ADMIRALTY JURISDICTION
(Part 2)

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ACTIONS *IN REM*

The distinctive feature of Admiralty is its capacity to entertain proceedings taken directly against ship, cargo, freight or other maritime property. In contrast with the action *in personam*, which proceeds against a defendant having common law personality, the action *in rem* commences against the thing which causes damage or in respect of which obligations accrue.[1] If the owner of the *res*, or someone having a financial interest in it, does not defend the action, the *res* may be arrested and sold by the court and the proceeds applied in execution of judgment. The sale confers an absolute title on the purchaser free of any encumbrances. Usually, the owner does defend the suit.

Development

Ironically, the action *in rem* and the survival of Admiralty are a legacy from the very common lawyers intent upon eliminating the civilian jurisdiction.[2] The High Court of Admiralty traditionally initiated proceedings by arresting the defendant in person or his ship or goods. By use of prohibition, common law could readily remove a plaint against the person to its own courts[3] but, knowing only redress *in personam*, it had no facility to entertain actions against goods. Instead, it attempted to cripple Admiralty's proceedings at the point when the owner of the arrested goods appeared and entered into a recognizance to secure release of his property from custody. Common lawyers asserted that the Court of Admiralty was not a court of record and could not, therefore, accept recognizances.[4] Responding to this argument, the civilians contended that the bail undertaking was not a recognizance but a *stipulatio* sanctioned by their Roman law heritage.[5] With Admiralty at their mercy, common law courts surprisingly accepted

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1 *The Volant* (1842) 1 Not. Cas. 503; 1 W. Rob. 383; 166 E.R. 616; *Harmer* v. *Bell* (1850) 7 Moo. P.C. 267; 13 E.R. 884.

2 E. F. Ryan, "Admiralty Jurisdiction and the Maritime Lien" (1968) 7 *West. Ont. L.R.* 173, 193.

3 See R. G. Marsden, *Select Pleas in the Court of Admiralty* (1894) Vol. I, lxxiv-lxxx; Vol. II, xli-lvii.

4 4 Coke 135; *Thomlinson's Case* (1598) 12 Co. Rep. 104; 77 E.R. 1379.

5 3 Blackstone Ch. 7, 109; *Hook* v. *Moreton* (1698) 1 Ld. Raym. 397; 91 E.R. 1165.

this semantic illusion.[6] They could afford to do so because they had stripped Admiralty bare of jurisdiction over contractual claims, except for seamen's wages,[7] and precious little scope remained for Admiralty to arrest ship and cargo.

Until common lawyers mounted their concerted attack, Admiralty had no reason to differentiate between *actio in personam* and *actio in rem*.[8] The initiating arrest was common to both and, once the defendant entered a stipulation, proceedings were identical. But the business coveted by common law, principally contractual, was vulnerable to the common law process *in personam*. To compete, nay to survive, Admiralty was compelled to identify obligations which were not personal to the defendant and to articulate remedial mechanisms which could not be duplicated by common law courts. The civilians fashioned an action which proceeded against the *res* to enforce an obligation attaching to the *res*.

One such obligation was readily adoptable from their Roman law heritage. Where the master of a vessel abroad pledged the ship or cargo as security to raise funds, the bottomry or respondentia bond created an obligation similar to the Roman law *hypotheca in rem*[9] which was enforceable against the ship or cargo[10] and could not be entertained *in personam* at common law.[11] Unless arising out of a specialty,[12] common law did not interfere with the claim for mariners' wages which Admiralty enforced against the ship itself as an obligation incurred by the ship.[13] Likewise, salvage at sea enjoyed some freedom from common law intervention and Admiralty employed the suit *in rem* to enforce salvage claims against the property salved as a service rendered for its benefit.[14] However the action *in rem* could not be used to reward salvage of life unless coupled with property to which the action could attach.[15] Closely associated with salvage

6 *Pane* v. *Evans* (1663) 1 Keb. 552; 83 E.R. 1108; *Degrave* v. *Hedges* (1707) 2 Ld. Raym. 1285; 92 E.R. 343.

7 *Prohibition to Admiralty* (1622) Winch 8; 124 E.R. 7; *Wells* v. *Osman* (1704) 2 Ld. Raym. 1044; 92 E.R. 193.

8 Ryan, op. cit. 189.

9 *Justin* v. *Ballam* (1711) 2 Ld. Raym. 805; 92 E.R. 38; *The Nestor* 18 Fed. Cas. 9, 18 (1831).

10 *Bridgeman's Case* (1614) Hob. 11; 80 E.R. 162; *Menetone* v. *Gibbons* (1789) 3 T.R. 267; 100 E.R. 568; *Stainbank* v. *Fenning* (1851) 11 C.B. 51; 138 E.R. 389; *The Atlas* (1827) 2 Hagg. 48; 166 E.R. 162.

11 *Greenway & Barker's Case* (1613) Godb. 260; 78 E.R. 151; *Corset* v. *Husely* (1688) Comb. 135; 90 E.R. 389; *Johnson* v. *Shippin* (1713) 1 Salk 35; 91 E.R. 37.

12 *Opy* v. *Adison* (1693) 12 Mod. 38; 88 E.R. 1149.

13 *Clay* v. *Sudgrave* (1700) 1 Salk 33; 91 E.R. 34; *Wells* v. *Osman* (1704) 2 Ld. Raym. 104; 92 E.R. 193; *Brown* v. *Benn* (1707) 2 Ld. Raym. 1247; 92 E.R. 322; *Barber* v. *Wharton* (1726) 2 Ld. Raym. 1452; 92 E.R. 445.

14 *Hartfort* v. *Jones* (1698) 1 Ld. Raym. 393, 588; 91 E.R. 1161, 1293; *The Two Friends* (1799) 1 C. Rob. 271; 165 E.R. 174; *The Calypso* (1828) 2 Hagg. 209; 166 E.R. 221; *The Eleanor* (1805) 6 C. Rob. 39; 165 E.R. 842.

15 *The Johannes* (1860) Lush 182; 167 E.R. 87; *The Fusilier* (1865) Br. & L. 341; 167 E.R. 391; *The Willem III* (1871) L.R. 3 A. & E. 487.

was the determination of claims over *droits* retrieved from the sea[16] and the restoration or condemnation of piracy spoils.[17] Admiralty also used the mechanism *in rem* to entertain claims for possession of ships wrongfully seized at sea.[18] Evidently, wrongs committed at sea were not a lucrative source of litigation until the 19th century when a controversy erupted as to whether this head of jurisdiction was confined to collisions[19] or extended to all torts committed at sea.[20]

These, coupled with ancillary powers,[21] comprised the slender jurisdiction on which Admiralty subsisted for two hundred years. But these heads of jurisdiction were not necessarily exclusive to Admiralty. If common law could entertain a suit *in personam* jurisdiction was concurrent, for which reason the personal suit was used infrequently in Admiralty.[22] What was exclusive to Admiralty was the action *in rem*.

When the 19th century coaxed the High Court of Admiralty from exile, it resurrected the two proceedings *in rem* and *personam*.[23] In both cases the libellant (plaintiff) initiated the suit by swearing a warrant for the arrest of the impugnant (defendant) addressed to the Marshal who would execute the warrant against the person or property named therein. In the case of a suit *in rem* against a ship the Marshal served the warrant on the vessel by holding the original to the mainmast, nailing a copy in its place and chalking a fouled anchor[24] in a prominent place on the ship.[25] As custody conferred no right of sale, the libellant would allege the fiction that the ship was in a perishable condition, in response to which the Court would decree a perishable monition ordering the Marshal to sell the ship and pay the proceeds into court. In default of the appearance of the owner or other interested party to defend the suit, a summary hearing

[16] *Constable's Case* (1601) 5 Co. Rep. 106a; 77 E.R. 218; *R.* v. *Property Derelict* (1825) 1 Hagg. 383; 166 E.R. 136; *Lord Warden of Cinque Ports* v. *R.* (1831) 2 Hagg. 438; 166 E.R. 304; *49 Casks of Brandy* (1836) 3 Hagg. 257; 166 E.R. 401; *R.* v. *Two Casks of Tallow* (1837) 3 Hagg. 294; 166 E.R. 414; *Wells* v. *Glas Float Whitton No. 2* [1897] A.C. 337. See R. G. Marsden, "Admiralty Droits and Salvage" (1899) 15 *L.Q.R.* 353.

[17] *The Hercules* (1819) 2 Dods. 353; 165 E.R. 1511; *The Marianna* (1835) 3 Hagg. 206; 166 E.R. 382; *The Panda* (1842) 1 W. Rob. 423; 166 E.R. 631; *Piracy Act* 1850 (U.K.) s. 5.

[18] *The Warrior* (1818) 2 Dods. 288; 165 E.R. 1490.

[19] *The Robert Pow* (1863) Br. & L. 99; 167 E.R. 313; *The Ida* (1860) Lush 6; 167 E.R. 3; *R.* v. *City of London Court* [1892] 1 Q.B. 273.

[20] *Wood* v. *Germain* (1730) Burrell 311; 167 E.R. 587; *The Ruckers* (1801) 4 C. Rob. 73; 165 E.R. 539; *The Sarah* (1862) Lush 549; 167 E.R. 248; *The Zeta* [1893] A.C. 468; *The Tubantia* [1924] P. 78.

[21] *Die Fire Damer* (1805) 5 C. Rob. 357; 165 E.R. 804; *The Apollo* (1824) 1 Hagg. 306; 166 E.R. 109; *The Harmonie* (1841) 1 W. Rob. 179; 166 E.R. 540.

[22] *The Clara* (1855) Swab. 1; 166 E.R. 986; *Brown* v. *Wilkinson* (1846) 15 M. & W. 391; 153 E.R. 902; *Ramsay* v. *Allegre* 25 U.S. 611 (1827).

[23] See generally, F. L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1880* (Cambridge, University Press, 1970) 12 ff.

[24] The anchor, "fouled" by its cable wound around the shank, is the symbol of the office of the Lord High Admiral.

[25] A practice which has not disappeared, see *The Jarlinn* [1965] 1 W.L.R. 1098, 1100.

followed and the proceeds used to satisfy the claim. An interested party could file an appearance within a year after the decree. If, after the ship's arrest, an interested party appeared to defend the suit he could secure the ship's release from custody by entering bail or a "fidejussory caution" at the value of the ship. Even so the trial retained its character as a suit against the ship, or against the bail funds substituting for the ship.

The action *in personam* followed a parallel procedure. If the Marshal could not locate the impugnant, a process existed whereby his goods could be attached, although attachment proceedings were not as frequent in England as they were in America.[26] Once arrested the impugnant could secure his release on bail. In both types of suit the libellant was required to file his libel stating his cause of action to which the defendant pleaded by an answer. Further pleadings could ensue by replication and duplication. Both parties were required to present sureties or enter into a personal recognizance called a "juratory caution". If required, witnesses were examined secretly by a commissioner of the Court who could put interrogatories submitted by the parties. The witnesses' depositions were conveyed to the Court for formal hearing. Decision was by way of citation and sentence.

During the 19th century, the Court furnished an alternative to the initiating arrest. In lieu of the ship's arrest, the owner could enter a caveat, personally undertaking to appear and defend the action. For suits *in personam*, the warrant for arrest was replaced by a monition to the Marshal commanding him to serve notice on the defendant to appear and show cause why a decree should not be made against him.[27] These procedures were legitimized by the rules made pursuant to the *Admiralty Court Act* 1854 (U.K.).[28] Unsatisfied judgments *in personam* were executed by monition for personal attachment under the *Admiralty Court Act* 1861 (U.K.)[29] in addition to writs of execution.[30] The *Supreme Court of Judicature Acts* (U.K.) purported to retain Admiralty procedures in the new court structure[31] but the documentation was reconstituted to a uniform High Court model.[32] Suits were redefined as actions initiated by a writ of summons endorsed with a statement of claim. However, both actions *in rem* and *in personam* were preserved.[33] New Rules of Court in

[26] See *Manro* v. *Almeida* 23 U.S. 473 (1825); *Miller* v. *U.S.* 78 U.S. 268 (1870).
[27] *The Hope* (1801) 3 C. Rob. 215; 165 E.R. 440; *The Governor Raffles* (1815) 2 Dods. 14; 165 E.R. 1400; *The Meg Merrilies* (1837) 3 Hagg. 346; 166 E.R. 434; *The Port Victor* [1901] P. 243.
[28] S. 13; *Admiralty Court Rules* 1859.
[29] S. 15.
[30] S. 22.
[31] *Supreme Court of Judicature Act* 1873 (U.K.) ss. 70, 73.
[32] Ibid. *Supreme Court of Judicature (Amendment) Act* 1875 (U.K.) s. 18, First Schedule.
[33] *Supreme Court of Judicature Act* 1873 (U.K.) s. 89, Schedule Rules of Procedure 1; *Supreme Court of Judicature (Amendment) Act* 1875 (U.K.) First Schedule Rules of Court, Order V rule 4.

1883 reformed the initiating process[34] and the Court itself was remodelled by the *Administration of Justice Act* 1970 (U.K.). The *Administration of Justice Act* 1956 (U.K.) renovated the jurisdiction of Admiralty, but an account of the modern jurisdiction must be deferred until Australia revises her jurisdiction.

Competing Theories

Although the seed had been germinating since the 17th century,[35] it was not until the 19th century that the concept of the maritime lien was articulated by Justice Story[36] and absorbed by English jurisprudence.[37] In its embryonic state, the existence of a maritime lien conceptually presupposed a successful action *in rem*. That is to say, if a prospective plaintiff could obtain judgment *in rem* against a ship or cargo, he was said to have a maritime lien in that ship or cargo.[38] The conclusion follows, from a process of reasoning similar to the general law reasoning, that a person is vested of a proprietary interest in a *res* because he could successfully sue a range of people who interfere with that *res*.[39] And just as general law inverts the right and the remedy, so it is more common to read that the action *in rem* depended upon the existence of a maritime lien.[40] It is a conceptual tautology, but a useful one. However it must now be treated with caution, for, in Anglo-Australian law the action *in rem* is no longer synonymous with the maritime lien. Legislation has made the action *in rem* available to plaintiffs who are not invested with a maritime lien.[41] All maritime liens are enforced by actions *in rem* but not all actions *in rem* enforce maritime liens. In the United States conceptual purity prevails. There, the libel *in rem* can redress only maritime liens.[42] In both jurisdictions the maritime lien is an inchoate interest in a maritime *res*[43] which attaches to the *res* immediately the claim arises[44] and which is enforceable

[34] See T. E. Smith, *Admiralty Law and Practice* (4th ed., London, Stevens & Haynes, 1892) 126.

[35] See *Hartfort* v. *Jones* (1698) 1 Ld. Raym. 393, 588; 91 E.R. 1161, 1293; *The Two Friends* (1799) 1 C. Rob. 271; 165 E.R. 174; compare P. M. Hebert, "The Origin and Nature of Maritime Liens" (1930) 4 *Tul. L.R.* 381 and G. Price, *The Law of Maritime Liens* (London, Sweet & Maxwell, 1940) Ch. 1.

[36] *The Nestor* 18 Fed. Cas. 9 (1831). And see *The Rebecca* 20 Fed. Cas. 373 (1831); *The Young Mechanic* 30 Fed. Cas. 873 (1855).

[37] *The Batavia* (1822) 2 Dods. 500; 165 E.R. 1559; *The Eleanora Charlotta* (1823) 1 Hagg. 156; 166 E.R. 56; *The Aline* (1839) 1 W. Rob. 111; 166 E.R. 514; *The Volant* (1842) 1 Not. Cas. 503, 508 which report is preferable to (1842) 1 W. Rob. 383, 387; 166 E.R. 616, 618.

[38] See Ryan, op. cit. 195 ff.

[39] One difference is that Admiralty developed a *jus in re* as distinct from a *jus ad rem*.

[40] *Harmer* v. *Bell* (1850) 7 Moo. P.C. 267, 284; 13 E.R. 884, 890; *The Nestor* 18 Fed. Cas. 9 (1831); *The Tervaete* [1922] P. 259, 270.

[41] See G. Price, "Statutory Rights In Rem in English Admiralty Law" (1945) 27 *J.C.L. & I.L.* 21.

[42] *The Rock Island Bridge* 73 U.S. 213, 215 (1867).

[43] *Wells* v. *Gas Float Whitton No. 2* [1897] A.C. 337.

[44] *Hamilton* v. *Baker* (1889) 14 App. Cas. 209; *The Tervaete* [1922] P. 259.

by an action *in rem*.[45] The maritime lien travels with the *res* until extinguished by payment of the claim or, pursuant to proceedings *in rem* it is replaced by bail or judicially sold.[46] The maritime lien must be dissociated from the common law lien as, inter alia, it does not depend upon possession.[47]

Conceptually, there is said to be a fundamental distinction between Anglo-Australian and United States jurisprudence concerning the nature of the action *in rem* and the maritime lien. The United States is said to subscribe to the personification theory and her British Commonwealth cousins, the procedural theory.[48] The personification theory in its purest form embodies[49] the three-fold proposition that the action *in rem* proceeds against the *res* without reference to the liability of the owner who contests the suit and judgment is confined to the value of the *res*. The procedural theory, in its purest form, holds that once the owner enters bail he personally submits to the jurisdiction of the court for adjudication of personal liability and he is personally liable to satisfy judgment if it exceeds the amount of bail. There are three facets of the two schools of thought which serve to illustrate the juristic nature of the action *in rem* in the respective jurisdictions.

First is the issue whether the defending owner is personally accountable for judgment. In the formative years of the 19th century, English authorities reflected the personification theory, holding that the owner of an arrested ship was not liable for judgment in excess of the ship's value[50] or in excess of the bail fund which substituted for the ship.[51] To hold him liable for the surplus would be tantamount to engrafting an action *in personam* onto the action *in rem*.[52] Yet after the Judicature fusion of courts, the line of precedent was abruptly reversed in a judgment of the Divisional Court

[45] *Harmer* v. *Bell* (1852) 7 Moo. P.C. 267; 13 E.R. 884; *The Ripon City* [1897] P. 226.

[46] *William Money* (1827) 2 Hagg. 136; 166 E.R. 193; *The Point Breeze* [1928] P. 135; *The Saracen* (1847) 2 W. Rob. 451; 166 E.R. 826. See F. G. Harman, "Discharge and Waiver of Maritime Liens" (1973) 47 *Tul. L.R.* 786.

[47] *The Eleanora Charlotta* (1823) 1 Hagg. 156; 166 E.R. 56; *Harmer* v. *Bell* (1852) 7 Moo. P.C. 267; 13 E.R. 884.

[48] See Hebert, op. cit.; Wiswall, op. cit. Ch. 6; cf. *The Schooner Freeman* v. *Buckingham* 59 U.S. 182; 189-190 (1855); *The Carlotta* 48 F. 2d 110 (1931).

[49] The wider implication of the theory is that Admiralty should exercise jurisdiction over a ship from its birth to its death, see *Tucker* v. *Alexandroff* 183 U.S. 424 (1901); *Noel* v. *Isbrandtsen* 287 F. 2d 783 (1961); *Hercules Co. Inc.* v. *The Brigadier General Absolom Baird* 214 F. 2d 66 (1954); *In the Matter of the Queen Ltd* 1973 A.M.C. 646; *Latus* v. *U.S.* 277 F. 2d 264; 364 U.S. 827 (1960).

[50] *The Margaret* (1834) 3 Hagg. 238; 166 E.R. 394; *The Hope* (1840) 1 W. Rob. 154; 166 E.R. 531; *The Volant* (1842) 1 Not. Cas. 503, 1 W. Rob. 383; 166 E.R. 616; *The John Dunn* (1840) 1 W. Rob. 159; 166 E.R. 532; *The Mellona* (1848) 3 W. Rob. 16; 166 E.R. 869; *Brown* v. *Wilkinson* (1846) 15 M. & W. 391; 153 E.R. 902; cf. *The Truine* (1834) 3 Hagg. 114; 166 E.R. 348.

[51] *The Nied Elwin* (1811) 1 Dods. 50; 165 E.R. 1229; *The Kalamazoo* (1851) 15 Jur. 885; *The Duchesse de Brabant* (1857) Swab. 264; 166 E.R. 1129; cf. *The Jonge Bastiaan* (1804) 5 C. Rob. 322; 165 E.R. 791.

[52] *The Zephyr* (1864) 11 L.T. 351.

which has been severely criticised.[53] In this case, ominously named *The Dictator*,[54] three tugs which had rescued the ship from distress commenced an action *in rem* to recover a salvage reward of £5,000. At trial the Court decreed an award of £7,500[55] and allowed the plaintiffs to amend their writ. Subsequently the plaintiffs moved to recover the balance of £2,500 from the shipowners personally. The Court acceded to the motion and held that the shipowners were personally liable for the £2,500 in excess of the bail of £5,000. The decision was approved by the Court of Appeal in *The Gemma*.[56] It is perhaps unfortunate that both these cases involved salvage claims and as such the plaintiff could in no event recover more than the value of the vessel salved. Consequently, the only point at issue was not whether the plaintiff was limited to the value of the ship but whether he was limited to the amount of bail, and the Court could have declined to follow authority[57] on that issue without impugning the integrity of the action *in rem*. Nevertheless, an action would eventually arise in which damages exceeded the value of the ship. When it did, English courts applied the bail decisions and allowed the plaintiff to recover the surplus, on the ground that the action *in rem* is simply a procedural device to compel the owner to contest personal liability.[58]

On the corresponding issue in the United States, the orthodox view is that the court cannot give personal judgment against the owner beyond the amount stipulated in the release bond, because the appearance of the owner is not a personal submission to jurisdiction.[59] However, there have been occasions when courts departed from this aspect of the personification theory.[60] In *The Fairisle*,[61] a libel *in rem* was filed against the ship for salvage services rendered. At the preliminary hearing to set the amount of stipulation, the Court, being unable to predict the assessment of the future trial, released the ship on a bond of $25,000. At trial, it transpired that the services were valued at $45,100 and judgment was entered against the owner for this amount. In *Mosher* v. *Tate*[62] a crewman filed a libel against a fishing boat to recover wages allegedly due. The owner filed a cross-libel seeking to recover monies alleged to be due. The trial court entered a decree for the libellant but also ordered the release of the vessel without any security. On appeal the Court held that if actions *in rem* could

[53] Wiswall, op. cit. Ch. 6. But see *Admiralty Court Act* 1861 (U.K.) s. 15.
[54] [1892] P. 304.
[55] [1892] P. 64.
[56] [1899] P. 285.
[57] Supra fn. 51.
[58] *The Port Victor* [1901] P. 243; *The Broadmayne* [1916] P. 64; *The Joannis Vatis No. 2* [1922] P. 213; *The Banco* [1971] P. 137.
[59] *The Monte A* 12 F. 331 (1882); *The Nora* 181 F. 845 (1910); *The Bournemouth* 318 F. Supp. 839 (1970).
[60] See (1964) 77 *Harv. L.R.* 1122.
[61] 76 F. Supp. 27 (1947), 171 F. 2d 408 (1948) relying on *The Minnetonka* 146 F. 509 (1906).
[62] 182 F. 2d 475 (1950). See (1950-51) 64 *Harv. L.R.* 164.

be joined with actions *in personam* there was no reason why a decree against the defendant personally should not be made in the libel *in rem*. It is a striking coincidence with the English parallel that the former decision involved a salvage claim and the issue therefore was not whether judgment could be entered in excess of the ship's value but whether it could be entered in excess of bail. These decisions have since been disapproved[63] and approved.[64] The resolute departure from the personification theory in England and the aberrant departure in the United States[65] may be explained by a policy to avoid the duplicity of actions—one *in rem*, the other *in personam*—where a joinder or collateral hearing would otherwise be available. Yet to implement this expedient in England, the Court ran counter to the weight of authority[66] and contradicted the reasons given by the Judicial Committee on the second aspect of the competing theories, to which we now proceed.

The zenith of the personification theory was reached in *Harmer* v. *Bell*.[67] The *Bold Buccleugh* collided with and sank a vessel whose owners procured her arrest. After collision but before proceedings were instituted, the *Bold Buccleugh* was sold to a bona fide purchaser who had no notice of the claim. When the ship was arrested, the new owner defended the suit on the ground that the ship could not be held liable for an incident for which he personally was not accountable. The Judicial Committee rejected the argument, holding that the suit *in rem* was not a procedural device to coerce the owner into defending his personal liability, but an action to adjudicate the liability of the ship itself. Consequently, the plaintiff acquired a right to sue the negligent ship at the time of the collision—a maritime lien—which attached to the ship and survived its sale even to a bona fide purchaser without notice. The decision is inconsistent with a purely procedural theory[68] which would try the personal liability of the defendant at the time of trial. However, the decision is the leading authority in Anglo-Australian[69] and United States[70] law that, subject to the postponement of the lien through laches,[71] the maritime lien attaches to the *res* when the cause of action arises, irrespective of subsequent transactions. In

[63] *Logue Stevedoring Corp.* v. *The Dalzellance* 198 F. 2d 369 (1952).
[64] *Savas* v. *Maria Trading Corp.* 285 F. 2d 336 (1960).
[65] See G. Gilmore and C. L. Black, *The Law of Admiralty* (2nd ed., New York, Foundation Press, 1975) pp. 802-803.
[66] Supra fn. 50.
[67] (1850) 7 Moo. P.C. 267; 13 E.R. 884.
[68] See also *The Batavia* (1822) 2 Dods. 500; 165 E.R. 1559; *The Dowthorpe* (1843) 2 W. Rob. 73; 166 E.R. 682; *The Aline* (1839) 1 W. Rob. 111; 166 E.R. 514; *The Europa* (1863) 2 Moo. N.S. 1; 15 E.R. 803.
[69] See *The Tervaete* [1922] P. 259, 275; *The Monica S.* [1968] P. 741, 132; *The Alletta* [1974] 1 Lloyd's Rep. 40.
[70] *John G. Stevens* 170 U.S. 113, 115 (1898); *The Rebecca* 20 Fed. Cas. 373, 382 (1831).
[71] *The Key City* 81 U.S. 653 (1871); *The Royal Arch* (1875) Sw. 269; 166 E.R. 1131; *The Goulandris* [1927] P. 182.

Anglo-Australian law this result must be contrasted with statutory rights *in rem* and actions *in personam* which do not aspire to the stature of maritime liens.[72]

Given that the action *in rem* adjudges liability at the time of the incident alleged to give rise to a maritime lien, *Bold Buccleugh* leads us to a third facet of the competing lien theories introduced by the question: whose liability does the action *in rem* try? It is consistent with both theories to answer that the liability of the ship is tested—the personification theory because the ship is the corpus of the action, the procedural theory because the action compels the owner to contest the liability of the ship. The significance of this answer is that the ship bears judgment and the owner or mortgagee suffers a financial outlay even though he could not be held personally liable for damages in an action *in personam*. But how is the liability of an inanimate object determined? In a quasi-contractual claim, such as salvage, the problem is not acute where the prerequisites to the obligation in the ship do not involve human acquiescence. Yet a contractual claim may necessitate tracing the authority of the contracting party to the owner himself.[73] And it is difficult to attribute delictual liability to a ship when factors of causation and vicarious liability presuppose human responsibility.[74] In *Currie* v. *McKnight*,[75] the House of Lords approved the *Bold Buccleugh* when it held that a ship cannot be liable *in rem* for the damage caused by the crew unless the ship was itself the instrument of damage. Assuming that the ship is the instrument of damage does it bear liability irrespective of the owner's personal liability? Neither theory provides a conclusive answer.

The premise in the United States is that proceedings *in rem* are proceedings against the ship and not the owner. To render the ship liable the conduct of the master and crew is attributed to the vessel.[76] Indeed, the ship is liable for the negligence of the master notwithstanding that the owner could not be held personally or vicariously liable on a suit *in personam*.[77] Accordingly, the ship is liable for the negligence of a compulsory pilot for whom the owner could not be held responsible.[78] So too, must it bear liability when under the control of a charterer.[79]

[72] E.g. *The Two Ellens* (1872) L.R. 4 P.C. 161; *The Henrich Bjorn* (1886) 11 App. Cas. 270; *The Sara* (1889) 14 App. Cas. 209; *Dalgety & Co. Ltd* v. *Aitchison* (1957) 2 F.L.R. 219.

[73] *The Queen of the Pacific* 180 U.S. 49 (1901).

[74] *Giamona* v. *Mineo* 125 F. Supp. 354 (1954); *The Rose Standish* 26 F. 2d 480 (1928).

[75] [1897] A.C. 79.

[76] *The Little Charles* 26 Fed. Cas. 979 (1819); *The Malek Adhel* 43 U.S. 210 (1844).

[77] *Grillea* v. *U.S.* 232 F. 2d 919 (1956); *Grigsby* v. *Coastal Marine Service* 412 F. 2d 1011 (1969).

[78] *The China* 74 U.S. 53 (1868); *Canadian Aviator Ltd* v. *U.S.* 324 U.S. 215 (1945); *U.S.* v. *S.S. President Lincoln* 1964 A.M.C. 1841.

[79] *The Barnstaple* 181 U.S. 464 (1901); *British West Indies Produce Inc.* v. *S.S. Atlantic Clipper* 353 F. Supp. 548 (1973); *Demsey & Assoc.* v. *S.S. Sea Star* 461 F. 2d 1009 (1972); cf. *The Valencia* 165 U.S. 264 (1897).

However, the personality of the ship does admit to exceptions. Authorities suggest the ship is not liable for the conduct of persons in possession of it unlawfully.[80] Nor is the ship liable for maritime liens created while in Admiralty custody[81] unless equity requires it.[82] Moreover, two recent cases question the conclusiveness of the personification concept. In *Pichirilo* v. *Guzman*[83] and *Reed* v. *S.S. Yaka*,[84] wharf labourers were directly employed by charterers to load and unload the ships under demise charter. The libellants both sustained injuries from the unseaworthiness of the ships for which the owners were not personally liable and for which the liability of the charterers was limited by a Workmen's Compensation Act. In the absence of unlimited liability on the charterers and personal liability on the owners, the courts were not prepared to hold the ships liable *in rem*. Both decisions were reversed but the Supreme Court declined to decide the issue whether there can be *in rem* liability in the absence of (unlimited) liability *in personam*.

The erosion of a personification concept began in England in the mid-19th century when it was held that a ship is not liable *in rem* if the owner is not vicariously responsible for the wilful acts of servants acting outside the scope of employment.[85] Apart from statute,[86] cases have held the ship immune from liability where the owner is not responsible for the conduct of a compulsory pilot.[87] In *The Utopia*,[88] a port authority took control of a wreck lying in harbour and negligently failed to light it adequately, whereupon a collision occurred. The owners of the colliding vessel sued the owners of the wreck *in rem* alleging, inter alia, that their personal blamelessness was no immunity to the liability of the ship. The advice of the Judicial Committee was delivered by Sir Francis Jeune, who had championed the procedural theory in *The Dictator*. His Lordship rejected the argument on the ground that the ship's liability must be traced to the owners, personally or vicariously. From this and other

80 *The Barnstaple* 181 U.S. 464 (1901); *The General McPherson* 100 F. 860 (1900); *Gilligan* v. *The Winged Racer* 10 Fed. Cas. 391 (1860).

81 *Bromfield Mfg Co.* v. *Brown, Jones & Smith* 117 F. Supp 630 (1954); *Vlavianos* v. *The Cypress* 171 F. 2d 435 (1948). For other types of custody, see *The Resolute* 168 U.S. 437 (1897); *City of Erie* v. *S.S. North American* 267 F. Supp. 875 (1967). See G. H. Longenecker, "Developments in the Law of Maritime Liens" (1971) 45 *Tul. L.R.* 574.

82 *New York Dock Co.* v. *The Poznan* 274 U.S. 117 (1927); *Rainbow Line* v. *M.V. Tequila* 341 F. Supp. 459 (1972); *Empresa Nacional Elcano* v. *M.V. Tropicana* 1971 A.M.C. 1583 to the point where, apart from wage claims, the exceptions have consumed the rule.

83 290 F. 2d 812 (1961); 369 U.S. 698 (1962).

84 307 F. 2d 203 (1962); 373 U.S. 410 (1963).

85 *The Druid* (1842) 1 W. Rob. 391; 166 E.R. 619; *The Ida* (1860) Lush. 6; 167 E.R. 3.

86 6 Geo. IV, c. 125, s. 14 (1825); *Pilotage Act* 1913 (U.K.) s. 15.

87 *The Arum* [1921] P. 12; *The Halley* (1868) L.R. 2 P.C. 193.

88 [1893] A.C. 492.

cases,[89] one may conclude that English law lifts the veil of the ship's personality to determine whether the human forces immediately responsible for the ship's conduct derive authority from, or shunt liability to, the owner.[90] The liability of ships under charter does not predicate personal liability of the owner; it is sufficient that the charterer would be personally liable and that the charterer derives his authority from the owner.[91]

Neither English nor American jurisprudence is committed to a pure version of one or the other theory and it has been unnecessary to probe them judicially in Australia.[92] However, in *Rosenfeld Hillas & Co. Pty Ltd* v. *The Fort Laramie*,[93] the consignee of a shipment of cargo sued the ship *in rem* in the High Court for the short delivery of cargo as listed on bills of lading. The bills of lading in this case had been signed by a part owner and Knox C.J. held that the plaintiff could not rely upon the bills of lading to bind the owners of the ship as conclusive evidence of the quantity of cargo shipped. On this issue the Full Court reversed the decision on appeal.[94] But on his assumption Knox C.J. said:[95]

> "It was, however, argued that, even if the statements in the bills of lading would not be conclusive against the other owners in an action *in personam* against them, they might still be conclusive in an action *in rem* against the ship because [the signatory] was himself one of the owners. This argument must fail unless an action *in rem* will lie against a ship in a case in which there would be no right of action *in personam* against the owners. It has never been decided whether such an action will lie; and on principle it appears to me that it will not."

Of course, it is unlikely that Australian courts would depart from the English line of authorities and, in fact, support was given for the procedural theory in *Caltex Oil (Aust.) Pty Ltd* v. *The Willemstad*.[96] In that case the High Court ruled that the master of a vessel in which he has no financial interest is not a proper defendant to an action *in rem* against the vessel, notwithstanding his appearance. In the course of judgment and relying on English authority, Gibbs J. observed:[97]

> "An action *in rem* is an action against the ship itself. However, when the defendants to such an action have entered an appearance, judgment

[89] *The Sylvan Arrow* [1923] P. 220; *The Parlement Belge* (1880) 5 P.D. 197; *The Castlegate* [1893] A.C. 38; *The Lemington* (1874) 32 L.T. 69; *The Orient* (1871) L.R. 3 P.C. 696.

[90] Cf. *Phillips* v. *Highland Rly* (1883) 8 App. Cas. 329; *The Edwin* (1864) Br. & L. 281; 167 E.R. 365.

[91] *The Ripon City* [1897] P. 226; *The Tasmania* (1888) 13 P.D. 110; *The Ticonderoga* (1857) Sw. 215; 166 E.R. 1103; *The Ruby Queen* (1861) Lush. 266; 167 E.R. 119; *The Andrea Ursula* [1971] 2 W.L.R. 681.

[92] See *The Nicaraguan Barque Courier* (1879) 13 S.A.L.R. 124; *Dalgety & Co. Ltd* v. *Aitchison* (1958) 2 F.L.R. 219; *Aichhorn & Co. K.G.* v. *The Talabot* (1974) 132 C.L.R. 449, 451, 456; *J. Gadsden Pty Ltd* v. *Australian Coastal Shipping Commission* [1977] 1 N.S.W.L.R. 575, 583.

[93] (1922) 31 C.L.R. 56.

[94] (1923) 32 C.L.R. 25.

[95] (1922) 31 C.L.R. 56, 63.

[96] (1977) 136 C.L.R. 529.

[97] Ibid. 538.

may be enforced against them personally, and to the full extent of the damages proved, even though those damages exceed the value of the ship."

The theories make useful servants but poor masters. They serve to explain differences but they do not explain similarities. For example, both England[98] and the United States[99] absolved the ship from liability if owned or chartered by an entity which can claim sovereign immunity, a policy from which both jurisdictions are retreating in relation to sovereign trading activities.[100] And an unsuccessful suit either *in personam* or *in rem* attracts *res judicata* to preclude further use of the other, notwithstanding that the identity of the *res* and its owner may differ conceptually.[101] To paraphrase the most learned of American commentators,[102] the fiction of the ship's personality has played a negligible role in the development of maritime lien law; it has never been much more than a literary theme and it has never been a principle of decision.

To complete the juristic nature of the action *in rem*, it is of interest to observe its statutory development in England. The nucleus of both theories is that the action *in rem* is brought against the offending *res*. The personification theory attempts to confine all ramifications to that central proposition, whereas the procedural theory adopts a more relaxed view of the implications of that proposition. According to modern English jurisprudence, the object of commencing action against the offending ship is to compel the appearance of its owner. If one abstracts this proposition further, the owner's appearance could be more effectively secured by permitting an action *in rem* to lie against any maritime property owned by that defendant, albeit unconnected with the litigation. Having submitted to the jurisdiction his personal liability could be tried irrespective of the *res* arrested and judgment could be executed against that property. Then the *in rem* device would resemble the attachment process which Admiralty developed to complement the arrest procedure and the suit *in rem* would no longer centre upon the offending ship. In *The Beldis*,[103] the Court of Appeal declined to extend the action *in rem* to the defendant's property at large. However, following the International Convention relating to the Arrest of Sea-Going Ships 1952, and the International Convention on

[98] *The Parlement Belge* (1880) 5 P.D. 197; *The Sylvan Arrow* [1923] P. 220; *The Meandros* [1925] P. 61; *Compania Naviera Vascongada* v. *S.S. Cristina* [1938] A.C. 485; *The Arantzazu Mendi* [1939] A.C. 256; *The Porto Alexandre* [1920] P. 30; *The Jassy* [1906] P. 270.

[99] *The Schooner Exchange* (1812) 11 U.S. 116; *The Western Maid* 257 U.S. 419 (1922); *The Charlotte* 1924 A.M.C. 1070; *The Gaelic Prince* 11 F. 2d 426 (1922); *The Pesaro* 271 U.S. 562 (1925); *The Navemar* 303 U.S. 68 (1938).

[100] *The Philippine Admiral* v. *Wallem Shipping (Hong Kong) Ltd* [1977] A.C. 373; *Republic of Mexico* v. *Hoffman* 324 U.S. 30 (1945); *Calmar S.S. Corp.* v. *U.S.* 345 U.S. 446 (1953); 46 U.S.C.A. 525, 781.

[101] *Bailey* v. *Sundberg* 49 F. 583 (1892); *Sullivan* v. *Nitrate Producers* 262 F. 371 (1919); *Burns Bros* v. *Central Rly N.J.* 202 F. 2d 910 (1953).

[102] Gilmore and Black, op. cit. 615-616.

[103] [1936] P. 51.

certain Rules concerning Civil Jurisdiction in Matters of Collision,[104] the United Kingdom enacted the *Administration of Justice Act* 1956 (U.K.) which makes available the action *in rem* against any ship (known as a sister ship) owned by a person who would be liable *in personam* under the Act.[105] This Act is not in force in Australia nor has the Convention been enacted here and, consequently, the action *in rem* has not been extended to this procedural extremity.

There is evidence that the procedural notion is still undergoing development in England. When reviewing the statutory development of the action in *The Banco*,[106] Lord Denning commented that in default of the owner's appearance, judgment against the *res* cannot be enforced against the owner personally i.e. against any property other than the offending *res*.[107] This follows from the central proposition of the *in rem* concept and reflects the orthodox view. Yet in *The Conoco Britannia*,[108] the defendants sought to set aside a writ *in rem* against a ship on the grounds that the specific performance claimed by the plaintiff, being an action *in personam*, could not be sustained against the vessel. The Admiralty Court dismissed the motion because of the statutory amalgamation of equitable and other remedies, a result which, it is submitted, would prevail in Australia under the *Colonial Courts of Admiralty Act* 1890 (Imp.). However, in the course of judgment,[109] Brandon J. questioned the proposition that, in the absence of an appearance by the owner, the decree could not be enforced against the owner personally.

The action *in rem* was the life-boat of Admiralty jurisdiction. Should it become a purely procedural device to secure jurisdiction over a defendant there is little need to associate it with a specialist jurisdiction in Admiralty and it could spawn a common law device of arresting any property as a means of obtaining jurisdiction over a defendant who is not otherwise within the jurisdiction of the court. Until then, it will remain an integral feature of Admiralty jurisdiction.

AUSTRALIAN JURISDICTION

Structure

Of the Australian Colonial Courts of Admiralty, only the Supreme Court of New South Wales has created an Admiralty Division[110] to exercise jurisdiction[111] independently of mercantile causes heard by the Common

[104] See *The Annie Hay* [1968] P. 341; *The Banco* [1971] P. 137.
[105] *The St. Elefterio* [1957] P. 179; *The Monica S.* [1968] P. 741; *The Putbus* [1969] P. 136; *The Andrea Ursula* [1971] 2 W.L.R. 681; *The Berney* [1978] 2 W.L.R. 387.
[106] [1971] P. 137.
[107] Ibid. 151.
[108] [1972] 2 All E.R. 238.
[109] Ibid. 245.
[110] *Supreme Court Act* 1970 (N.S.W.) s. 38.
[111] Ibid. ss. 53(1), 8(1)(b).

Law Division.[112] Nevertheless, the New South Wales court and all Australian courts deriving jurisdiction from the *Colonial Courts of Admiralty Act* 1890 (Imp.) do not sit as specially constituted courts, nor do they lose their identity as local courts. Rather, the imperial legislation depends upon their domestic existence as courts of unlimited jurisdiction in order to confer upon them the additional Admiralty jurisdiction.[113] The amalgamation of jurisdictions averted the split personality of courts experienced in the pre-Judicature division of law and equity and consequently, an action wrongly commenced in a Colonial Court of Admiralty may be disposed of in the ordinary jurisdiction of the court.[114] For example, in *Parker* v. *The Commonwealth*,[115] the widow of a serviceman killed when H.M.A.S. Melbourne collided with H.M.A.S. Voyager brought an action in the High Court sitting as a Colonial Court of Admiralty. For want of jurisdiction over claims in respect of death occurring at sea, Windeyer J., of his own motion, proceeded to give judgment as though it were an ordinary action under the Court's original jurisdiction.

The character of a Colonial Court of Admiralty was also examined in *McIlwraith McEarcharn Ltd* v. *The Shell Company of Australia Ltd*.[116] The respondent obtained a declaration from the Supreme Court of New South Wales, exercising its Admiralty jurisdiction, that it was entitled to limit its liability for a collision under s. 503 *Merchant Shipping Act* 1894 (Imp.). From that decree the appellant appealed to the Full Court of the Supreme Court[117] and thence to the High Court. The respondent unsuccessfully contended, inter alia, that the High Court was incompetent to hear the appeal from a Colonial Court of Admiralty. The High Court held that an appeal from the Colonial Court of Admiralty is an appeal from the Supreme Court, Latham C.J. commenting that

> "a decision of the Supreme Court in the exercise of jurisdiction conferred by the Colonial Courts of Admiralty Act is a decision of the Supreme Court in every sense."[118]

The *Colonial Courts of Admiralty Act* 1890 (Imp.) provides that all powers of the ordinary civil jurisdiction may be availed of in the Admiralty jurisdiction.[119] In *Huddart Parker Ltd* v. *The Mill Hill*,[120] two writs *in rem* issued from the Victorian Registry of the High Court against the ship and

112 Ibid. s. 56.
113 *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 2.
114 *Union Steamship Co. of New Zealand* v. *Ferguson* (1969) 119 C.L.R. 191; *Asiatic Steam Navigation Company Ltd* v. *The Commonwealth* (1957) 96 C.L.R. 397; *Bristricic* v. *Rokov* (1977) 51 A.L.J.R. 163.
115 (1965) 112 C.L.R. 295.
116 (1945) 70 C.L.R. 175.
117 (1944) 45 S.R. (N.S.W.) 144.
118 (1945) 70 C.L.R. 175, 191.
119 Ss. 2(1), 15; *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688; *Swift & Co. Ltd* v. *The Heranger* (1965) 82 W.N. (N.S.W.) 540; *The Banco* [1971] P. 137; cf. *Bow, McLachlan & Co. Ltd* v. *The Camosun* [1909] A.C. 597.
120 (1950) 81 C.L.R. 502.

her cargo, claiming salvage remuneration under a towage contract. The defendants applied for a stay of proceedings pending submission of the claims to arbitration in London pursuant to the terms of the contract. Dixon J. held that although no specific power existed to stay Admiralty proceedings, he was entitled to exercise such powers as would be available to him in the Court's civil jurisdiction. His Honour concluded that, by virtue of s. 79 of the *Judiciary Act* 1903 (Cth.) the Court was empowered to exercise the discretion conferred on the State court under the *Arbitration Act* 1928 (Vic.) to stay proceedings. For other reasons, his Honour declined to grant the stay.

The imperial Act also provides that rules of court for regulating practice and procedure may be made in the same manner as in the ordinary civil jurisdiction. The Act further provides that locally made rules should not come into operation until approved by Her Majesty in Council, but this provision no longer pertains since the commencement of the *Statute of Westminster*.[121] In the absence of locally produced rules, the rules made pursuant to the *Vice-Admiralty Courts Act* 1863 (Imp.) are to apply.[122] Those Vice-Admiralty Rules 1883 appear to apply to the Supreme Court of the Northern Territory[123] whereas the High Court and State Supreme Courts operate under locally promulgated rules of court.[124]

Local legislation also governs appeals. The *Colonial Courts of Admiralty Act* 1890 (Imp.) section 5 provides that judgments of a Court exercising Admiralty jurisdiction shall be subject to local appeal as in the exercise of ordinary civil jurisdiction.[125] On the meaning of this section, the High Court in *McIlwraith's* case held that "local appeal" was not confined to appellate courts within the one State, Dixon J. taking the opportunity to confirm that the unit of Admiralty jurisdiction is the Commonwealth.[126] Section 6 of the Act provides for appeal to the Queen in Council which seems to apply notwithstanding the *Privy Council (Limitation of Appeals) Act* 1968 (Cth.) and the *Privy Council (Appeals from the High Court) Act* 1975 (Cth.).[127]

Service of Writ

It is as true in Admiralty as in common law that a court cannot assume

121 *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 7; *Swift & Co. Ltd* v. *The Heranger* (1965) 82 W.N. (N.S.W.) 540, 543.
122 *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 16(3).
123 *Burns Philp & Co. Ltd* v. *The Golden Swan* [1971] A.L.R. 511.
124 High Court: *High Court Rules* (Cth.) 1952. Supreme Courts: *Admiralty Rules* (Vic.) 1975, (N.S.W.) 1952; *Supreme Court Rules* (Qld.) 1900, (S.A.) 1947, (Tas.) 1965, (W.A.) 1971.
125 S. 15 defines "local appeal" as "an appeal to any court inferior to Her Majesty in Council" and "appeal" as "any appeal, rehearing or review".
126 (1945) 70 C.L.R. 175, 201-204.
127 As to which see, *Kitano* v. *Commonwealth* (1975) 132 C.L.R. 231; *Viro* v. *Reg.* (1978) 52 A.L.J.R. 418; *Southern Centre of Theosophy* v. *South Australia* (1979) 54 A.L.J.R. 43.

jurisdiction unless the defendant is amenable to its command.[128] Putting aside for the moment the locality where the cause of action arose, the service of the writ is a key factor in establishing the curial jurisdiction.[129] Actions *in personam*, at common law and Admiralty, can proceed only if the defendant was personally served with the writ within the territorial jurisdiction of the court, or the defendant submits to the jurisdiction, or an order for substituted service is made or an order is made for service outside the jurisdiction. In the first three cases the defendant is physically or notionally within the territory over which the court exercises sovereignty, irrespective of where the cause of action arose. In the last case, service outside the jurisdiction can be ordered only where there exists some connecting factor with the geographical jurisdiction approved by State or Commonwealth legislation.[130]

A court is competent to hear an action involving a tort committed outside the jurisdiction if the defendant is served with the writ within the jurisdiction. But, an order cannot be made to serve the defendant with a writ outside the jurisdiction, unless the tort were committed within the jurisdiction.[131] In *The Fagernes*, the plaintiff applied to Admiralty for an order to serve a writ outside England on shipowners who resided in Italy. The action was brought *in personam* because the ship had sunk in the Bristol Channel having allegedly caused a collision with the plaintiff's ship and therefore could not be served with a writ *in rem*. At first instance,[132] the order was made on the grounds that the waters of the Bristol Channel were internal waters of England and Wales and the collision therefore occurred within the territorial jurisdiction of the Court. On appeal,[133] the Court of Appeal reversed the decision, holding that the tort was committed outside the jurisdiction of the court and therefore no order for service of the writ outside the jurisdiction could be made.

Similar principles apply to the service of a writ *in rem* on the *res*, except that there is no legislative provision allowing for the service of a writ *in rem* outside the jurisdiction. Accordingly, service must be effected on the ship or cargo within the geographical boundaries of the court's jurisdiction. In *Aichhorn & Co. K.G.* v. *M.V. Talabot*[134] the Full High Court dismissed an appeal from the judgment of Stephen J., holding that the

[128] *Laurie* v. *Carroll* (1958) 98 C.L.R. 310. See generally, P. E. Nygh, *Conflict of Laws in Australia* (3rd ed., Sydney, Butterworths, 1976) Ch. 5; E. I. Sykes, *Australian Conflict of Laws* (Sydney, Law Book Co., 1972). Ch. 9.

[129] Ibid. and see P. G. Nash, *Civil Procedure* (Melbourne, Law Book Co., 1976) Ch. 2.

[130] See *High Court Rules* 0.10; *Rules of Supreme Courts* 0.11; (A.C.T., N.T.) 0.12; *Service and Execution of Process Act* 1901 (Cth.) ss. 5, 11.

[131] See *The Hagen* [1908] P. 189; *The Brabo* [1949] 1 All E.R. 294; *Bonython* v. *Commonwealth* [1951] A.C. 201.

[132] [1926] P. 185.

[133] [1927] P. 311.

[134] (1974) 132 C.L.R. 449; quaere whether s. 380 *Navigation Act* 1912 (Cth.) extends the boundaries of the local jurisdiction.

inherent Admiralty rule required service of the writ *in rem* to be effected within the territorial confines of the court. It is not necessary that the *res* be within the jurisdiction when the writ is issued by the court, but it cannot be served until the *res* physically arrives within the jurisdiction.[135] It is worth diverting a moment to another yet relevant issue. Suppose before the writ *in rem* is served on a ship, the ownership of the ship has changed hands. We have seen that this is irrelevant to the indelible maritime lien.[136] For a statutory lien, however, it seems that the action can be sustained against the owner at the time of service only if the writ were issued before the sale.[137]

Appropriate Forum

Having secured formal jurisdiction over the defendant, which turns upon the service of the writ, the court then proceeds to determine whether it shall hear the case. At this point the place where the cause of action arose becomes important, for the court must consider whether it is the appropriate forum to adjudicate the dispute. A great deal has been written on the principles governing a court in arriving at its decision.[138] The court may decide that the cause of action has such little connection with the jurisdiction that it is a *forum non conveniens*.[139]

In the *Atlantic Star*[140] the Dutch ship collided with a Dutch barge in a channel of the River Schelde in Belgium. The owners of the barge commenced proceedings in Antwerp and issued a writ *in rem* in England which was served on the Atlantic Star when she arrived in Liverpool. The owners of the *Atlantic Star* sought to stay or set aside proceedings in England. On appeal the House of Lords, by a majority of four to two, stayed the English proceedings. Their Lordships agreed that the exercise of the discretion is a matter of balancing the advantages and disadvantages to both parties. In this context Lord Wilberforce objected to the use of the essentially American term "*forum non convenience*" because English law requires the balance of factors to be stronger than mere convenience to deny the plaintiff a hearing which is properly instituted in an English court. The fact that the ship is within the jurisdiction of the court is a "strong point of connection with an English forum"[141] and generates a presumption that the action should proceed. The presumption may be rebutted where the proceedings would be oppressive or vexatious to the

135 *The Espanoleto* [1920] P. 223; *The Prins Bernhard* [1963] 2 Lloyd's Rep. 236; *The Banco* [1971] P. 137. See also the power to detain under the *Navigation Act* 1912 (Cth.) s. 383.
136 *Harmer* v. *Bell* (1850) 7 Moo. P.C. 267; 13 E.R. 884.
137 *The Monica S.* [1968] P. 741.
138 Supra, fn. 128.
139 Nash, op. cit.
140 [1974] A.C. 436.
141 Ibid. 470.

defendant and where no substantial advantage over foreign proceedings would accrue to the plaintiff. Although English courts do not generally relinquish jurisdiction,[142] Lord Kilbrandon agreed that, in this case, continuation of the proceedings would be oppressive or vexatious to the defendant. In arriving at this decision, his Lordship took such factors into account as the fact that it was the plaintiff who had commenced actions in Belgium, that witnesses and evidence were more readily available in Belgium, that the English proceedings would occasion unnecessary expense and that the cause of action was totally devoid of physical connection with England. Lord Reid added that distinction should be drawn between a plaintiff to whom England is the natural forum and should not therefore be driven from his judgment seat, and a plaintiff who merely selects the forum for his own ends (who should not be denied the hearing for that reason alone, unless justice could be equally served in a foreign forum).

United States courts have also taken the view that the plaintiff's choice of forum should rarely be disturbed, particularly if he be an American citizen.[143] Nevertheless, if the American forum is clearly inappropriate, it will defer to foreign proceedings. In *M.S. Bremen* v. *Zapata Off-Shore Company*[144] the German tug agreed to tow an off-shore drilling rig from Louisiana to the Adriatic Sea. However, the towage contract contained a "choice of forum" clause which required any dispute to be heard by courts in London. The rig was damaged in tow in the Gulf of Mexico and its American owners sued the tug in the United States. The tug owners commenced a counterclaim in London and the defendants in both proceedings objected to the respective courts assuming jurisdiction. The English courts adhered to the "choice of forum" clause[145] and the United States courts to their traditional view that an American plaintiff should have access to American courts.[146] The issue was resolved on appeal to the Supreme Court of the United States which capitulated in favour of the choice of forum clause. However, the Court asserted that public policy does not require United States courts to accede to choice of forum clauses unless the foreign forum would be the more convenient forum and if the contract was "unaffected by fraud, undue influence or overweening bargaining power".[147]

142 See *The Janera* [1928] P. 55; *The London* [1931] P. 14; *The Madrid* [1937] P. 40; *The Quo Vadis* [1951] 1 Lloyd's Rep. 425; *The Monte Urbasa* [1953] 1 Lloyd's Rep. 587; *The Lucile Bloomfield* [1964] 1 Lloyd's Rep. 324; *The Soya Margareta* [1961] 1 W.L.R. 709.

143 See *Gulf Oil Corp.* v. *Gilbert* 330 U.S. 501 (1946); *Krenger* v. *Pennsylvania* 174 F. 2d 556 (1949); *Koster* v. *American Lumbermens Mutual Casualty Co.* 330 U.S. 518 (1946). And compare *Wood and Selick* v. *Compagnie Generale Transatlantique* 43 F. 2d 941 (1930); *Carbon Black Export* v. *S.S. Monrosa* 254 F. 2d 297 (1958); *Indussa Corp.* v. *S.S. Ranborg* 377 F. 2d 200 (1967); *Ins. Co. of North America* v. *N.V. Oostzee* 201 F. Supp. 76 (1961).

144 407 U.S. 1 (1972).

145 [1968] 2 Lloyd's Rep. 158.

146 428 F. 2d 888 (1970); 446 F. 2d 907 (1971).

147 407 U.S. 1, 12 (1972).

The ability of the parties to nominate their forum by contract is a factor relevant to the court's discretion. In Australia, the court is given no discretion in an action under the *Sea-Carriage of Goods Act* 1924 (Cth.) which declares a choice of forum clause void in a bill of lading.[148] Otherwise, the general rule in Anglo-Australian law is that the court should abide by the parties contractual selection of a forum.[149] In *The Eleftheria*,[150] Brandon J. summarised the principles as follows:

> "The principles established by the authorities can, I think, be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: — (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

However, in *The Fehmarn*[151] the English Court of Appeal refused to surrender jurisdiction to the courts of the U.S.S.R. in accordance with the parties' selection. A cargo was shipped from a Russian port to England in a German ship under a bill of lading stipulating that disputes should be tried in the U.S.S.R. The British buyer commenced action against the German ship in England which the Court of Appeal adjudged to be a place more closely connected with the dispute than the U.S.S.R. And in *The Sniadecki*,[152] two actions *in rem* were brought in England by Chilean shippers and British consignees over a consignment of cargo shipped from South America on board a Polish ship under bills of lading which provided for disputes to be decided in Poland. The Court of Appeal held that,

148 S. 9; *Compagnie des Messageries Maritime* v. *Wilson* (1954) 94 C.L.R. 577.
149 See *Huddart Parker Ltd* v. *The Mill Hill* (1950) 81 C.L.R. 502; *Mackender* v. *Feldia A.G.* [1967] 2 Q.B. 590; *The Makefjell* [1975] 1 Lloyd's Rep. 528; *J. Braconnot* v. *Compagnie des Messageries Maritimes* [1975] 1 Lloyd's Rep. 372.
150 [1970] P. 94, 99-100.
151 [1958] 1 All E.R. 333.
152 [1976] 2 Lloyd's Rep. 241.

having weighed the competing factors, the trial judge was entitled to refuse a stay of proceedings notwithstanding that the English court may have to apply Polish law to decide the dispute.

Demarcation

Having invoked jurisdiction by the valid service of a writ and the court having decided it is the appropriate forum to adjudicate the claim, we come to a third step in the jurisdictional process. An Australian court must now consider whether it hears the action in its Admiralty or common law jurisdiction.

When Australian courts succeeded to the respective jurisdictions of common law and Admiralty, they also inherited a residual problem of demarcation over the geographical boundaries and division of subject matter.[153] Admiralty had no inherent jurisdiction over water within the body of a county and outside the county it was further constrained by subject matter. In *Union Steamship Co. of New Zealand Ltd* v. *The Caradale*,[154] two ships collided in Hobson's Bay in Melbourne. The owner of one commenced a common law action against the owner of the other in the Supreme Court of Victoria. The defendant in that action commenced an action *in rem* in the original jurisdiction of the High Court of Australia and the defendant there, plaintiff in Victoria, sought a stay of proceedings. In the course of judgment, Dixon J. adverted to s. 2(4) of the *Colonial Courts of Admiralty Act* 1890 (Imp.) which provides:

> "Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exerciseable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise."

His Honour considered that this provision required the Supreme Court of Victoria to sit as a Colonial Court of Admiralty if the cause of action arose outside its territorial jurisdiction, which his Honour took to be the colonial equivalent of the "body of a county". But on the facts his Honour found that the collision occurred in a bay whose waters were part of the internal territory of Victoria over which the Supreme Court could exercise common law jurisdiction. Yet, it is not clear how the Court could have consistently rejected the application to stay the Admiralty proceedings in the High Court, as it did,[155] unless Admiralty and common law are to exercise concurrent jurisdiction over internal waters.

The issue was taken up in *Union Steamship Company of New Zealand Ltd* v. *Ferguson*[156] when a seaman sued *in personam* in the High Court

153 See *The Mecca* [1895] P. 95; *The Tolten* [1946] P. 135; *Seward* v. *Vera Cruz* (1884) 10 App. Cas. 59.
154 (1937) 56 C.L.R. 277.
155 (1937) 60 C.L.R. 633.
156 (1969) 119 C.L.R. 191.

the owners of a ship on which he was injured when the ship was moored to a wharf in the port of Burnie on the coast of Tasmania. At first instance, Windeyer J. held that, although exposed to the open sea, the waters were part of the territorial jurisdiction of Tasmania and therefore likened to the body of a county over which the Colonial Court of Admiralty could exercise no inherent jurisdiction. On appeal, Barwick C.J. was inclined to a different line of reasoning. The Chief Justice observed that the English Admiralty jurisdiction embraced all waters outside the body of *English* counties including the internal waters of colonies. Accordingly, when Australian Colonial Courts of Admiralty inherited the English Admiralty jurisdiction they also inherited jurisdiction over internal colonial waters. Section 2(4), he ventured the opinion, could be interpreted simply as an expression that a court would sit in Admiralty in preference to its ordinary civil jurisdiction if the cause of action fell within both. His Honour pointed out that section 2(4) did not necessarily negative jurisdiction over internal waters but it was unnecessary so to decide because, on the facts, he found that the waters could not be notionally enclosed by the coastline and on both interpretations, therefore, were within the Admiralty jurisdiction of the High Court. The issue was not decisive in any event, as all justices on appeal agreed with Windeyer J. that the *Admiralty Court Act* 1861 (U.K.)[157] corrected any territorial barriers in this particular case. Legislation has now vested the English Court of Admiralty with jurisdiction over ports and inland waters.[158]

It should not be assumed that merely because the cause of action arose on the high seas, it must fall within the jurisdiction of Admiralty. The high seas were not exclusive to Admiralty, for Admiralty's jurisdiction was additionally circumscribed by subject matter. Before we proceed to outline the subject matter over which Australian courts may entertain actions in Admiralty, it is worth recalling an example of a court sitting in its ordinary jurisdiction to hear a case involving a collision on the high seas. In *Parker* v. *The Commonwealth of Australia*,[159] the plaintiff sued *in personam* in the Admiralty jurisdiction of the High Court to recover compensation for her husband's death which occurred when the H.M.A.S. Melbourne and the H.M.A.S. Voyager collided some twenty miles off the coast. However, as we shall see, the inherent jurisdiction of Admiralty did not include competence over suits by dependants for the loss of life of relatives. Accordingly, Windeyer J. proceeded to entertain the case in the ordinary original jurisdiction of the High Court which was available to the plaintiff, being an action against the Commonwealth.[160]

[157] See infra "*Content*".
[158] *Administration of Justice Act* 1956 (U.K.) s. 4(1).
[159] (1965) 112 C.L.R. 295.
[160] *Judiciary Act* 1903 (Cth.) s. 38. Note that s. 262 *Navigation Act* 1912 (Cth.) was not available against a naval vessel, ss. 3, 261.

Content

The most unsatisfactory feature of colonial jurisdiction is the fragmented and piecemeal range of disputes which may be entertained by the local courts, having succeeded to the 19th century English jurisdiction in Admiralty. The following glimpse of the major heads of jurisdiction is far from exhaustive.

The inherent jurisdiction[161] embraces the enforcement of bonds which, to raise money or credit for the completion of a voyage,[162] hypothecate the ship (bottomry) or cargo (respondentia), although such arrangements are now commercially obsolete. Being an obligation which binds the *res*, the bond is not enforceable *in personam* but, rather, gives rise to a maritime lien.[163] Claims by the master and crew for wages[164] and claims by the master to recover disbursements[165] also inhere in Admiralty and may be enforced *in rem*[166] or *in personam*.[167] In addition, a statutory jurisdiction to entertain wage claims is created by the *Admiralty Court Act* 1861 (Imp.)[168] and also the *Navigation Act* 1912 (Cth.)[169] in respect of those British ships[170] to which the Act applies.[171] A wages jurisdiction is also conferred by the *Merchant Shipping Acts* and State legislation.[172] Admiralty

161 *The Gratitudine* (1801) 3 C. Rob. 240; 165 E.R. 450; *The Royal Arch* (1857) Sw. 269; 166 E.R. 1131; *The Helgoland* (1859) Sw. 491; 166 E.R. 1228; *The Sultan* (1859) Sw. 504; 166 E.R. 1235.

162 *Soares* v. *Rahn* (1839) 3 Moo. 1; 13 E.R. 1; *The Indomitable* (1859) Sw. 446; 166 E.R. 1208; *The St. George* [1926] P. 217.

163 *Johnson* v. *Shepney* (1703) Holt 48; 90 E.R. 925; *The Ripon City* [1897] P. 226.

164 *The Great Eastern* (1867) L.R. 1 A. & E. 384; *The Nina* (1868) L.R. 2 P.C. 38; *The Leon XIII* (1883) 8 P.D. 121. And see *The Fairport No. 3* [1966] 2 Lloyd's Rep. 253; *The Westport No. 4* [1968] 2 Lloyd's Rep. 559; *The Acrux* [1965] P. 391.

165 *The Feronia* (1868) L.R. 2 A. & E. 65; *The Castlegate* [1893] A.C. 38; *The Turgot* (1886) 11 P.D. 21. And see *The Westport No. 3* [1966] 1 Lloyd's Rep. 342; *The Zafiro* [1960] P. 1.

166 *The Sydney Cove* (1815) 2 Dods. 11; 165 E.R. 1399; *The Nymph* (1856) Sw. 86; 166 E.R. 1033; *Admiralty Court Acts* 1840 (U.K.) s. 4; 1861, s. 10.

167 *Wells* v. *Osman* (1704) 2 Ld. Raym. 1044; 92 E.R. 193; *The Linda Flor* (1857) Sw. 309; 166 E.R. 1150; *Admiralty Court Act* 1861 (U.K.) ss. 10, 35; cf. *The Ruby No. 2* [1898] P. 59.

168 *Admiralty Court Act* 1861 (U.K.) s. 10; *The Sara* (1889) 14 App. Cas. 209; *The British Trade* [1924] P. 104.

169 *Navigation Act* 1912 (Cth.) ss. 91-94.

170 Ibid. s. 10.

171 Ibid. s. 2.

172 The *Merchant Shipping Acts* 1854 (Imp.), ss. 188, 190-191 and 1889 s. 1 applied to the colonies but were replaced by the Act of 1894, ss. 164, 166-167 which, if the date of colonial jurisdiction is frozen at 1891, does not apply to Australian courts unless extended by paramount force. See *China Shipping Co.* v. *South Australia* (1979) 27 A.L.R. 1; 54 A.L.J.R. 57. The qualified recovery of wages for service on ships registered in the United Kingdom and British ships registered outside the United Kingdom and in British possessions, s. 261(d), is extended. Other provisions may be adapted, s. 264, by the British possession to British ships registered therein. State legislation, see *Australian and New Zealand Commentary on Halsbury's Laws of England* (1974), Admiralty, p. 33 applies to coasting trade and in some cases adopt the *Merchant Shipping Act* 1894 (Imp.) and therefore the repealing *Merchant Shipping Act* 1970 (U.K.) s. 18.

could also order the forfeiture of wages under an ancillary power.[173] Jurisdiction over wage claims is concurrent with common law.

Jurisdiction over salvage and *droits* derives from the inherent jurisdiction and from imperial, federal and state statutes. The inherent jurisdiction, historically barred from internal waters, has been extended to the body of counties.[174] It embraces the salvage of property, and life coupled with property,[175] in water[176] enforceable by suits *in rem* and *in personam*.[177] Australian courts may also entertain suits by virtue of the *Merchant Shipping Acts* (Imp.) in respect of salvage from United Kingdom waters or British ships elsewhere.[178] The *Navigation Act* 1912 (Cth.) confers curial jurisdiction over salvage claims and wreck wherever occurring[179] but the statutory reward for life salvage is confined to Australian waters or ships registered in Australia.[180] Jurisdiction is concurrent with common law. Towage claims are also justiciable noting that towage comprising salvage gives rise to a maritime lien but otherwise creates only a statutory lien.[181] A pilot may recover fees in Admiralty.[182]

Australian courts succeed to an inherent jurisdiction over damage occasioned by wrongs committed on the high seas, actionable *in rem* and *in personam*.[183] In addition, the *Admiralty Court Acts* (U.K.) expand jurisdiction over damage done to and by ships,[184] including foreign ships.[185] Section 6 of the 1840 Act reads:

> ". . . the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of . . . damage received by any ship or sea-going vessel . . . and to enforce the payment thereof,

[173] *The MacLeod* (1880) 5 P.D. 254; *The Fairport* (1884) 10 P.D. 13.
[174] *Admiralty Court Act* 1840 (U.K.) s. 6.
[175] *The Johannes* (1860) Lush 182; 167 E.R. 87; *The Fusilier* (1865) Br. & L. 341; 167 E.R. 391; *The Willem III* (1873) L.R. 3 A. & E. 487.
[176] *The Gustaf* (1862) Lush 506; 167 E.R. 230; *Wells* v. *Gas Float Whitton No. 2* [1897] A.C. 337; *The Veritas* [1901] P. 304.
[177] *The Two Friends* (1799) 1 C. Rob. 271; 165 E.R. 174; *The Port Victor* [1901] P. 243; *The Five Steel Barges* (1890) 15 P.D. 142.
[178] *Merchant Shipping Act* 1894 (Imp.) s. 544. And see *Admiralty Court Act* 1861 (U.K.) s. 9; *The Pacific* [1898] P. 170; *The Fulham* [1898] P. 206, [1899] P. 251.
[179] *Navigation Act* 1912 (Cth.) s. 328; *Burns Philp & Co. Ltd* v. *Nelson & Robertson Pty Ltd* (1958) 98 C.L.R. 495.
[180] S. 315.
[181] *Admiralty Court Act* 1840 (U.K.) s. 6; *The Princess Alice* (1849) 3 W. Rob. 138; 166 E.R. 914; *Westrup* v. *Great Yarmouth Steam Co.* (1889) 43 Ch.D. 241; *The Wotonga* (1881) 2 L.R. (N.S.W.) 5.
[182] *The Ambatielos* [1923] P. 68; *The Clan Grant* (1887) 12 P.D. 139.
[183] *The Volant* (1842) 1 Not. Cas. 503; 1 Wm. Rob. 383; 166 E.R. 616; *The Sarah* (1862) Lush 549; 167 E.R. 248; *The Mecca* [1895] P. 95; *The Tolten* [1946] P. 135.
[184] *Admiralty Court Acts* (U.K.). The 1840 Act refers to "ships or sea-going vessels" and the 1861 Act to "ships used in navigation and not propelled by oars"; *Everard* v. *Kendall* (1870) L.R. 5 C.P. 428; *The Mudlark* [1911] P. 116; *Edwards* v. *Quickenden* [1939] P. 261; *The Champion* [1934] P. 1. And see *Marine Craft Constructors Ltd* v. *Erland Blomquist (Engineers) Ltd* [1953] 1 Lloyd's Rep. 514; *The Queen of the South* [1968] P. 449.
[185] *The Courier* [1862] Lush 541; 167 E.R. 244; *The Mali Ivo* (1869) L.R. 2 A. & E. 356; *The Zeta* [1893] A.C. 468.

> whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the . . . damages [were] received. . . ."

The 1861 Act provides in s. 7:

> "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Both sections have partially severed the body of counties—high seas dichotomy and have crystallized the jurisdiction in Admiralty over torts committed on water which cause damage. Examples include damage to marine installations,[186] damage to passing ships (even when caused by the wash),[187] damage caused when avoiding collision,[188] damage done by salvors to a wreck,[189] the expense of removing wreck,[190] damage caused by a falling derrick alongside[191] and oil pollution.[192]

There was some doubt in the 19th century whether Admiralty had jurisdiction *in rem* over personal injuries.[193] It was held to do so where a submerged driver was struck by a ship[194] and *in personam* suits were entertained over injuries to persons on board ship.[195] The weight of opinion concluded that Admiralty could hear actions *in rem* for personal injuries[196] though not for loss of life.[197] To dispel doubts and overcome limitations, the *Navigation Act* 1912 (Cth.) provides in s. 262:

> "Any enactment which confers on any Court Admiralty jurisdiction in respect of damages shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*."

This section was not available to the widowed plaintiff in *Parker* v. *The Commonwealth*[198] claiming damages for loss of a life caused by the collision of two naval vessels. Section 261A extends various sections of the

186 *The Clara Killam* (1870) L.R. 3 A. & E. 161; *The Zeta* [1893] A.C. 468; *The Veritas* [1901] P. 304. And see *The Tolten* [1946] P. 135; *The Hoegh Silvercrest* [1962] 1 Lloyd's Rep. 9.

187 *Luxford* v. *Large* (1833) 5 Car. & P. 421; 172 E.R. 1036; *Netherlands Steam Boat Co.* v. *Styles* (1854) 9 Moo. 286; 14 E.R. 305; *The Kong Magnus* [1891] P. 223; cf. *The Royal Eagle* (1950) 84 Ll.L.R. 543.

188 *The Industrie* (1871) L.R. 3 A. & E. 303.

189 *The Zelo* [1922] P. 9. See *The Tojo Maru* [1972] A.C. 242.

190 *The Chr. Knudsen* [1932] P. 153.

191 *The Minerva* [1933] P. 224.

192 *Outhouse* v. *The Thorshavn* [1935] 4 D.L.R. 628.

193 *Smith* v. *Brown* (1871) L.R. 6 Q.B. 729; *The Franconia* (1877) 2 P.D. 163; *The Bernina No. 2* (1887) 12 P.D. 58; cf. *The Guildfaxe* (1868) L.R. 2 A. & E. 325; *The Beta* (1869) L.R. 2 P.C. 447.

194 *The Sylph* (1867) L.R. 2 A. & E. 24.

195 *Wood* v. *Germain* (1730) Burrell 311; 167 E.R. 587; *The Ruckers* (1801) 4 C. Rob. 73; 165 E.R. 539; *The Sarah* (1862) Lush 549; 167 E.R. 248.

196 *Nagrint* v. *The Regis* (1939) 61 C.L.R. 688; *The Zeta* [1893] A.C. 468; *The Theta* [1894] P. 280. For England, the *Maritime Conventions Act* 1911 (U.K.) dispelled the doubts.

197 *Parker* v. *The Commonwealth* (1965) 112 C.L.R. 295; *The Vera Cruz No. 2* (1884) 9 P.D. 96; *Seward* v. *Vera Cruz* (1884) 10 App. Cas. 59.

198 (1965) 112 C.L.R. 295.

Navigation Act 1912 (Cth.) to naval vessels, including the apportionment of liability for contributory negligence,[199] yet it does not apply to s. 262.

Reverting to the heads of jurisdiction conferred by the *Admiralty Court Acts* (U.K.), in *Nagrint* v. *The Regis*[200] Dixon C.J., sitting as a Colonial Court of Admiralty in the High Court, was invited to exercise jurisdiction in respect of an intra-state accident. The plaintiff sued a vessel claiming damages for injuries and property damage sustained when the vessel on which she was passenger capsized in Port Jackson harbour while conducting a sight-seeing excursion. His Honour interpreted s. 7 of the 1861 Act as applying to physical injuries inflicted by the ship to persons on board. He emphasized, however, that the ship must be the instrument of damage. The Chief Justice said:[201]

> ". . . when the injury arises from some defect in the condition of the ship considered as a premises or as a structure upon which the person injured is standing, walking or moving, the ship is treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury. But where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation, then the damage is to be regarded as done by the ship as an active agent or as the 'noxious instrument'."

This excerpt was approved and applied in *Union Steamship Co. of New Zealand* v. *Ferguson*.[202] The plaintiff sued *in personam* in the Admiralty jurisdiction of the High Court to recover damages for injuries sustained as a crew member of a ship. The ship was made fast to a wharf in the coastal port of Burnie in readiness to load cargo. The plaintiff was standing on a hatch cover connected to a winch when a fellow employee negligently put the winch in motion causing the plaintiff to overbalance and fall into the ship's hold. On appeal, the Full Court agreed with the trial judge that the ship was the active agent or noxious instrument of injury and that s. 7 therefore applied. However, the doctrine of common employment would have debarred the plaintiff's claim had it not been abolished in 1958 by section 59A of the *Navigation Act* 1912 (Cth.).

Admiralty's inherent jurisdiction embraces actions *in rem* to recover possession of a ship[203] and to remove the master[204] but not to decide questions of ownership.[205] The *Admiralty Court Act* 1840 (U.K.) supplemented jurisdiction with power to decide all questions of title or ownership incidental to a claim for possession, salvage, damages, wages or bottomry.[206]

199 See *Navigation Act* 1912 (Cth.) ss. 259-261.
200 (1939) 61 C.L.R. 688.
201 Ibid. 700.
202 (1969) 119 C.L.R. 191.
203 *Re Blanshard* (1823) 2 B. & C. 244; 107 E.R. 374.
204 *The New Draper* (1802) 4 C. Rob. 287; 165 E.R. 615.
205 *The Warrior* (1818) 2 Dods. 288; 165 E.R. 1490.
206 *Admiralty Court Act* 1840 (U.K.) s. 4; *The Margaret Mitchell* (1858) Sw. 382; 166 E.R. 1174; *The Pacific Star* v. *Bank of America National Trust and Savings Association* [1965] W.A.R. 159.

The 1861 Act further extended jurisdiction to disputes between co-owners touching the ownership, possession, employment and earnings of a ship or share therein[207] if the ship is registered in Australia.[208] There is no jurisdiction to enforce a mortgage unless the ship is under arrest of the court[209] or the mortgage is registered under the *Merchant Shipping Act* 1894 (Imp.).[210] Claims for necessaries, although they do not give rise to a maritime lien,[211] are justiciable in Admiralty[212] provided that, if the necessaries were supplied elsewhere than the port of registry, the owner is not domiciled in the jurisdiction.[213] And no action may be brought for building, equipping or repairing a ship unless the ship is under arrest of the court.[214]

Historical friction robbed Admiralty of jurisdiction over charter parties and general average.[215] Admiralty was also devoid of jurisdiction over cargo claims until the *Admiralty Court Act* 1861 (U.K.) introduced s. 6:[216]

> "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in [Australia][217] in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless . . . [an owner] is domiciled in [Australia]."[217]

For a piece of reform legislation designed to fill the incongruous void in Admiralty jurisdiction, s. 6 contains a number of curious restrictions, notwithstanding that it receives liberal interpretation.[218] One denies jurisdiction where a ship owner is domiciled within the domestic jurisdiction, which is particularly anomalous in a federated union of States. Dr Lushington explained the limitation in *The St. Cloud*:

> "The short delivery of goods brought to this country in foreign ships or their delivery in a damaged state, was frequently a grievous injury for

[207] *Admiralty Court Act* 1861 (U.K.) s. 8; *The Lady of the Lake* (1870) L.R. 3 A. & E. 29.
[208] *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 2(3)(a).
[209] *Admiralty Court Act* 1840 (U.K.) s. 3; *The Dowthorpe* (1843) 2 W. Rob. 73; 166 E.R. 682; *The Tagus* [1903] P. 44.
[210] *Admiralty Court Act* 1861 (U.K.) s. 11.
[211] *The Henrich Bjorn* (1886) 11 App. Cas. 270; *The Two Ellens* (1872) L.R. 4 P.C. 161; *The Cella* (1888) 13 P.D. 82.
[212] *Admiralty Court Act* 1840 (U.K.) s. 6.
[213] *Admiralty Court Act* 1861 (U.K.) s. 5; *Dalgety & Co. Ltd* v. *Aitchison* (1958) 2 F.L.R. 219.
[214] Ibid. s. 6. *The Tergeste* [1903] P. 26; *Lewmarine Pty Ltd* v. *The Kaptayanni* [1974] V.R. 465.
[215] *The Yuri Maru* [1927] A.C. 906; *The Norway* (1864) Br. & L. 226; 167 E.R. 347; *La Constancia* (1846) 2 W. Rob. 487; 166 E.R. 839.
[216] See *The Figlia Maggiore* (1868) L.R. 2 A. & E. 106; *The Ironsides* (1862) Lush 458; 167 E.R. 205; *The Cap Blanco* [1913] P. 130.
[217] *Colonial Courts of Admiralty Act* 1890 (Imp.) s. 2(3)(a).
[218] *The St. Cloud* (1863) 8 L.T. 54; *The Pieve Superiore* (1874) L.R. 5 P.C. 482; *The Bahia* (1863) Br. & L. 61; 167 E.R. 298.

> which there was no practical remedy; for, the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. . . . It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign ports, the common law tribunals could not afford effectual redress."[219]

As a section intended to facilitate claims for short delivery of cargo, the legislation employs a striking infelicity of language when it speaks of "goods carried into port".[220] Reading it strictly, the section would deprive a plaintiff of recourse for goods which were not shipped or which were lost en route. In *The Danzig*,[221] Dr Lushington surmounted the latter obstacle by applying the section to cargo lost en route, and in *The Marlborough Hill* v. *Alex Cowan & Sons Ltd*[222] the Full Court of the Supreme Court of New South Wales suggested that the section should equally apply to unshipped cargo as though the section read "carried or to be carried". On appeal, the Privy Council was faced with a third constraint, namely, that s. 6 of the 1861 Act makes specific reference to bills of lading.[223]

In *The Marlborough Hill* v. *Alex Cowan & Sons Ltd*,[224] the respondents issued a writ *in rem* against the ship, when she arrived in Sydney from New York, alleging the non-delivery of cargo. The ship, inter alia, objected to the jurisdiction of the Supreme Court of New South Wales in Admiralty on two grounds: first, that the documentation issued to the consignees was not a bill of lading within the meaning of s. 6; secondly, there being no evidence that the cargo was shipped, that no action lay against the ship *in rem*. The ship's agents had issued a "received for shipment" bill of lading which acknowledges receipt of cargo preparatory to loading, in contrast with the orthodox "shipped" bill of lading which signifies that the cargo has been laden on board.[225] On appeal, the Judicial Committee rejected the first objection, holding that a "received for shipment" bill of lading is so notoriously known as a bill of lading that it satisfies the terms of s. 6. There was no appeal on the second objection, but the Committee indicated that they did not disagree with the Full Court of the Supreme Court of New South Wales which had decided that jurisdiction was available, although further proof of the carrier's bailment would be necessary.

This issue was pursued before the High Court of Australia, in *Rosenfeld Hillas & Co. Pty Ltd* v. *The Fort Laramie*.[226] The plaintiff sued the ship

219 (1863) 8 L.T. 54, 55.
220 See *Larsen* v. *The Nieuw Holland* [1957] St. R. Qd. 605.
221 (1863) Br. & L. 102; 167 E.R. 315.
222 (1919) 19 S.R. (N.S.W.) 306.
223 [1921] 1 A.C. 444; see also, *The Ironsides* (1862) Lush 458; 167 E.R. 205.
224 (1919) 19 S.R. (N.S.W.) 306.
225 See now *Sea-Carriage of Goods Act* 1924 (Cth.) s. 7.
226 (1923) 32 C.L.R. 25.

in rem in the High Court for failure to deliver the quantity of cargo listed in the "shipped" bills of lading. At first instance,[227] Knox C.J. held that the signature of one part owner on the bills of lading could not bind the ship and that judgment must be entered for the ship in the absence of extraneous evidence that the cargo had, in fact, been shipped. On appeal, the Full Court took the view that the weight of evidence entitled them to draw the inference that the cargo had been shipped, Isaacs J. holding that the bills of lading were prima facie evidence of shipment.

The jurisdiction of a Colonial Court of Admiralty to entertain an action under s. 6 of the *Admiralty Court Act* 1861 (U.K.) is not confined to cargo carried into the port of destination but also embraces intermediate ports and ports of refuge.[228] However, a further anomaly in the wording of s. 6 was exposed in *F. Kanematsu and Company Ltd* v. *The Shahzada*.[229] The plaintiff was the owner of cargo shipped from Sydney. Before the ship cleared harbour she was involved in a collision and beached in the harbour, refloated and returned to a berth in the port. The perishable cargo was removed and stored pending repairs to the ship during which time it deteriorated. The plaintiff sued the ship *in rem* in the High Court where Taylor J. ruled that the ship had not carried the cargo into port within the meaning of s. 6 and the Court, therefore, had no jurisdiction to entertain the claim.[230] The final limitation of s. 6, namely that it applies only to inward traffic, was illustrated in *The Terukawa Maru* v. *Co-operated Dried Fruit Sales Pty Ltd*.[231] There the cargo owner was denied jurisdiction in the High Court for redress against the ship for the non-delivery of cargo shipped from Melbourne to Guiana, because s. 6 applies only to cargo carried *into* a port in Australia.

To finalise the content of the Australian Admiralty jurisdiction, mention should be made of the jurisdiction to limit shipowners' liability. Civilians in Admiralty were accustomed to concepts of corporate entity and limited liability long before common lawyers came to grapple with them. The notion that a ship *in rem* alone bore liability generated a corporate personality in the ship and effectively limited the quantum of the shipowner's financial liability to the value of his ship. Yet even before this aspect of the personification theory began to erode,[232] shipowners were faced with an increasing incidence of collisions from which underwriters would not indemnify them.[233] To protect shipowners from financial

227 (1922) 31 C.L.R. 56.
228 *F. Kanematsu & Co. Ltd* v. *The Shahzada* (1956) 96 C.L.R. 477, 484.
229 Ibid.
230 It is not clear from s. 6 whether "owner" qualifies "bill of lading" (in which case the section would be exclusive to bills of lading) or "goods" (in which case the owner of cargo would have access to the court irrespective of the existence of a bill of lading). In *The Shahzada* a bill of lading had issued to the Japanese owner of the cargo shipped by its Australian agent.
231 (1972) 126 C.L.R. 170.
232 Supra "Actions *In Rem*".
233 W. W. Eyer, "Shipowners' Limitation of Liability" (1964) 16 *Stan. L.R.* 370.

collapse and to promote calculable insurance cover, the *Merchant Shipping Acts* conferred legislative limitations of liability on shipowners.[234] Jurisdiction over claims to limit liability was conferred upon the High Court of Chancery until the *Admiralty Court Act* 1861 (U.K.) conferred concurrent jurisdiction on the High Court of Admiralty where the ship in question was under arrest or released on bail.[235]

The current jurisdiction in the *Merchant Shipping Act* 1894 (Imp.) is conferred by s. 504 on any competent court of a British possession. Suits to limit liability were entertained in Australia with no apparent argument as to whether a Colonial Court of Admiralty or court exercising its ordinary jurisdiction was a competent court within the meaning of the section.[236] For example, when the steamships *Kakariki* and *Caradale* collided in Hobson's Bay in Melbourne and the latter was held solely to blame,[237] her owners applied to the High Court for a decree limiting their liability.[238] There being no argument on the jurisdictional issue, Dixon J. gave judgment on the merits of the claim. However, in *McIlwraith McEacharn Ltd* v. *Shell Company of Australia Ltd*[239] where objection was made to the High Court hearing an appeal from a State Colonial Court of Admiralty, Dixon J. observed[240] that the Colonial Court of Admiralty would have no jurisdiction to entertain a limitation claim unless the ship were under arrest or released on bail within the terms of the *Admiralty Court Act* 1861 (U.K.).[241] Nevertheless, his Honour pointed out that the same court may make such orders as a competent court in its ordinary jurisdiction and no jurisdictional issue has therefore been argued in subsequent limitation actions.[242] It is convenient to close the outline of jurisdictional content on the very point on which this article opened, namely, that an Australian Colonial Court of Admiralty does not lose its identity as a domestic court.

234 From time to time, limitation of liability and immunity from liability have been conferred, see 87 Geo. II, c. 15 (1733); 26 Geo. III, c. 86 (1786); 53 Geo. III, c. 159 (1813); *Merchant Shipping Acts* 1854, 1862 (Imp.). See now, *Merchant Shipping Act* 1894 (Imp.) ss. 502, 503; *Merchant Shipping (Liability of Shipowners and Others) Act* 1900 (Imp.); *Navigation Act* 1912 (Cth.) Part VIII.

235 S. 13.

236 *William Holyman & Sons Pty Ltd* v. *The Marine Board of Launceston* (1929) 24 Tas. L.R. 64; *The Millimumul* (1930) 30 S.R. (N.S.W.) 461; *China Ocean Shipping Co.* v. *South Australia* (1979) 27 A.L.R. 1; 54 A.L.J.R. 57.

237 *Union Steamship Company of New Zealand Ltd* v. *The Caradale* (1937) 60 C.L.R. 633.

238 *James Patrick and Company Pty Ltd* v. *Union Steamship Company of New Zealand Ltd* (1938) 60 C.L.R. 650.

239 (1945) 70 C.L.R. 175.

240 Ibid. 207-208.

241 Not given to pedantry, his Honour did not put the argument that s. 13 *Admiralty Court Act* 1861 (U.K.) refers expressly to the High Court of Admiralty in *England*, yet s. 2(3)(a) *Colonial Courts of Admiralty Act* 1890 (Imp.) converts "England" to "Australia". Such an interpretation would deprive a Colonial Court of Admiralty of any jurisdiction.

242 *Asiatic Steam Navigation Company Ltd* v. *The Commonwealth* (1956) 96 C.L.R. 397; *Bistricic* v. *Rokov* (1977) 51 A.L.J.R. 163.

CONCLUSION

Admiralty can trace its lineage to the 14th century when its struggle for power, autonomy and free-generating litigation plunged the infant jurisdiction into conflict with the common law courts. Although the schism between jurisdictions over maritime crime was bridged in the 15th century, the 14th century line of demarcation could not eliminate the poaching of commercial business which indeed intensified with the expansion of maritime trade in the 16th century. So competitive were they, that common lawyers and civilians both employed devices to capture and retain business but, ultimately, the common law prohibition proved to be the superior weapon. Wielded with hostility in the 17th century, the prohibition enabled Coke to restrict the range of disputes justiciable in Admiralty. Indeed, the common law process may have entirely supplanted the maritime system had it not been for the civilians' deft adaptation of the concept *in rem* which preserved for them a limited jurisdiction.

Admiralty's prognosis further deteriorated with the 18th century confrontation in the American colonies and the 19th century dissolution of the Doctors' Common. Yet the action *in rem* was too valuable a process to be ignored. Stripped of its historical inhibitions, the action *in rem* became the cornerstone of a federal Admiralty jurisdiction in the United States. Even in England's 19th century climate of curial centralization, the preservation of the action *in rem* was sufficient reason to retain and expand the Admiralty jurisdiction. Yet, the statutory base for the jurisdiction was too fragmented to cope with maritime disputes of the 20th century and England comprehensively renovated her jurisdiction. However, in Australia, constitutional independence overtook the English reform and the factitious 19th century jurisdiction became entrenched in the colonial structure of Australian Admiralty courts.