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Hook, Line And Sinker (And Fishing Permits, Too?): The Inclusion Of Fishing Permits As Appurtenances To Maritime Liens

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HOOK, LINE AND SINKER (AND FISHING PERMITS, TOO?): THE INCLUSION OF FISHING PERMITS AS APPURTENANCES TO MARITIME LIENS

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I. INTRODUCTION

Fishermen going out to the Northeast's famed fishing grounds over the last several years have been pulling in large catches of once-ailing groundfish after more than a decade of decline.[1] Many fishermen, and even scientists and fishery managers, say that there are more fish in the ocean now than at any other point in recent memory.[2] However, despite the plentiful landings, total landings are down in some ports from years past due to stiff regulations that strictly curtail the areas that can be fished and the total number of days that a fisherman can be at sea.[3] This regulatory framework was put in place in an effort to limit the number of fish caught to a more sustainable level.[4] Indeed, the increased landings that individual

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1. John Richardson, *The Fate of Fishing: Families Who Know No Other Way of Life Brace For Big Change; New England's Groundfishing Crisis Has Culminated in Historic Court-Ordered Limitations*, PORTLAND PRESS HERALD, May 5, 2002, at 1A. Richardson reports that between 1991 and 1998, Maine's groundfishing landings experienced a 53% decline. *Id.*

2. Meredith Goad, *CHANGING HANDS IN CHANGING TIMES: Fishing for a Living; As the Rachel T Passes From One Seafaring Family to Another, Their Stories Illustrate the Decisions, Despair, Hardships and Hopes in Keeping Careers Afloat in the Tempestuous Summer of 2002*, PORTLAND PRESS HERALD, Sept. 1, 2002, at 1A [hereinafter Goad].

3. John Richardson, *Business Mix Keeps Port Robust; Cargo Traffic and Industrial Activity in Portland Harbor Rose in 2002, Offsetting Other Declines*, PORTLAND PRESS HERALD, Jan. 14, 2003, at 1A.

4. *See* Conservation Law Foundation v. Evans, 209 F. Supp. 2d 1 (D.D.C. 2001). In that Order, Judge Kessler makes it clear that although landings in some fisheries are on the rise, the National Marine Fisheries Service's (NMFS) efforts have failed to comply with federal law demanding that fisheries be brought to sustainable levels.

fishing boats are realizing indicate that the framework appears to be working, at least to a degree.[5]

The fisheries of the Northeast, however, still find themselves in a precarious position. Though the stocks of the principal groundfish appear to be rebounding, they remain quite low and in need of more time to rebuild.[6] To sustain their current growth, the fisheries must stay closely monitored, and perhaps more importantly, minimally fished. Towards this goal, the National Marine Fisheries Service (NMFS), the federal agency that oversees all commercial fishing in the Exclusive Economic Zone (EEZ),[7] issued a proposed set of rules in March 2002 that would curtail commercial fishing more drastically than it has been in the past.[8]

While the fisheries remain tenuously balanced between collapse and recovery, the fishermen who try to make their livings from those fisheries find themselves in an even more precarious position. New rules limiting days at sea may well be necessary for the preservation of ailing fish stocks, but they put yet another strain on the livelihoods of fishermen.[9] Fishermen hoping to stay in business face considerable challenges from regulatory bodies like NMFS, depleted fish stocks, and competition from within an extremely tight industry.

Because fishing is often a "boom or bust" industry, leaving fishermen without cash for long periods of time, fishermen are often highly leveraged and rely on credit for the extension of services and supplies.[10] Fishermen need boats; and boats need adequate supplies, wharfage, and repair from shipyards and other facilities. Many of the fishermen who have been strapped for cash in these last years of heavy restrictions on days at sea and

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5. Anecdotal evidence suggests that fishing boats are pulling in large catches of the fish that are the target of the regulatory framework. *See* Goad, *supra* note 2.

6. *Scientists Report on Status of Three Fish Stocks—July 25, 2001* (July 25, 2001), *available at* http://nefsc.nmfs.gov/press_release/advisory01.08.html (last visited Mar. 14, 2002).

7. NMFS is an agency under the National Oceanic and Atmospheric Administration, which is, in turn, an agency under the Department of Commerce. The Exclusive Economic Zone is roughly composed of those waters that are more than three miles and less than two hundred miles off the coast of the United States (author's note).

8. John Richardson, *Drastic Limits on Fishing Proposed,* PORTLAND PRESS HERALD, Mar. 2, 2002, at 1A [hereinafter Richardson, *Drastic Limits*]. The proposed rules, a direct response to Judge Kessler's ruling in *Conservation Law Foundation v. Evans, supra* note 4, would curtail days-at-sea and continue with a rolling series of areas closed to all commercial fishing. *Id.*

9. *Id.*

10. *See, e.g.*, Goad, *supra* note 2 (giving an example of one fisherman who quit fishing in the face of huge costs for maintenance, fuel, dockage and miscellaneous repairs); Laura Ruane, *Gulf Shrimpers Feel Pinch,* THE NEWS-PRESS (Fort Myers, Fl.), Jan. 18, 2003, at 1A.

total allowable catch have had to pay for these goods and services on credit. The credit supplied by shipyards and other creditors gives rise to a maritime lien, the ungainly sea creature that will be the subject of this Comment.

A maritime lien gives a creditor, in the event of a default or other defined trigger such as tort, the right to arrest and sell a vessel so that the creditor can collect on her debts. What's more, it is not only the vessel that is sold when a maritime lien is enforced; it is the vessel's appurtenances as well.[11] Appurtenances include a vessel's sails, equipment, and anything that makes the vessel a "going concern."[12] Recently, the First Circuit ruled that fishing permits were so integral to a vessel that the permits should be considered appurtenances and thus be sold with the vessel when a creditor enforces a maritime lien.[13] This decision may prove to have far reaching implications for the commercial fishing industry.

This Comment will address the issue of maritime liens and the recent designation of fishing permits as appurtenances to those liens. The First Circuit case of *Gowen, Inc. v. F/V Quality One*[14] will be analyzed as a current example of the issues and problems associated with that designation.

This Comment maintains that the inclusion of fishing permits as appurtenances to maritime liens may endanger fishermen's livelihoods more than it benefits the creditors who extend goods and services to fishermen on credit. It will also argue that the inclusion of fishing permits is not required by case law or by any existing statute. To the contrary, it would be more equitable and less restrictive to treat fishing permits not as appurtenances, but as a distinct piece of property, to be treated as collateral in a separate maritime lien, enforced only if the value of the vessel itself is not equal to or greater than the value of the goods and/or services extended.

Finally, it is important to mention what this Comment will not cover. The universe of maritime liens is intricately tied to both the law of admiralty and the law of secured transactions. It is my intention to provide a brief overview of maritime liens, fishing permits, and the separate regulatory regimes that control them for the purpose of elucidating and

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11. Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587, at *11 (D. Me. 2000).

12. A "going concern" is any commercial enterprise that is engaged in a business with an expectation of staying in business indefinitely. BLACK'S LAW DICTIONARY 699 (7th ed. 1999). *See infra* for an expanded discussion of the nature of appurtenances.

13. Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64 (1st Cir. 2001).

14. *Id.*

taking issue with the *Gowen* court's connection between fishing permits and maritime liens.[15]

II. MARITIME LIENS

A maritime lien is a lien on a vessel that is given to secure the claim of a creditor who has provided goods and services to the vessel or who has suffered an injury caused by the vessel's operation.[16] Maritime liens, like other liens, are important tools for both vessel owners and their creditors. For vessel owners, a lien can provide valuable cash, supplies, and repairs.[17] For creditors, the relatively easy applicability of maritime liens provides a measure of protection in a trade that is, by its very nature, in a constant state of flux.[18]

Congress has addressed maritime liens in the Maritime Commercial Instruments and Liens Vessel Identification System Act of 1988 (MCILVISA).[19] In that Act, Congress designated a system for prioritizing between ship mortgages, maritime liens and other security interests.[20] The purpose of the Act, much like the purpose of maritime liens in general, was to provide protection for maritime creditors in order to stimulate investment in the shipping industry.[21] The MCILVISA is applicable to all vessels except "public vessels," regardless of whether those vessels are engaged in

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15. The Maritime Commercial Instruments and Liens Vessel Act of 1988, 46 U.S.C. §§ 31301–31343 (2001), the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (2000), and the current regulations affecting the fisheries of the Northeastern United States, codified at 50 C.F.R. Part 648, will be the principle statutes consulted in this Comment.

16. BLACK'S LAW DICTIONARY 935 (7th ed. 1999).

17. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68 ("A familiar purpose of such liens is to make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic supplies or services needed for its operation").

18. 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-1, at 482 (2d ed. 1994) [hereinafter SCHOENBAUM] ("A maritime lien is a rough security device invented in the nineteenth century to keep ships moving in commerce while preventing them from escaping their debts by sailing away"). *See also* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY § 9-8, at 597 (2d ed. 1975) ("the rules which might fit stationary chattels would not work in the case of ships which roamed the earth") [hereinafter GILMORE & BLACK].

19. 46 U.S.C. §§ 31301–31343 (2001).

20. 46 U.S.C. § 31301 (2001). The interpretive notes for this section indicate that the MCILVISA "presumptively applies to determine questions of priorities between maritime liens and ship mortgages in United States cases."

21. Faneuil Advisors, Inc. v. O/S *Sea Hawk*, 50 F.3d 88, 92 (1st Cir. 1995).

the shipping industry.[22] As such, the provisions of the MCILVISA directly affect those involved in the commercial fisheries.

A. Maritime Liens—A Primer

A maritime lien is a claim on a vessel—not on the owner or master of the vessel—that arises from services rendered to that vessel or out of injuries caused by that vessel.[23] As such, it is a debt instrument designating a certain amount of money owed to either a voluntary or an involuntary creditor. Maritime liens, like Article 9 liens,[24] are enforced *in rem*.[25] However, that is where most of the similarities between maritime liens and Article 9 liens end.[26]

Maritime liens are different in almost every respect from Article 9 liens.[27] Some of the principal differences between maritime liens and other liens include: reversed chronological priority, secrecy, and the denial of ownership rights to the lienor. To briefly explain each concept, reversed chronological priority means that unlike traditional liens and security interests, the *last* in time is the first in right.[28] To be fully enforceable and perfected, maritime liens do not require the creditor to have either possession or to have provided notice to other creditors through filing, thus a maritime lien is "secret."[29] Finally, the creditor has no right to control the movements of the ship.[30] The creditor has no rights whatsoever in the vessel, save the ability to have it arrested.[31] The differences between maritime liens and traditional liens are distinct enough to cause some

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22. 46 U.S.C. § 31342 (2001).

23. SCHOENBAUM, *supra* note 18, § 9-1, at 481.

24. Article 9 is the comprehensive codification of law governing security interests in most forms of personal property. It will be discussed more fully *infra*. UNIFORM COMMERCIAL CODE art. 9 (2001) [hereinafter U.C.C.]. All subsequent references to Article 9 will be made to the revised version of 2000.

25. GILMORE & BLACK, *supra* note 18, § 9-1, at 482 "The ship, personified, is itself—or herself—the defendant in a proceeding *in rem* to enforce a lien").

26. In fact, maritime liens, though nebulous and secret, are good against "dry land" liens, even those that are properly perfected security interests under Article 9 of the Uniform Commercial Code. Matter of Topgallant Lines, Inc., 154 B.R. 368, 376 (S.D. Ga. 1993) ("Although few cases have dealt specifically with clashes between the UCC and maritime law, those decisions which have addressed the issue resolve any conflict in favor of maritime law").

27. GILMORE & BLACK, *supra* note 18, § 9-1, at 586 ("A maritime lien, so-called, is not a lien at all in the common-law sense of the term").

28. *Id.* § 9-2, at 588.

29. *Id.*

30. *Id.*

31. *Id.*

commentators to lament the confusion caused by the use of the moniker "lien" in this context.[32] As Gilmore and Black point out, a "lien is a lien is a lien, but a maritime lien is not."[33]

1. How (and why) do maritime liens arise?

Maritime liens can arise through either contract or tort. They can arise through claims against the furnishing of "necessaries" to a vessel, salvage operations, preferred ship mortgages, claims for damage or loss of cargo, pollution claims, and other claims against a vessel.[34] "Necessaries" can be best understood as those things that a vessel needs in order to continue on her way, such as repair services or ship supplies.[35]

In the absence of payment, a maritime lien will arise anytime a supplier or dockmaster furnishes necessaries to a vessel or that vessel is involved in a tortious incident and incurs liability.[36] Maritime liens arise automatically; that is, there is no need to perfect the lien by filing with a requisite governmental agency.[37] As soon as a vessel owes money the maritime lien arises, even in the absence of a recordation, filing or public acknowledgment.

Under MCILVISA, however, Congress has established a system whereby a lien claimant *may* file a notice with a U.S. Coast Guard Documentation Office.[38] MCILVISA makes it clear that any person who furnishes necessaries to a vessel has a maritime lien and may bring an action *in rem* to enforce that lien, whether or not there is a filed notice of the lien.[39] This notice serves to effectively "clear the air" with respect to

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32. GILMORE & BLACK, supra note 18, §9-1, at 589 ("Clarity of thought is not promoted when, by an accident of linguistic history, two unlike things are called by the same name .... The law of maritime liens might well have been worked out more satisfactorily than it has been if the unfortunate term 'lien' had not come into use during the nineteenth century").

33. *Id.*

34. SCHOENBAUM, *supra* note 18, § 9-1, at 483–485.

35. *See* 46 U.S.C. § 31301 (2001) ("'Necessaries' includes repairs, supplies towage, and the use of a dry dock or marine railway").

36. SCHOENBAUM, *supra* note 18, § 9-1, at 490.

37. *Id.* ("A maritime lien arises from the moment of the service or occurrence that provides its basis. The lien is non-consensual and unrecorded. It follows the vessel into the hands of even a good faith purchaser").

38. 46 U.S.C. § 31343(a) (2001). To be recordable the notice must include the nature of the lien, the date the lien was established, the amount of the lien, the name and address of the claimant, and be signed and acknowledged. *Id.* Of course, the lien is not extinguished or nullified in the absence of such a notice—the notice serves only to better warn others of the claim against the vessel.

39. 46 U.S.C. § 31342(a) (2001).

obligations that the vessel may have, but the notice is not a prerequisite to liability.

2. *In Rem*—or, why the boat is to blame

In *The Common Law,* Oliver Wendell Holmes wrote that a "ship is the most living of inanimate things."[40] One of the principal differences between maritime liens and other liens is the nature of the obligor. A maritime lien is an instrument that is held by the creditor against the vessel itself, not against the vessel's owner, lessee, master or anyone else.[41] Claimants who wish to enforce a maritime lien bring a proceeding *in rem* against the vessel.[42] The language used by Justice Marshall in one of the seminal American cases addressing the *in rem* proceeding to enforce maritime liens is worth quoting in full here:

> But this is not a proceeding against the owner, it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.[43]

The theory behind this curious mechanism is that the owner is often not in a position to control the vessel. Thus, it would be inequitable to hold the owner personally responsible for liabilities taken on by the vessel.[44] Maritime liens follow the boat, remora-like, even after the vessel changes hands. As such, a consequence of the proceeding *in rem* is that the maritime lien follows the boat from owner to owner, even if the new owner

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40. OLIVER WENDELL HOLMES, THE COMMON LAW 25 (Mark Dewolfe Howe, ed., The Belknap Press of Harvard University Press 1963) (1881).

41. GILMORE & BLACK, *supra* note 18, § 9-2, at 589.

42. *Id.*

43. *The Little Charles*, 26 Fed.Cas. 979, 982 (C.C.D.Va. 1819). Similarly, Justice Story wrote, in the *Brig Malek Adhel,* 43 U.S. 210, 233 (1844), the "vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."

44. SCHOENBAUM, *supra* note 18, § 9-1, at 491 n. 67.

is a good faith purchaser who buys the vessel without knowledge of the liens against it.[45]

This idea that the vessel can itself be responsible for its debts is, of course, a handy fiction.[46] The *in rem* proceeding gives creditors the power to collect on their debts immediately, rather than trying to chase down an owner who may live on another continent, and enables courts to enforce liens that might otherwise go unenforced. Otherwise, vessels could slip into the fog, sold to a good-faith purchaser on the other side of the globe, while the supplier who provided sailcloth, for example, would be left entirely empty-handed.[47]

3. The mechanics of a maritime lien

Once a maritime lien has been recognized to exist, how does it work? The maritime lien gives a creditor a *jus in re*, a "right in a thing."[48] As such, that right is a proprietary right, giving the holder of the maritime lien the right to "take the thing from one who possesses it, and to subject it by a sale to the payment of his debt."[49] A proceeding against a vessel does, of course, have very real legal consequences for the owners of vessels—regardless of the fiction that the vessel is paying her own debts—in that the practical result of a proceeding *in rem* against a vessel is the sale of the vessel to pay for the lien.[50] These real life consequences are illustrated by the circumstances surrounding the sale of the fishing vessel *Quality One*.

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45. Paul M. Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381, 390 (1929–30). Hebert says, "[o]ne judge has gone so far as to say that a vessel is subject to a maritime lien for collision if it is stolen." *Id.*

46. *See* HOLMES, *supra* note 40, at 25. There he wrote that it "is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

47. See, for example, GILMORE & BLACK, *supra* note 18, § 9-8, at 597, giving the example of the fraudulent practice of purchasing a car on credit in New York and selling it in Arizona to a purchaser who buys in good-faith, knowing nothing about the lien on the car back in New York. Compare that with the maritime lien, where one who buys a vessel with an outstanding maritime lien without knowledge of that lien is still subject to the lien's enforcement regardless of the lienor's assertion or lack thereof of the maritime lien. Article 9, on the other hand, requires a lienor to actively assert his rights against a good-faith purchaser in order to maintain his security interest. U.C.C. § 9-320, cmt. 3.

48. SCHOENBAUM, *supra* note 18, § 9-1, at 481.

49. Hebert, *supra* note 45, at 405.

50. *See id.* at 392.

There, Gowen, Inc. (Gowen) was a Portland, Maine company that had provided $12,000 of wharfage services and repairs to the *Quality One*.[51] The invoices for those services were unpaid. Gowen filed an action in the federal district court to recover its debts. However, neither *Quality One* nor her owners made any response.[52] Without a response, Gowen was able to obtain a warrant for the arrest of the vessel. The vessel was arrested pursuant to a warrant that commanded the seizure of "her equipment, engines, and appurtenances."[53] Subsequent to the arrest, Gowen obtained a default judgment against the vessel and immediately moved for its sale.

Pursuant to the order of the District Court, the United States Marshal's office seized the boat, advertised it locally, and publicly auctioned the vessel. At the auction, only two bids were submitted. Of those, Andrew Todd offered $17,000 for the vessel and her appurtenances, having been notified that the sale was going to be challenged by the vessel's previous owners in court. His bid was accepted, and he paid $17,000 that same day. The sale price was well below the $49,500 paid for the same vessel in 1997.[54]

It was only after the sale of the vessel that the owners of the *Quality One*, Nunya, Inc., filed suit in the federal District Court, arguing that the auction price was too low and that the fishing permits should not have been sold with the boat.[55]

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51. Bart Jansen, *Supreme Court Refuses to Hear Maine Fishing Permits Decision*, PORTLAND PRESS HERALD, Oct. 1, 2001, at B1 [hereinafter Jansen, *Supreme Court*]; Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587, at *2 (D. Me. 2000).

52. Practically speaking, of course, the only party who could provide an answer to the motion would have been the *Quality One's* owners.

53. Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64, 65 (2001).

54. These facts are accumulated from Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64; Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587; and Jansen, *Supreme Court*, *supra* note 51.

55. Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587, at *2.

B. Appurtenances and Their Wide Net

What does it mean that the *Quality One* was sold with her "appurtenances"? Appurtenances are those things that are not the vessel herself, but give the vessel a sense of identity, without which she would be less than whole.[56] In its *Gowen* holding, the First Circuit wrote that, "traditionally, a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel and is essential to its operation."[57] For example, fairly obvious examples of appurtenances might be the tackle and sails of a schooner, or the engine block of a lobster boat.[58] But what about the refrigerator in the galley of the schooner that the owners have rented for its busy summer charter season? And what about the traps stacked up on the stern of the lobster boat? Are both of these so integral to the operation of the vessel that they would go with the vessel in an action to enforce a maritime lien?[59]

1. What is an appurtenance?

Appurtenances make a vessel a going concern, but include more than what is required to make the vessel capable of navigation. This definition goes back to at least the middle of the nineteenth century. In an early case, *The Witch Queen,* a federal district court judge in California was confronted with the question of whether a diving-bell and air-pump should be included as appurtenances.[60] The decision notes that the enforcement of a maritime lien is a proceeding *in rem* against "a ship, her tackle, sails, apparel, furniture, boats, *or other appurtenances*"[61] (emphasis added). The Court concluded:

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56. *See* 70 AM. JUR. 2D *Shipping* § 573 (1987) ("A maritime lien extends to the ship's hull, engine, tackle, sails, rigging, furniture and equipment. The determination of whether equipment is integral to the vessel and therefore lienable under the statute must be made on a factual basis in each individual case").

57. Gowen, Inc. v. F/V *Quality One,* 244 F.3d at 67 (internal citations omitted).

58. *See* GILMORE & BLACK, *supra* note 18, § 9–19, at 622–23 n. 80.

59. Though it would depend on the specific circumstances of each case, the answer is most likely yes. SCHOENBAUM, *supra* note 18, § 9-1, at 488, writes: "Examples of accessories and appurtenances to which a lien on a vessel attaches include a winch and a gallowses installed on a fishing boat, fishing stores onboard a whaling ship, cement loading, bagging, and unloading equipment, a refrigerator on a ship carrying meat as cargo, a diving bell and air pump used for pearl fishing, and tanks used to carry oil."

60. The *Witch Queen,* 30 F.Cas. 396, 397 (1874).

61. *Id.*

> The previous enumeration of 'tackle, sails, apparel, furniture and boats,' includes everything belonging to the vessel as a 'navigating ship.' Unless the word 'appurtenances' applies to other objects on board belonging to the owners, for the purposes of the voyage, it can have no operation.[62]

Thus, the diving-bells and everything else on board the vessel *Witch Queen* for the "purposes of the voyage" were included as appurtenances, and thus included in the lien against the vessel.[63]

Another case addressing the issue of appurtenances is *The Joseph Warner*.[64] In this case, the court faced the issue of whether a "deck winch, a pair of gallowses, a compass and a set of running lights"[65] were improperly removed by a defaulting owner who knew that the fishing vessel was subject to a maritime lien.[66] These assorted items were on the vessel when the services giving rise to the maritime lien were provided, yet missing when the creditor moved to enforce the lien.[67] The court, in deciding that the items were appurtenances to be included with the maritime lien, analogized the situation to the doctrine of fixtures in realty law, saying that a mortgagor cannot rightfully remove fixtures that have added value to the real estate while the mortgage is still in force.[68] The court ultimately ruled that "whatever is placed in a vessel subject to a lien to carry out the purposes for which the vessel was equipped, increasing its value for use although it may be removed without injury to itself or to the vessel, becomes a part of the vessel, as between lienor and owner, and cannot be removed or otherwise disposed of while the lien is in force."[69]

Thus, an appurtenance can be understood to be something placed on a vessel that enables that vessel to "carry out the purposes for which the vessel was equipped." In other words, "appurtenance" is an almost metaphysical term—one that includes those items that help a sailboat to sail and a lobster boat to lobster.

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62. *Id.*
63. *Id.* at 398.
64. The *Joseph Warner*, 32 F. Supp. 532 (D. Mass. 1939).
65. *Id.* at 533.
66. *Id.*
67. *Id.*
68. *Id.* at 534.
69. The *Joseph Warner*, 32 F. Supp. at 532.

2. Other owners take care!

Since *The Witch Queen*, the rule regarding appurtenances has been expanded to include even those appurtenances onboard that are being used for the specific voyage, but do not belong to the owner of the vessel. In *Turner v. United States*,[70] the Second Circuit Court of Appeals held that a refrigerator not owned by the owners of a vessel that sank in a collision with another vessel was a part of the ship; and, as such, it "as part of the *res*, must share the loss."[71] The court explained, "though there be separate ownership of the *res* when it is made answerable for torts committed by the vessel, and though there be separate ownership of the refrigerating plant, as between the parties to the charter, it is a part of the vessel, to which those suffering damages are entitled to look for reimbursement for torts committed by the vessel."[72]

In essence, the court in *Turner* is prioritizing the right of the lienholder to reimbursement for a tortious debt over any proprietary rights held by the owner of the refrigerator. As such, a maritime lien, though the proceeding *in rem* is supposed to affect only the vessel herself, has a sphere of influence that can have real legal and financial consequences for vessel owners and even those whose only involvement with a particular voyage is the leasing of equipment to the vessel.

3. Intangibles

The net cast by the term "appurtenances" may have been made wider still in 1927, when the Supreme Court decided the case *United States v. Freights, Etc., of S.S. Mount Shasta*.[73] In that case, the United States owned the steamship *Mount Shasta*. The United States chartered that vessel to the Victor S. Fox and Company, Inc. ("Fox"), reserving a lien on all cargoes and subfreights for any unpaid dues under the terms of the charter.[74] Subsequently, Fox made a voyage to the Gold Coast of Africa to bring a cargo of mahogany logs back to the United States. The voyage was successful, except that Fox never paid the United States. The United States sued to recover a debt of about $390,000.[75] But because the United States owned the *Mount Shasta*, it would do no good to attach the vessel. Instead,

70. Turner v. United States, 27 F.2d 134 (2d Cir. 1928).
71. *Id.* at 136.
72. *Id.*
73. United States v. Freights, Etc., of S.S. *Mount Shasta*, 274 U.S. 466 (1927).
74. *Id.* at 469.
75. *Id.*

the United States brought an action *in rem* against the right to payment itself.[76] The District Court ruled that because there was no physical *res* that could be attached, the suit must be dismissed.[77] The Supreme Court reversed, hearing the case on direct appeal.[78] Justice Holmes wrote:

> By the general logic of the law a debt may be treated as a *res* as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's capable of being attached and appropriated by the law to the creditor's duties. The ship is not a *res* because it is tangible but because it is a focus of rights that in like manner may be dealt with by the law. It is no more a *res* than a copyright.[79]

Thus, though the right to payment was itself intangible, the Court ruled that proprietary rights can attach to a right to payment or other intangible in the same manner as they can to a physical object like a ship. Therefore, there is nothing to prevent a suit *in rem* against an intangible right to payment. It is perhaps important to note, however, that *Freights of Mount Shasta* does not explicitly treat the intangible debt as an appurtenance to a lien on the vessel; instead the debt itself is the subject of the lien.

III. THE NATURE OF FEDERAL FISHING PERMITS

Now that the maritime lien has been explored, it is necessary to inquire whether a fishing permit should be appropriately considered as property for the purposes of securing a maritime lien. And in order to do that, it is first necessary to explain what a fishing permit is.

Exactly what is the holder of a fishing permit entitled to do with that permit? Who (or what) is the rightful holder of the permit? How can the government presume to claim ownership of the bounty of the seas lying below the surface many miles from shore?[80] Do fishing permits give the

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76. *Id.* This right to payment is, in Article 9 terms, an account. Accounts are readily recognized as property for the purposes of collateral and security interests. *See* U.C.C. § 9-312 (2000).

77. United States v. Freights, Etc., of S.S. *Mount Shasta*, 274 U.S. at 470.

78. *Id.* at 469.

79. *Id.* at 470. Holmes wrote over the dissent of Justice McReynolds. McReynolds insisted that "jurisdiction is founded upon physical power over a *res* within the district upon the theory that it is a 'contracting or offending entity,' a 'debtor' or 'offending thing,' something that can be arrested or taken into custody, or which can fairly be taken as tangible property." *Id.* at 471, 472.

80. *See* Alison Reiser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813, 829 (1997) (demonstrating that the "current management system under the Magnuson-Stevens Act is based on a property regime

holder of the permit some property right in the fish they are licensed to harvest?[81]

Generally speaking, a fishing permit is the means by which legislature and fishery management bodies regulate and control access to a particular fishery.[82] Fishing permits are notoriously difficult to categorize with respect to whether or not they are property, or create a property right in the fish to be harvested.[83] The application for and issuance of fishing permits is a process entitled to the guarantees of due process of law and equal protection of the laws.[84]

Other licenses, such as a state-issued liquor license, have been deemed to be "personal property" and can be used as collateral in which a security interest can be created,[85] subject to the provisions of Article 9 of the Uniform Commercial Code that address general intangibles.[86] Fishing permits, however, are not often treated as property for the purposes of Article 9 security interests.[87] Further, commercial fishing permits are

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of state ownership with government-devised regulation, although an industry-dominated consultative system plays a substantial role").

81. Most state and federal fishery management plans emphasize that fishing permits are privileges, and do not establish a property right in the fish. However, simply labeling a commercial fishing permit as a "privilege" does not mean that that is how the courts (and the IRS) will see the matter. *See* Jon David Weiss, Note, *A Taxing Issue: Are Limited Entry Fishing Permits Property?* 9 ALASKA L. REV. 93, 105–112 (1992). There, Weiss demonstrates that Alaskan limited-entry fishing permits are both valuable and transferable and says that the legislature "unwittingly" created property subject to a federal tax lien. Of course, the *Gowen* court's ruling that fishing permits are appurtenances to maritime liens seems to have edged the fishing permit closer still to true property—there the Court did not elaborate on whether their decision would necessitate the treatment of fishing permits as property. In a respondent's brief for a case that was seeking certiorari at the same time *Gowen* was decided, the Solicitor General of the United States, Ted Olson, argued that fishing permits treated as appurtenances to maritime liens should *not* be treated as property. He writes, "[f]ishing privileges that serve as security interests are subject to the same regulatory requirements as privileges that do not; the privileges do not convey a property interest in fish or a fishery or a right to be free of future regulatory changes." Brief for the Federal Respondents in Opposition at *5, Daniels v. Patenaude, No. 01-126, *available at* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-0126.resp.html (last visited Feb. 22, 2002).

82. 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 40 (2001).

83. *See infra*, section V(C)(2).

84. 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 40 (2001) (citing Bartlett v. State Commercial Fisheries Entry Com'n, 948 P.2d 987 (Alaska 1997)).

85. *See* 68A AM. JUR. 2D *Secured Transactions* § 113 (1993).

86. *See, e.g.*, U.C.C. § 9-301, cmt. 4 (2000).

87. It is as yet unsettled how the *Gowen* decision will affect the treatment of fishing permits for the purposes of Article 9 (author's note).

issued by many different regulatory bodies.[88] Some fishing permits are issued to individual commercial fishermen[89] while others are issued to the vessel itself.[90]

Federal fishing permits are controlled by a strict and expansive regulatory regime.[91] The management of the nation's fisheries is controlled primarily by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),[92] originally enacted in 1976 in response to several findings of Congress relating to the threats facing both the fisheries and the nation's fishing communities.[93] While giving considerable leeway to the various regional fishery management councils that were established by the Magnuson-Stevens Act,[94] the Magnuson-Stevens Act provides the framework that all fishing management plans must correspond to.[95] As such, to better understand the nature of federal fishing permits, it is important to understand the findings, stated purposes and major provisions of the Magnuson-Stevens Act before examining the particular regulations controlling federal fishing permits.

A. Overview of the Magnuson-Stevens Act

In the middle part of the last century, the world catch of fish was increasing at a dramatic rate of approximately seven percent each year.[96] This led to a doubling in total world catch every ten to twelve years.[97] The drastic increase in fishing pressure led to unprecedented strain on the

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88. *See* Robin Kundis Craig, *Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio 1992*, 32 ENVTL. L. REP. 10190, 10211 (2002). There are eight Regional Councils acting under the authority of the National Marine Fisheries Service.

89. Permits are issued directly to vessel owners in the Pacific groundfish fisheries. 50 C.F.R. § 660.333 (2002).

90. This will be discussed in more detail *infra*, but in the northeast, multispecies permits are issued directly to the vessel, rather than the owner. 50 C.F.R. § 648.4(a) (2002).

91. For example, the single section of the Federal Register that addresses federal fishing permits in the northeastern United States alone runs to nearly two hundred fifty pages. *See* 50 C.F.R. § 648 (2002).

92. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (2000).

93. *See* 16 U.S.C. § 1801 (2000).

94. 16 U.S.C. § 1801(b)(5) (2000).

95. 16 U.S.C. § 1853(a) (2000). *See also* Reiser, *supra* note 80, at 829 ("The U.S. system follows neither fisheries co-management nor fisheries self-governance; it is a decentralized management system heavily structured and constrained by national procedural requirements and standards").

96. FRANCIS T. CHRISTY, JR. & ANTHONY SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES: SOME PROBLEMS OF GROWTH AND ECONOMIC ALLOCATION vii (2d ed. 1972).

97. *Id.*

world's oceans. Fisheries' observers watching the rate of increase in catch remain more or less stable even as the number of fishing vessels on the world's oceans increased dramatically and technological advances in fishing vessels and gear opened up new waters for exploitation clearly demonstrated this strain.[98] By the 1970's, it was obvious to observers of the commercial fishing industry that something had to be done about the exploding trends in the world's fisheries.

In response to the overfishing crisis, Congress passed the Magnuson-Stevens Act in the mid-1970's.[99] Congress found that the fish off of the nation's coasts and in the high seas "constitute valuable and renewable natural resources."[100] Congress also found that the stocks of some species of fish were being depleted at such a rate that the commercial extinction of once teeming stocks of fish, such as the Atlantic cod, was a very real possibility.[101] The 1976 version of the Magnuson-Stevens Act identified fish stock reduction due to overfishing as the principal factor in the demise of the world's fisheries.[102] The 1996 amendments made it clear that increased fishing pressure was only part of the problem; direct and indirect habitat loss and the failure of fishery management programs also contributed to the problem.[103]

Congress further found that the commercial and recreational fisheries have historically been a large economic boom to the United States, and that "activities of massive foreign fishing fleets" have contributed to overfishing and the general economic malaise of coastal areas.[104] The agreements that the United States had made with other nations had been largely ineffective at stemming the abuse of the fisheries, and there were signs that the fisheries may be rendered useless before an effective, multilateral, international agreement.

However, the Congressional outlook in its findings was not entirely bleak. Congress found that the fisheries, while depleted and finite, were renewable; and that under a sound national program, the recent trends in

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98. *See id.* at 104–37.

99. 16 U.S.C. §§ 1801–1883. The problems in the nation's fisheries had been apparent for some time. For an interesting discussion of the problem as it was perceived in the mid-1960's, and of how the problem worsened into the seventies, *see* CHRISTY, JR. & SCOTT, *supra* note 96.

100. 16 U.S.C. § 1801(a)(1) (1996).

101. *See id.* § 1801(a)(3)–(4); *see also* MARK KURLANSKY, COD: A BIOGRAPHY OF THE FISH THAT CHANGED THE WORLD 177–233 (1997).

102. 16 U.S.C. § 1801 (2000) (original 1976 language is found in the history to the section).

103. *Id.* § 1801(a).

104. *Id.* § 1801(a)(3).

overfishing and the collapse of fisheries might be contained and even reversed.[105]

1. Congressional purposes behind the Magnuson-Stevens Act

It was with the above findings in mind that Congress passed the Magnuson-Stevens Act. With the Magnuson-Stevens Act, Congress sought to accomplish several objectives. First and perhaps foremost, Congress sought to "take immediate action to conserve and manage the fishery resources found off of the coasts of the United States."[106] To that end, the Magnuson-Stevens Act was to protect "essential fish habitat" and determine "optimum yields" for the various fisheries in order to stave off further stock collapses.[107]

Another purpose of the Magnuson-Stevens Act was "to promote domestic commercial and recreational fishing under sound conservation and management principles."[108] In other words, the Magnuson-Stevens Act was passed not only to conserve the fish stocks that were in rapid decline, but also to preserve the fishing industry itself. The goal of the Magnuson-Stevens Act was not conservation for the sole sake of conservation, but conservation for the sake of the fishing industry as well.

2. Major provisions of the Magnuson-Stevens Act

One of the most dramatic changes that the Magnuson-Stevens Act brought to fishery management was the extension of United States jurisdiction to two hundred nautical miles off of the coast.[109] With that extension, the EEZ was born. The EEZ was propounded by the Magnuson-Stevens Act and actually established by "Proclamation Numbered 5030" on March 10, 1983.[110] The EEZ was put into place to prevent the unbridled pillaging of fish stocks by foreign fishing vessels that had sometimes been taking place within sight of land.[111] The EEZ, originally contemplated as a fishery management tool, has come to be a valuable tool in, among other

105. *Id.* § 1801(a)(4).

106. *Id.* § 1801(b)(1).

107. 16 U.S.C. § 1801(b)(4).

108. *Id.* § 1801(b)(3).

109. 16 U.S.C. § 1811(a). The previous extent of U.S. jurisdiction was the right that President Truman claimed to the continental shelf in 1945 in order to control the mineral resources located there. KURLANSKY, *supra* note 101, at 160.

110. *See* 16 U.S.C. § 1802(11).

111. *See* 16 U.S.C. § 1801.

things, trade control, the drug war, and more recently, the search for terrorists.

With the establishment of the EEZ, Congress was not acting unilaterally on the world stage in extending United States sovereignty over a greater portion of the oceans. A number of other countries (notably Iceland, Norway, and several Latin American countries) and the European Economic Community had already declared, or were about to declare, two hundred mile fishing zones.[112]

The Magnuson-Stevens Act also set up a framework for the establishment of Regional Fishery Management Councils (Regional Councils).[113] These councils were to be composed not only of government officials, but of representatives from "the fishing industry, consumer and environmental organizations, and other interested persons."[114] The councils were set up regionally, as opposed to nationally, so that they might better "take into account the social and economic needs of the States."[115]

The Magnuson-Stevens Act provided two avenues by which fishery management plans could be produced. The management plans could come from the Regional Councils or directly from the Secretary of Commerce.[116] No matter the source of the management plan, the Magnuson-Stevens Act required certain elements for any management plan.[117] Among those requirements, a fishery management plan must assess both the maximum sustainable yield and the optimum yield for the managed fishery,[118] include a "fishery impact statement" that details the likely effects of the plan on "participants in the fishery and fishing communities affected by the plan,"[119] and "allocate harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery."[120]

For the purposes of this Comment, the more relevant provisions of the Magnuson-Stevens Act with respect to fishery management plans are in those provisions left to the discretion of the Secretary of Commerce[121] or

112. KURLANSKY, *supra* note 101, at 166–173.
113. 16 U.S.C. § 1801(b)(5).
114. *Id.*
115. *Id.*
116. *See* 16 U.S.C. § 1853(a).
117. *Id.*
118. *Id.* § 1853(a)(3).
119. *Id.* § 1853(a)(9).
120. *Id.* § 1853(a)(14).
121. The Secretary of Commerce has delegated its power here to the National Marine Fisheries Service, a regulatory division of the National Oceanic and Atmospheric Administration. *See generally* http://www.noaa.gov (last visited Apr. 25, 2003).

the Regional Councils. Fishery management plans may, under the Magnuson-Stevens Act, require fishing permits with respect to any U.S. fishing vessel *or* the operator of any U.S. fishing vessel.[122] Furthermore, fishery management plans can designate zones where fishing is limited or prohibited,[123] establish catch, sale and transport limits,[124] and prohibit or limit the use of certain fishing gear.[125]

Perhaps most importantly, the Magnuson-Stevens Act enables fishery management plans to establish systems that limit access to the fishery in order to achieve optimum yield.[126] In establishing a limited-access system, the fishery management plan must take into account the present participation in the fishery, historical fishing practices in the fishery, the economics of the fishery, the ability of the fishing vessels used in the managed fishery to participate in other fisheries, and "the cultural and social framework relevant to the fishery and any affected fishing communities."[127] In other words, a fishery management plan limiting access to a particular fishery must demonstrate how that limited access will affect those who participate in the fishery. These limited access systems now control most major fisheries in the United States.[128]

With the Magnuson-Stevens Act, Congress intended to protect not just the ailing fish stocks, but those fishermen and fishing communities who depend on the wealth of the oceans for economic, physical, and cultural sustenance.

B. The Mechanics of Fishing Permits in the Northeastern United States

The Magnuson-Stevens Act provides the skeletal framework for fishery management and the issuance of federal fishing permits; substance and detail is in the various regional regulations. The extensive, and complicated, regulations covering the Northeastern United States, codified at 50 C.F.R. § 648 (section 648), will be the focus of this section.[129] This discussion is not intended to summarize all of the regulations, but to give an overview of the pertinent regulations in light of their relevance to the

122. 16 U.S.C. § 1853(b)(1)(A)&(B).
123. *Id.* § 1853(b)(2).
124. *Id.* § 1853(b)(3).
125. *Id.* § 1853(b)(4).
126. *Id.* § 1853(b)(6).
127. 16 U.S.C. § 1853(b)(6)(A)–(F).
128. *See* Craig, *supra* note 88, at 10213.
129. Fisheries of the Northeastern United States, 50 C.F.R. § 648 (2002).

discussion of the inclusion of fishing permits as appurtenances to maritime liens.

Section 648 provides a highly specific definition of each northeast fishery,[130] outlining exactly the sort of fish to be covered by the regulations. Each fishery has specific restrictions with regard to fishing gear, area closures, total allowable catch, minimum and maximum size limits, etc.[131] Subpart A of section 648 contains the general provisions to which all northeast fisheries must adhere. The requirements relating to the issuance of vessel permits are part of these general provisions.

The issuance of any given fishing permit is specific to the fishery for which it is issued.[132] For example, the limited access multispecies permit (LAMP) is a classic example of the northeastern permit issuance regime.[133] The permits are issued to a vessel, not to an owner or an operator of the vessel, on an annual basis.[134] These permits are not easy to obtain, as eligibility for a LAMP is dependent on meeting one of three qualifications. A vessel must: (i) have been issued a LAMP for the preceding year; (ii) be replacing a vessel that was issued a LAMP for the preceding year; or (iii) be replacing a vessel that was issued a confirmation of permit history.[135] This means that the availability of a LAMP is virtually shut off to those outside the industry. It is impossible to obtain a LAMP without having had one already, or knowing someone who has had a LAMP who is leaving the fishery.

Given that the LAMP is issued to the vessel, rather than the vessel's owner or operator, it makes sense that the "fishing and permit history of a vessel is presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred," unless there is an agreement otherwise.[136] A LAMP, however, may be issued to a vessel that is replacing another vessel that has sunk or otherwise become inoperable, subject to the conditions that the replacement vessel is about the same size and power of the vessel that

130. *Id.* § 648.2.

131. *See id.* § 648, subparts B–N.

132. 50 C.F.R. § 648.4 (2002).

133. *Id.* § 648.4(a)(i). This discussion is particularly relevant because the *Quality One*, the vessel in question in the *Gowen* case, had a LAMP, in addition to several other permits. Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64, 68 (1st Cir. 2001).

134. 50 C.F.R. § 648.4(a)(i) (2002). This is a part of the *Gowen* court's argument. It would, of course, be much more difficult to argue that fishing permits are appurtenances to a vessel if those permits were issued to an owner or operator instead of to the vessel itself.

135. *Id.*

136. *Id.* § 648(a)(i)(D).

it is replacing[137]—meaning that the permit is not lost entirely in the unfortunate event that the vessel meets an untimely demise.[138]

In theory, if not in practice, a LAMP is nontransferable. Section 648.4 makes no provisions for the transferability of the permits, and in fact, provides a specific restriction on "permit splitting:" "A limited access permit issued pursuant to this section may not be issued to a vessel or its replacement or remain valid, if the vessel's permit or fishing history has been used to qualify another vessel for another Federal fishery."[139] However, the regulations are silent as to the use of the vessel's permit or fishing history to qualify another vessel for the *same* fishery. According to one source, fishermen "routinely advertise the sale of certain types of permits for tens of thousands of dollars, which they can accomplish by selling a boat with a permit and then immediately buying it back without the permit."[140] Thus, through a complicated practice of dubious legality, LAMPs are transferable.

These characteristics imply that, under the regulatory regime established by section 648, fishing permits are of significant value to those who hold them–and what's more, extremely difficult to replace once lost.

IV. FACTS AND LAW IN THE GOWEN CASE

Now armed with the requisite background information on maritime liens and fishing permits, it is appropriate to discuss how the *Gowen* court's inclusion of fishing permits as appurtenances to maritime liens may have unwittingly affected fishing communities adversely. Although most of the *Gowen* facts have been recited above, a modest summary follows.

A. The Gowen Facts

Essentially, the vessel *Quality One* owed money for wharfage and repairs.[141] Gowen, Inc., the wharfage and vessel-repair services company that extended the services to the *Quality One*, had not been paid, and

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137. *Id.* § 648(a)(i)(E)(1)&(2).

138. *Id.* § 648(a)(i)(J) (2002) provides that a "confirmation of permit history" may be issued to a person who does not currently own a vessel, but who has, in the past, owned a qualifying vessel that has "sunk, been destroyed, or transferred to another person," so long as that person has retained the fishing and permit history of the original vessel. This confirmation of permit history makes that person eligible to apply for a new LAMP, issued to a replacement vessel.

139. 50 C.F.R. § 648(a)(i)(L).

140. Jansen, *Supreme Court, supra* note 51, at B1.

141. Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64, 65 (1st Cir. 2001).

brought an action in federal district court to enforce the maritime lien.[142] The court enforced the lien, ordering a public auction of the vessel, including "any valid fishing permits and history to the extent permitted by applicable law."[143] The vessel was sold for $17,000.[144]

After Nunya, Inc., the former owner of the *Quality One*, protested the sale price and the inclusion of the fishing permits, arguing that the fishing permits were not subject to arrest by the U.S. Marshal,[145] the district confirmed both the sale price and the inclusion of the fishing permits.[146]

Nunya, Inc. and the *Quality One* appealed both the sale price and the inclusion of the fishing permits to the First Circuit.[147] The First Circuit recognized both the difficulty and the novelty of the case, but affirmed the district court's decision.[148] It is the reasoning of the First Circuit's opinion on the issue of the inclusion of fishing permits as appurtenances that this section will focus on.

B. The Gowen Court's Interpretation of the Law

The First Circuit recognizes that there is "no authoritative answer as to [whether] fishing permits should be classed" either as appurtenances or as an entirely separate asset, unrelated to the vessel.[149] Furthermore, the court cites the commentator Schoenbaum,[150] writing "the determination of [whether something is an appurtenance] is commonly made on a case-by-case basis without great consistency of results."[151] In other words, the First Circuit begins its discussion of the inclusion of fishing permits as appurtenances hesitantly, recognizing that it is—to abuse another maritime cliché—venturing into uncharted waters.

As the first step towards its ultimate conclusion, the Court adopts the traditional definition of appurtenances, saying "a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel

142. *Id.*

143. *Id.*

144. *Id.* at 66.

145. Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587 at *2 (D. Me. 2000).

146. *Id.* at *21.

147. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 66.

148. *Id.* at 71.

149. *Id.* at 68. Later in the opinion, the Court again makes mention of the fact that there is no clear consensus in the maritime world, saying "[t]here is no evidence of any common understanding in the maritime world that permits are, or are not, subject to liens." *Id.* at 69.

150. SCHOENBAUM, *supra* note 18.

151. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68.

and is essential to the vessel's navigation, operation, or mission."[152] The Court, perhaps misreading the *Freights of the Mount Shasta* case discussed *infra*, notes that "there is no general objection to treating an intangible as an appurtenance."[153] The Court continues, saying that if fishing permits are *not* to be treated as appurtenances, they are "merely personal property of the owner, like a desk in a steamship company office."[154]

With at least an abstract definition of what constitutes an appurtenance, the Court's next step examines the purported purpose of a maritime lien. According to the Court, that purpose is to "make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic supplies or services needed for its operation."[155]

As a final premise, the Court looks to the purpose behind federal fishing permits. These permits, the Court suggests, are issued by the government in an effort to closely manage stocks of fish that have declined rapidly in recent decades.[156] Now, with a definition of appurtenances, an understanding of the purposes behind both maritime liens and fishing permits, the Court is prepared to arrive at the meat of its argument.

The Court said, "vessels like the *Quality One* are valuable significantly, and sometimes almost entirely, because of their permits."[157] In other words, a vessel that is barely seaworthy is almost valueless in itself without its permits. As such, the Court says that "not only the market value but the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation

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152. *Id.* at 67.

153. *Id.* at 68. Citing to the *Freights of Mount Shasta* case, the Court says, "freight charges due on account of a vessel's carriage of cargo are to maritime liens against the vessel." However, as shown in the discussion of the *Freights of Mount Shasta, supra* section II(B)(3), the Supreme Court did not rule that the debt was itself an appurtenance. Instead the Supreme Court held that the right to payment itself could be the offending *res*, against which an action may be brought. *See* United States v. Freights, Etc., of S/S *Mount Shasta*, 274 U.S. 466 (1927).

154. *Id.* at 67. Personal property is "any movable or intangible thing that is subject to ownership and not classified as real property." BLACK'S LAW DICTIONARY 1233 (7th ed. 1999). In real property law, personal property is generally not identified as part of the land when the land has been used as security, unless it has taken on the characteristics of a fixture.

155. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68 (citing Stewart & Stevenson Services, Inc. v. M/V *Chris Way MacMillan*, 890 F. Supp. 552, 562 (N.D. Miss. 1995). The Court in *Stewart & Stevenson Services, Inc.* analogizes the question of when something becomes an appurtenance to "the question of when an article becomes a fixture on real property." Stewart & Stevenson Services, Inc. v. M/V *Chris Way MacMillan*, 890 F. Supp. 552, 562 (1995).

156. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68.

157. *Id.*

equipment."[158] Often, with vessels like the *Quality One*, the only means of providing value to the vessel is to include the rare and hard-to-obtain fishing permits that have been assigned to the vessel when securing credit for the vessel.[159] In other words, if fishing permits are not included as appurtenances to a marine lien, marine creditors are going to be less likely to extend credit, and as such, "fishermen seeking repairs and supplies are likely to benefit from treating a vessel's permits as appurtenances."[160]

After dismantling appellant Nunya's argument that a forthcoming registration system for fishing permits suggests that fishing permits should not be treated as appurtenances,[161] the Court affirmed the District Court's inclusion of fishing permits as appurtenances.[162]

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158. *Id.*

159. *Id.* The Court says that the *Quality One* had several permits, a multispecies permit and several individual permits. *See* Craig, *supra* note 88, 32 ENV. L. REP. at 10213. Here, Craig says that "almost all major U.S. fisheries now have some sort of limited access in recognition of pervasive problems of overcapacity and overcapitalization and their effects on overfishing." In other words, most U.S. fisheries are closed to newcomers, and most are based on the "one-out, one-in principle"—limiting the issuance of new permits to the occasions where another permit is permanently given up. On the issue of how difficult it is to obtain fishing permits, see discussion *supra*, and consider that an applicant for a multispecies permit is eligible only if her vessel meets one of three conditions: the "vessel must have been issued a limited access multispecies permit for the year before, be replacing a vessel that was issued a limited access multispecies permit for the preceding year, or be replacing a vessel that was issued a confirmation of permit history." 50 C.F.R. § 648.4(a)(1)(i) (2002).

160. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68–69. The District Court is perhaps clearer on this point, saying, "[a finding that fishing permits are *not* appurtenances] could have a serious impact on those engaged in commercial fishing. If this Court were to hold that fishing permits are not subject to maritime liens, marine suppliers could become hesitant to extend what is presumably much-needed credit in the form of goods and services to commercial fishing vessels, given that the value of such vessels without their permits is far less." Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587 at *12, n. 6.

161. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 69–70. As owner of the *Quality One*, Nunya, Inc. had argued that the registry system (16 U.S.C. § 1855(h)) would provide an exclusive means of perfection of title for fishing permits, and that the registry system would effectively preempt the use of maritime liens against fishing permits. But the Court pointed out that the statutory language was hardly conclusive on the issue, that the registration system was not yet in place and the statute "tells us nothing about how Congress would wish the matter to be handled where no registry system yet exists." *Id.* at 70.

162. The District Court's specific holding was that "the Court finds that commercial fishing permits are appurtenances equivalent to fishing nets and are subject to maritime liens." Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587 at *11 & *12.

V. DISCUSSION

There is no question that fishing vessels are often made more valuable by the inclusion of their fishing permits as appurtenances. However, the question of whether that added value *necessitates* the inclusion of fishing permits as appurtenances is not even addressed in either the District Court's or the First Circuit's opinion. It is quite a leap from the point that fishing permits add value to ailing commercial fishing vessels to the conclusion that, because of that value, fishing permits should be included in every case of a maritime lien. As has been demonstrated above,[163] a maritime lien arises every time a vessel obtains services on credit. And as shown, most federal fishing permits are very difficult to obtain once lost. Fishermen whose livelihoods depend on having those permits are, as a result of the *Gowen* decision, compelled to ostensibly put their livelihoods on the line every time they obtain services for their vessels on credit. While the First Circuit claims to have the best interests of the fishermen in mind, the *Gowen* decision makes the consequences of the enforcement of a maritime loan potentially catastrophic for a fisherman who will lose not only a boat, but a livelihood, and indeed, a way of life, as well.

The First Circuit knew that it was acting in a precedential vacuum as to whether fishing permits should be included as appurtenances.[164] In the absence of both controlling statutes and case law, the Court could have come to a different or opposite conclusion with little difficulty, and with similar legality. As such, the *Gowen* decision could have been made either way.[165]

Both the District Court and the First Circuit panel that decided *Gowen* claimed to have the best interests of maritime creditors, fishermen and fishing communities in mind when they decided that fishing permits are appurtenances to be included in maritime liens. Both Courts claimed that if they did not rule the way they did, creditors would be hesitant to extend credit to fishermen secured only by the rusting hulks of vessels that the fishermen offer as collateral.[166]

However, the analysis of both Courts is flawed in at least two respects. Both the District Court and the First Circuit emphasize the wrong aspects

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163. *See supra*, section II(A) on the nature of a maritime lien.

164. *See supra*, section III(B).

165. The decision was not, however, arbitrary and capricious, in that both courts were not ruling on whims. To the contrary, both courts sought to act within the law. They just happened to be operating in a legal universe devoid of much precedent.

166. *See* Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64, 68 (1st Cir. 2001); Gowen, Inc. v. F/V *Quality One*, 2000 U.S. Dist. LEXIS 8587 at *12, n. 6.

of the fishing permit regulatory regime, and furthermore, leap to a conclusion—that fishing permits *must* be included as appurtenances to maritime liens—that is not dictated by either law or logic.

A. The Courts' First Flaw

The first flaw is one that affects one of the key premises of the Courts' argument; namely, that the fishing permit regulatory regime is set up primarily to conserve the fisheries *qua* fisheries. In other words, according to both the District Court and the First Circuit, the fish are being managed for no other reason than to preserve the ailing fish stocks.[167] The First Circuit wrote in *Gowen* that "[b]ecause of declining fish stocks, federal law now elaborately regulates catches for many types of fish through a network of statutory provisions, regulations, and agreements too complicated to summarize."[168] As the Magnuson-Stevens Act[169] clearly maintains, however, the regulations were put into place not just to preserve the fish stocks, but to "promote domestic and commercial fishing," as well.[170]

Thus considered, this first "flaw" may not be so much a flaw, but a telling window into the Courts' reasoning. This differing understanding of the fishing permit regulatory regime is one that only slightly shifts the nuances of the argument, but it is a difference that may lead to a different conclusion. The shift is perhaps only semantic, but it may indicate that neither the District Court nor the First Circuit had the interests of the fishing communities at the forefront of their minds. Had the Courts recognized that the Magnuson-Stevens Act is set up for the conservation of both the ailing fish stocks and the livelihoods of those who harvest those fish stocks, they may have been more inclined to see the fishing permits themselves as intangible items of singular value to the holders of the permits. As has been demonstrated above, these commercial fishing permits are not merely replaceable chattel like the vessel's block and tackle system. To the contrary, the fishing permits are of such value to the fishermen that they are perhaps better viewed as a commodity entirely distinct from the vessel. The *Gowen* Courts' decision fails to recognize that individual value by requiring fishermen to include their permits as collateral on every occasion the fishermen need credit for the repair of their fishing boat.

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167. *See* Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68.

168 *Id.*

169. *See supra*, section III(A)(1).

170. 16 U.S.C. § 1801(b)(3) (2001).

B. The Courts' Second Flaw

The Courts' second flaw can be seen not through an appeal to a superseding statute,[171] but to logic itself. The First Circuit, after establishing its premises,[172] reaches the intermediate conclusion that "fishermen seeking repairs and supplies are likely to benefit from treating a vessel's permits as appurtenances."[173] This conclusion is, in the large, supported by the Courts' premises. However, with no further support for the argument, the holding of the Court leaps to its ultimate conclusion that if the treatment of fishing permits as appurtenances is *beneficial*, then such treatment is *necessary*.

There are, to be sure, many fishermen who would in fact benefit from the treatment of fishing permits as appurtenances, in that it would make it easier to obtain credit needed to finance vessel repairs. These fishermen would probably have fishing vessels that are not terribly valuable in themselves—vessels like the *Quality One* that are "valuable significantly, and sometimes almost entirely, because of their permits."[174]

However, consider the case of the fisherman who has a vessel in good condition, that is quite valuable in and of itself. That fisherman would presumably be able to obtain the necessary credit by offering only his vessel (and its traditional appurtenances) as security for the maritime lien. The *Gowen* Court's decision, however, requires that fisherman offer not just the vessel that would have adequately secured the maritime lien, but also the fishing permits that the fisherman relies on to the same—if not greater—extent as the vessel itself. That fisherman is clearly not benefitted by the inclusion of fishing permits as appurtenances to the maritime lien.

C. An Alternative Suggestion

In the absence of authority on the classification of fishing permits, the First Circuit sought in *Gowen* to advance the purposes for which maritime liens were created.[175] And at a first reading, the decision does seem to do exactly that—the inclusion of fishing permits as appurtenances to maritime liens is likely to "make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic

171. Such as the Magnuson-Stevens Act.
172. *See supra*, section IV(B).
173. Gowen, Inc. v. F/V *Quality One*, 244 F.3d at 68–69.
174. *Id.* at 68.
175. *Id.*

supplies or services needed for its operation."[176] However, consider an alternative suggestion, one that bifurcates the maritime lien into two distinct parts, or even separate liens: the first, and primary lien would include the vessel and its traditional appurtenances; and a second lien would include the vessel's permits. In other words, the second lien would use the fishing permits themselves as the *res* of the lien. The first lien would be used to settle the vessel's debts. Only in the case where the value of the extended goods or services exceeds that of a vessel would the second lien be triggered. Thus, in the case where a boat has been extended $1,000 worth of goods or services and the boat is valued at $1,100, the fisherman would lose his boat, but he would still have his permits. Conversely, if the boat has been extended $1,100 worth of goods or services and the boat is valued at $1,000, the creditor would be at liberty to include the fishing permits in the auction of the boat.

1. The nature of fishing permits under the alternative suggestion

Some may argue that treating the fishing permits as a separate *res* for a maritime loan treats fishing permits too much like "property." Fishing permits are typically seen as "privileges," rather than property.[177] However, this designation of fishing permits as something other than property is perhaps little more than a handy fiction[178]—much like the treatment of a ship as something with a personality of its own.[179] The consequences of the proposed alternative would do nothing to change the existing understanding of fishing permits as privileges. Under existing law, fishing permits are valuable and can be transferred. In fact, the *Gowen* Court's holding treats fishing permits as a property-like entity in much the same way as the

176. *Id.*

177. *See supra*, section IV.

178. This designation allows the government to sidestep thorny Takings Clause (U.S. CONST. amend. V) issues that arise when permit holders are subjected to area closures and catch limitations that were not in place when they were issued their permits. *See generally* George J. Mannina, Jr., *Is There a Legal and Conservation Basis for Individual Fishing Quotas?*, 3 OCEAN & COASTAL L.J. 5, 50 (1997) (noting "[a]s courts have long recognized, something can have value without being private property subject to the Fifth Amendment if the 'property right' is revoked by the government. The Magnuson-Stevens Act, as amended by the Sustainable Fisheries Act, confirms this judicial precedent by providing that an IFQ [a certain form of quota-based commercial fishing permit] is a revocable permit which does not confer any right to compensation if revoked or limited"); Weiss, *supra* note 81, at 112 (arguing that the Alaska state legislature "unwittingly" created property when it allowed fishing permits to be easily transferable even though its explicit intention was to prevent the treatment of fishing permits as property).

179. *See* HOLMES, THE COMMON LAW, *supra* note 40, at 25.

alternative offered here; for an appurtenance is only useful so long as it adds value to the security. Furthermore, the newer federal programs that buy back federal fishing permits from fishermen in an effort to decrease the size of the fishery also recognize the property-like nature and definite value of fishing permits.[180] Finally, the Supreme Court made clear in *United States v. Freights, Etc., of S/S Mount Shasta*,[181] that intangibles can be treated as the *res* of an independent maritime lien. Intangibles such as fishing permits do not need to be attached to a vessel or anything else to form the *res* of a maritime lien. An entity that has value is difficult, if not impossible, to describe or define without resorting to terms that are used to describe property, as well.[182]

2. What about Article 9?

Article 9 is the principal means by which secured transactions are regulated.[183] Article 9 establishes a framework by which debtors can give creditors an interest in personal property in exchange for the extension of a loan, goods, or services.[184] It is natural to think that treatment of fishing permits under Article 9 would provide a more attractive alternative than treating fishing permits as appurtenances. However, it is unlikely that Article 9 would provide a workable solution at this point in time.

Article 9 is a more formalized system than the maritime lien system. Before a creditor's security agreement is effective against other creditors, it must be "perfected."[185] For most personal property, perfection is achieved with the filing of a financing statement with a state government office.[186] As has been discussed, maritime liens arise automatically and secretly.[187] Article 9 does provide for automatic perfection in some cases,

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180. *See* Beth Daley, *Latest Plan to Reduce N.E. Fishing Fleet Seen Falling Short*, BOSTON GLOBE, Feb. 14, 2003, at B3.

181. United States v. Freights, Etc., of S/S *Mount Shasta*, 274 U.S. 466 (1927), discussed *supra* section II(B)(3).

182. As Shakespeare's Juliet asked of us all, "[w]hat's in a name? that which we call a rose/By any other name would smell as sweet..." WILLIAM SHAKESPEARE, ROMEO AND JULIET act II, sc. 2.

183. *See generally* RUSSELL A. HAKES, THE ABCS OF THE UCC: ARTICLE 9: SECURED TRANSACTIONS (1996).

184. *Id.* at 12; UCC § 9-203 (providing that a security interest attaches to personal property when (1) the debtor has signed a security interest containing a description of the collateral, (2) the secured party has given value, and (3) the debtor has rights in the collateral).

185. HAKES, *supra* note 183, at 25.

186. *Id.* at 26; UCC § 9-302.

187. *See supra*, section II(A).

and indeed, there is no reason the system could not work for fishing permits.[188]

It may well be that maritime liens could be included within the purview of Article 9 or another similar, uniform regime. With the radical advances in notification technology since the advent of maritime liens, the time for secret maritime liens, and the other idiosyncratic qualities of the maritime lien, may have passed with the schooner. The argument for a total reconsideration of the maritime lien is, however, one for another day. This Comment proposes a much more modest change to the existing maritime lien regime, one that could be implemented with a minimum of difficulty, and a minimum of change to the *status quo.*

However, other maritime liens are not covered by Article 9, and to carve out a narrow exception for the lien that covers fishing permits would be confusing and onerous, as it would subject debtor fishermen and creditor service providers to all of the various and sundry provisions of Article 9 for one lien and not for others. Until all maritime liens are covered by Article 9 or some other uniform system, it will be more efficacious to treat the secondary lien for fishing permits as an ordinary maritime lien.

VI. CONCLUSION

The difference between treating fishing permits as the *res* of a separate maritime lien and treating them as appurtenances to maritime liens is more than a semantic quibble. The consequences of the *Gowen* Court's holding on the fishing community may prove to be quite harsh. In a worst case scenario, fishermen may shirk from obtaining the repairs their vessels need because they do not wish to put their fishing permits at risk. As they would be using unsafe fishing gear, the result of such neglect would be an increased level of physical danger to those fishermen. Much more likely, however, is the case of a fisherman who does obtain the needed credit with the inclusion of his fishing permits as an appurtenance to the maritime lien—and who subsequently has the maritime lien enforced against him, causing him to lose both his boat and his permits.

As the *Gowen* Court understood,[189] fishing permits are sometimes the only serious assets that fishermen have. Those permits are assets that, if lost, can render all other fishing assets entirely worthless to that fisherman.

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188. HAKES, *supra* note 183, at 35. The security interest of a retailer selling consumer goods on a purchase-money basis is the most common example of automatic perfection. *Id.*

189. Gowen, Inc. v. F/V *Quality One*, 244 F.3d 64, 68 (1st Cir. 2001) ("[V]essels like the *Quality One* are valuable significantly, and sometimes almost entirely, because of their permits").

In other words, while a fisherman can lose his boat and replace it, he may not be able to replace a lost permit. The *Gowen* Court, recognizing the value of those permits, assumed that the best thing for the fisherman and their creditors would be to include the permits in an expanded definition of what is appurtenant to a maritime lien. But because a permit can be of such singular value, and because maritime liens can be so readily enforced against the fisherman, it would be less drastic and perhaps more equitable, to recognize fishing permits as the *res* of a separate maritime lien, one that would only be enforced in the event that the value of the boat itself does not cover the value of the amount owed. To do anything else unnecessarily jeopardizes the survival of an already challenged industry.