to enumerate and marshal all the liens upon vessel and freight. The divergence of legislation between different countries is so great that an agreement can be hoped for only upon certain general principles.

The American practice, as distinct from that of the Continent, gives precedence to the maritime lien upon a vessel for damage caused by her fault to another vessel. This maritime privilege when enforced against the offending ship relates back to the time of the collision and may be postponed to other liens subsequent thereto. The great increase of steam navigation (with the consequent frequency of collisions) demands that this lien for damage shall not be displaced by prior contract liens. We believe it is a salutary rule that the owner of the injured vessel is entitled to proceed *in rem* against the offender without regard to the question who may be her owners, or to the division, the nature, or the extent of the interests in her.

Upon the Continent of Europe this collision lien is not recognized at all in the codes of France, Italy and Spain, and is only given a low rank in the maritime codes of Belgium, Germany and Scandinavian States.

The coming Hamburg conference should deal with this point of divergence separating the American practice from that of the Continent of Europe. This Association of the United States urges that such a procedure be adopted as will protect the sufferer by collision.

We believe it is not advisable to recommend a precise order for the ranking of maritime liens. It is difficult to assign the relative merits of such liens apart from the consideration of the time when each has arisen. The most favored lien is liable to be postponed to later claims in order of time.

If there be first a general recognition of liens for reparation of wrongs done, it is hoped that then the countries could eventually reach an agreement as to the ranking and order of other maritime liens.

We consider also that a time limit should be prescribed for the enforcement of these liens, which should depend on the presence of the vessel in the port where the claim arose, or the return of the vessel to that port or country, so as to afford a reasonable opportunity for the creditor to enforce his demands.

The opinion of the Association in respect to the Proposed Draft Treaties as to collision and salvage reported by the special Commission appointed at the Paris Conference is as follows:

FIRST.

As to the Draft Treaty relative to a uniform law of collision,

We accede to the First, Second and Third Articles of the Proposed Draft Treaty.

The Fourth Article of the Draft proposes to adopt the rule of dividing damages between vessels in fault not equally, as is the present rule of the law of the United States, but in proportion to the gravity of the fault of each.

There has been of late years a tendency in that direction in this country, in view of which, and in view of the very strong expression in favor of such a rule at the Paris Conference, we desire to express ourselves as not opposing, while not favoring, the adoption of such a rule of damages.

But the same Fourth Article proposes that in case of common fault the liability of the vessels should not be joint.

This is opposed to what has been the settled rule of law in the United States since the case of The Atlas, decided by the Supreme Court of the United States in 1876.

And as it would compel the cargo-owner to bear his own loss, at least partially, if either vessel were totally lost, or if the value of either vessel in fault was not equal to the share of the damages for which she was held liable, we do not think such a change would be acceptable to this country.

Such a provision is also inconsistent with the provision in Article 5, that "Losses in case of collision are to be recompensed in full."

As to Article 5, we recommend that all of the Article after the words "in full" be stricken out.

We accede to Article 6.

Article 7 of the proposed treaty proposes a rule in reference to the respective liabilities of tug and tow which is opposed to the law in this country, in that it proposes to provide that the tow is to be considered as the principal and liable for fault of the tug as its agent, the tug, however, remaining directly liable for its own faults.

We think such a change would not be acceptable to this country.

It is contrary not only to the settled rule of law but also to the universal manner of doing business in this country, according to which the tug is the principal, as an independent contractor.

This article would also seem to confine this proposed change of the law to "seagoing ships" in tow. We do not think this country would accede to any change which should make the law of tug and tow to vary according to the kind of vessel in tow.

We accede to Articles 8 and 9.

The Tenth Article provides that if vessels have been in collision the failure to render needed assistance, when possible, shall not "entail a presumption of fault" in the collision.

Our statute is to the contrary, and we do not believe that the proposed change would be acceptable to this country.

We accede to Article 11.

And we recommend the addition to the proposed Treaty of another article, as follows:

"ARTICLE 13. All the above provisions are subject to the right of abandonment or surrender by the owner of his interest in the vessel and freight in discharge of his personal liability, in accordance with the laws of the respective countries, and without prejudice to that right."

SECOND.

As to the proposed Draft of a Treaty relating to salvage, we perceive that there is little difference between the proposed Treaty and our law of salvage.

The first article (numbered 15 in the Treaty) reads, as follows: "Successful services rendered to a ship in peril give the right to the reimbursement of freight and damages, and to an equitable remuneration. All legislative distinction between salvage and assistance (services in the nature of salvage) is abolished."

There is no legislative distinction in the United States between salvage and services in the nature of salvage.

That part of this article which provides that successful service rendered to a ship in peril "gives the right to the reimbursement of freight and damages, and to an equitable remuneration," seems to us objectionable.

The proper form should be "gives the right to an equitable remuneration."

The giving of an absolute right to recover freight and damages would be inconsistent with the nature of salvage suits under our law, in which the question has always been merely as to the amount of an equitable remuneration.

The elements of loss of freight and damages should be specified in Article 20, as elements to be considered in fixing the remuneration.

The next article, which provides that nothing is due if the services "remain without useful result," is broad enough to cover cases of salvage services rendered by different vessels

in succession, as to which there has been some controversy in our Courts.

And the clause that no more can be awarded than the value of the property saved, agrees with our law.

The next article, forbidding any reward for services rendered "against the express prohibition of the captain of the ship," might well except the very rare, yet possible, case of a captain who was not in his right mind.

The next two articles cover the case of salvage services rendered by tugs and pilots and seamen to vessels in whose service they are, and they agree with our law that no salvage can be claimed by them for services which are within their respective contracts.

The next article, as to the elements to be considered in fixing a salvage, agrees with our law; but loss of freight and damages should be included. But the last clause of the article reads that "in no case shall the competent authorities be either forced *or authorized* to allow a fixed proportion of the objects salved, or their value."

The words "or authorized" ought to be omitted. No reason is manifest for limiting the discretion of the "competent authorities" in this way. The practice of fixing salvage in some cases by a percentage of the value saved is of ancient date, and should not be forbidden.

The last article, as to the modifying by the Judge of "contracts made in time of peril," agrees with the rule of our law.

We therefore approve of the Draft Treaty relative to a uniform law of salvage, with the following exceptions:

The words "to the reimbursement of freight and damages and" should be stricken out of the Fifteenth Article.

The words "or authorized" in the Twentieth Article should be stricken out.

In Article 20, after the words "assisting vessel," should be added the words "and any loss of freight or damage sustained by her."

Messrs. Everett P. Wheeler, J. Parker Kirlin, J. Edward Carpenter, George Whitelock and A. Gordon Murray, were

appointed delegates to the International Marine Conference, to be held at Hamburg, on September 27th.

May 2, 1902.

ROBERT DEWEY BENEDICT,
President.

HENRY GALBRAITH WARD,
Secretary.