

THE NATURE OF THE ACTION IN REM

by

ALEXANDER GORDON JEFFREY



Submitted in partial fulfilment of the
requirements for the degree of Masters
in the School of Law, Howard College,
University of Natal.

DURBAN

1986

ACKNOWLEDGMENTS

I wish to record my indebtedness to all those who have assisted me with the preparation and finalisation of this dissertation.

In particular, I thank my wife Christine, who lovingly gave me every encouragement and support throughout this entire project. I appreciate the many weeks she spent in British libraries assisting me with the location and copying of material not available in South Africa. I also appreciate her assistance in proof-reading the final draft of this dissertation.

My supervisor, Hilton Staniland, has given me inspiration and expert guidance for which I am very grateful.

I would also like to thank my friends and relations for their encouragement and assistance: in particular, Jim Rodgerson of the Department of Electrical Engineering at the University of Natal, for compiling a computer programme which precisely suited my needs for this research and for assisting me with the practicalities of choosing and operating a computer and the preparation of the final copy of this dissertation; Des Clemo, Managing Director of Polaris Shipping (Pty) Ltd, for obtaining a copy of an unobtainable, out-of-print book for me in the United States and for all his practical advice concerning the action in rem; and my great-aunt, Shelagh Clear, retired senior lecturer at UNISA, for obtaining books in Pretoria for me.

I would also like to thank Barbara Becker of the Administration Department, University of Natal, for guiding this dissertation through the attendant administrative formalities.

I appreciate all the assistance given to me by Heather Fairleigh, Librarian of the GMJ Sweeney Law Branch Library, University of Natal, and her staff. Also, while I was in Great Britain, the authorities of the following institutions granted me permission to use their libraries, which I very much appreciate - the British Museum, the Universities of Oxford and Cambridge, and the Institute of Advanced Legal Studies, London. For their assistance, I wish to thank the librarians and their staff of the Bodleian Library, the Bodleian Law Library, and the Codrington Library at All Souls College, Oxford; the University Library and Squire Law Library, Cambridge; and the library of the Institute of Advanced Legal Studies.

CONTENTS

Table of Cases	i
Table of Statutes	ix
<u>CHAPTERS:</u>	
1. INTRODUCTION	
1. The Concept	1
2. The Applicable to the Determination of the Concept in South Africa	2
3. The Fundamental Nature of the Concept	3
4. Historical Perspective	3
5. The Various Approaches to Explaining the Concept	5
6. The Significance of this Study	8
2. THE LAW TO BE APPLIED IN DETERMINING THE CONCEPT IN SOUTH AFRICA	
1. The Position Prior to the 1983 Act	11
2. The Position Subsequent to the 1983 Act:	
1. In Terms of the Act	14
2. In terms of the Rules	19
3. Conclusion	23
3. HISTORICAL PERSPECTIVE	
1. Introduction	24
2. The Beginning	25
3. The Tudor Period	34
4. The Period of Decline	37
5. The Revival	42
6. The Consolidatory Period	45
7. The Modern Period	47

4.	THE ORIGIN OF THE ACTION IN REM	
1.	Introduction	49
2.	The Various Theories as to the Origin of the Action <u>in rem</u> :	
1.	The Conflict Theory	56
2.	The Procedural Theory	57
3.	The United States Theories	58
3.	Conclusion	67
5.	THE PROCEDURAL THEORY	
1.	Introduction	69
2.	The Basis of the Principle in <u>The Dictator</u>	71
3.	The Principle's Dubious Historical Validity	73
4.	Other Factors Contributing to the Evolution of the Procedural Theory	76
5.	The Cases Dealing with the Limitation of the <u>Res</u> Owner's Liability	78
6.	The Analogy Drawn Between Proceedings by Foreign Attachment and the Action <u>in rem</u>	91
7.	The Introduction of "Statutory Rights of Actions <u>in rem</u> " into English Admiralty Law	94
8.	Conclusion	110
6.	WEAKNESSES OF THE PROCEDURAL THEORY	
1.	Introduction	111
2.	Rights <u>in rem</u> which Accrue Independently of The <u>Res</u> Owner's Liability	111
3.	Arrest of <u>Any</u> Property Belonging to the Defendant	114
4.	<u>The Bold Buccleugh</u>	117
5.	The Reasons for the Procedural View that the <u>Res</u> Owner's Liability is not Limited to the	

Value of the <u>Res</u> in the event of an Appearance by the <u>Res</u> Owner	117
6. Conclusion	120
7. THE AMERICAN APPROACH	
1. Introduction	121
2. The Personification Theory	123
3. The Substantive Theory	136
4. Conclusion	152
8. THE ACTION <u>IN REM</u> AND THE MARITIME LIEN IN SOUTH AFRICAN LAW	
1. The Action <u>in rem</u>	154
2. Maritime Liens	162
3. Conclusion	166
9. CONCLUSION	167
BIBLIOGRAPHY	172

TABLE OF CASES

A

The Aegean Sun 1982 (4) SA 625 (C).

Alahaja Mai Deribe & Sons v The Ship Golden Toga 1986 (1) SA 505 (N).

The Alexander Larson (1841) 1 Wm Rob 288.

The Aline (1839) 1 W Rob 111.

The Aneriod (1877) 2 PD 189.

Re Aro Co Ltd [1980] 1 All ER 1067.

The August 8th [1983] 1 Lloyd's Rep 351.

The Acrux [1965] P 391.

The Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia (1913) 17 CLR 261.

In re Australian Direct Steam Navigation Co (1875) LR 20 Eq 325.

B

The Banco [1971] P 137.

Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A).

The Beldis [1936] P 51.

The Berg 1984 (4) SA 647 (N).

The Berg 1986 (2) SA 700 (A).

The Bold Buccleugh (1851) 7 Moo PC 267.

The Broadmayne [1916] P 64.

Brown v Wilkinson (1846) 15 M & W 391.

The Burns [1907] P 137.

C

The Cap Bon [1967] 1 Lloyd's Rep 543.

The Camosun 1909 AC 579.

The Cargo ex Port Victor [1901] P 243.

The Cargo ex Sultan (1859) Swab 504.

The Castlegate [1893] AC 38.

The China 72 US (7 Wall) 53.

Citizens' Bank v Nantucket Steamboat Co 5 Fed Cas 719 (1811).

The City of Mecca (1881) 6 PD 106.

The Clara (1855) Swab 1.

Clay v Sudgrave (1700) 1 Salk 33.

The Colorado [1923] P 102.

The Conet [1965] 1 Lloyd's Rep 195.

The Conoco Britannia [1972] 2 QB 543.

Corset v Husely (1688) Comb 135.

Ex parte The Crew MV Caracas Bay 1977 (4) SA 954 (C).

The Cristina [1938] AC 485.

Crooks and Co v Agricultural Co-Operative Union Ltd 1922 AD 423.

Currie v M'Knight [1897] AC 97.

D

De Howorth v The SS India 1921 CPD 451.

De Lovio v Boit et al 7 Fed Cas 418 (CCD Mass 1815).

The Dictator [1891-4] All ER Rep 360.

The Dundee (1823) 1 Hag Adm 109.

The Dupleix [1912] P 8.

E

The Ella A Clark (1863) B&L 32.

The Emerald Transporter see Gulf Oil v Fund of the MV Emerald Transporter 1985 (4) SA 133 (N) infra.

The Esherheim [1976] 2 Lloyd's Rep 1.

Estate Smith v CIR 1960 (3) SA 375 (A).

The Eugene F Moran 212 US 466 (1912).

Euromarine International of Mauren v The Ship Berg and Others see The Berg supra.

F

The Father Thames [1979] 2 Lloyd's Rep 364.

The Fidias 1986 (1) SA 714 (N).

The Fortitudo 2 Dods 58.

The Freedom (1871) LR 3 A&E 495.

G

The Gemma [1899] P 285.

Gernesey v Henton (see The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) 165).

Ex Parte Government of the USA: in re SS Union Carrier 1950 (1) SA 880 (C).

Greenway and Barker's Case (1613) Godbolt 260.

Gulf Oil v Fund of the MV Emerald Transporter 1985 (4) SA 133 (N).

The Gustaf (1862) Lush 506.

H

The Halcyon Isle [1980] 2 Lloyd's LR 325.

D Harmer v W E Bell and Others , see The Bold Buccleugh supra.

Hartford v Jones 1 Ld Raym 393.

The Henrich Björn (1886) 11 PD 270.

The Heinrich Björn (1885) 10 PD 44.

The Hope (1840) 1 Wm Rob 154.

The Houda Pearl 1982 (2) SA 37 (N).

SS Humber v SS Answald 1912 AD 546.

I

The Igor [1956] 2 Lloyd's Rep 271.

Industria Nacional de Papel v M/V Albert F 730 F2d 622 (11th Cir 1984).

J

The Joannis Vatis (No.2) [1922] P 213.

The Johann Friederich (1839) 1 Wm Rob 36.

The John Dunn (1840) 1 Wm Rob 159.

The John G Stevens 170 US 113 (1898).

The Jupiter [1924] P 236.

Justin v Ballam (1711) 2 Ld Raym 806.

K

The Kalamazoo (1851) 15 Jur 885.

Kandagasabapathy and Others v MV Melina Tsiris 1981 (3) SA 950 (N).

Katagum Wholesale Commodities Co Ltd v The Paz see The Paz infra.

The Khalij Sky 1986 (1) SA 485 (C).

Kinekor Films (Pty) Ltd v Dial-A-Movie 1977 (1) SA 450 (A).

L

Latus v United States 277 F2d 264 (2d Cir 1960).

Lipson v Harrison 2 WR 10.

The Little Charles 26 Fed Cas 979 (CCD Virginia 1818)

The Lloydiana [1983] 2 Lloyd's Rep 313.

The Longford (1889) 14 PD 34.

Looyen v Simmer and Jack Mines Ltd 1952 (4) SA 547 (A).

The Lottawanna 88 US (21 Wall) 558 (1874).

M

Magat and Others v MV Houda Pearl 1982 (2) SA 37 (N).

The Malek Adhel 2 How 210 (1844).

The Margaret (1835) 3 Hag Adm 238.

The Melina Tsiris 1981 (3) SA 950 (N).

The Mellona (1848) 3 Wm Rob 16.

Menetone v Gibbons and Another (1789) 3 TR 267.

The Milford (1858) Swab 362.

Minister of the Interior v Machadodorp Investments (Pty) Ltd 1957 (2) SA 395 (A).

The Monica S [1968] P 741.

The Monte A 12 F 331 (1882).

The Owners and/or Master of the MV Matoria and Others v Omnipex Overseas SA 1979 (3) SA 616 (C).

N

Nelson v Couch (1863) 33 LJ(CP) 46.

The Neptune (1824) 1 Hag Adm 227.

The Nestor 18 Fed Cas 9 (CCD Maine 1831).

O

The Orient (1871) LR 3 PC 696.

Oriental Commercial and Shipping Co Ltd v MV Fidias see The Fidias supra.

P

The Pacific (1864) B&L 243.

The Parlement Belge (1880) 5 PD 197.

The Palmyra 12 Wheat 1 (1827).

The Paz 1984 (3) SA 261 (N).

Peca Enterprises (Pty) Ltd v Registrar of the Supreme Court, Natal NO and Others 1977 (1) SA 76 (N).

The Pieve Superiore (1874) LR 5 PC 482.

Q

Quick & Louw & Moore and Another v SS Almoural 1982 (3) SA 406 (C).

R

Ramsay v Allegre 12 Wheat (6 US) 610 (1827).

The Rebecca 18 Fed Cas 9 (CCD Maine 1831).

The Rena K [1979] 1 QB 377.

The Ripon City [1897] P 226.

The Rock Island Bridge 73 US (6 Wall) 753 (1867).

The Royal Arch (1857) Swab 269.

S

Sampson v Curteys (see The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) 149).

The Sara (1889) 14 App Cas 209.

Southern Steamship Agency Inc and Another v MV Khalij Sky, see The Khalij Sky supra.

Stainbank v Fenning (1851) 11 CB 51.

Stainbank v Shepard (1853) 13 CB 418.

The St George [1926] P 217.

The St Merriel [1963] P 247.

Svenden v Wallace 13 QBD 69, 73.

T

Taylor v Best (1854) CP 14 CB 487.

The Tervaete [1922] P 259.

The Temiscouta (1855) 2 Sp Ecc & Adm 208.

Tharros Shipping Corporation SA v The Owner of the Ship Golden Ocean 1972 (4) SA 316 (N).

The Tobago (1804) 5 C Rob 218.

The Tolton [1946] P 137.

Trivett & Co (Pty) Ltd and Others v Wm Brandt's Sons & Co Ltd and Others 1975 (3) SA 423 (A).

The Triune (1834) 3 Hag Adm 114.

The Troubadour (1866) LR 1 A&E 302.

Tucker v Alexandroff 183 US 424 (1901).

The Two Ellens (1872) LR 4 PC 161.

V

The Veritas [1901] P 304.

The Volant (1842) 1 NC 503.

W

Wells v The Gas Float Whitton No 2 [1897] AC 337.

Wells v Osman (1704) 2 Ld Raym 1044.

The Western Maid 257 US 419 (1921).

The Wild Ranger (1863) B&L 84.

Wilson v Dickinson (1818) 2 B & Ald 2.

Y

The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855).

The Yuri Maru 1927 AC 906.

Z

The Zafiro [1960] P 1.

The Zephyr (1864) 11 LT 351.

TABLE OF STATUTES

Great Britain:

Jurisdiction of Admiral and Deputy Act, 1389 (13 Rich II c 5).
Jurisdiction of Admiral's Court Act, 1391 (15 Rich II c 3).
The Admiralty Court Act, 1840 (3 & 4 Vic c 65).
The Piracy Act, 1950 (13 & 14 Vic c 26).
Act, 1857 (20 & 21 Vic c 77).
Act, 1859 (22 & 23 Vic c 6).
The Admiralty Court Act, 1861 (24 Vic c 10).
The Vice-Admiralty Courts Act, 1863 (26 Vic c 24).
The Supreme Court of Judicature Act, 1873 (36 & 37 Vic c 66).
The Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vic c 83).
The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vic c 27).
The Administration of Justice Act, 1956 (4 & 5 Eliz II c 46).
The Supreme Court Act, 1981 (29 & 30 Eliz II c 46).
Rules: The Vice-Admiralty Court Rules, 1883.
General: The International Convention Relating to the Arrest of Sea-Going Ships, 1952.
The International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision,

Bermuda:

The Supreme Court (Admiralty Jurisdiction) Act, 1962.

Canada:

The Federal Court Act, 1970.

Malaysia:

The Courts of Judicature Act, 1964.

New Zealand:

The Admiralty Act, 1973.

South Africa:

The Admiralty Jurisdiction Regulation Act, No 105 of 1983.

Rules Regulating the Conduct of the Admiralty Proceedings of the
Several Provincial and Local Divisions of the Supreme Court of
South Africa: R2415 GG10522 of 21st November 1986.

United States of America:

The United States Constitution.

Act of Congress c 20 (24th September 1789).

CHAPTER 1

INTRODUCTION

1. THE CONCEPT:

The concept of the action in rem is unique to English Admiralty law¹ and the Admiralty law of those countries which inherited English Admiralty law during England's colonial history. These countries include: the United States of America² and the countries to which the Colonial Courts of Admiralty Act, 1890, ("the 1890 Act")³ applied, namely: Australia⁴, Canada⁵, Singapore⁶, Bermuda⁷, Malaysia⁸, New Zealand⁹, and South Africa.

¹ Acknowledged by Trollip JA in Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A) 275A.

² See De Lovio v Boit et al 7 Fed Cas 418 (1815); and Anon 'History of Admiralty Jurisdiction in the Supreme Court of the United States' (1871) 5 Am L Rev 581.

³ The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vic c 27).

⁴ The 1890 Act still applies although the Australian Law Reform Commission has conducted research on the subject of Admiralty reform: Australian Law Reform Commission Reference on Admiralty Jurisdiction Research Paper No 1; An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction Nov 1984. And see several articles on Australian Admiralty reform referred to by H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 4 LMCLQ 462 fn4.

⁵ The 1890 Act was replaced by the Federal Court Act, 1970. See generally: E C Mayers Admiralty Law and Practice in Canada (1916); and W Tetley 'Attachment, the Mareva injunction and saisie conservatoire' [1985] 1 LMCLQ 58.

⁶ The 1890 Act was replaced by the High Court (Admiralty Jurisdiction) Act, 1961.

⁷ The 1890 Act was replaced by the Supreme Court (Admiralty Jurisdiction) Act, 1962.

In South Africa, prior to the commencement of the Admiralty Jurisdiction Regulation Act No 105 of 1983 ("the 1983 Act"), the several divisions of the Supreme Court of South Africa, sitting as Admiralty Courts under the provisions of the 1890 Act, applied English Admiralty law as it existed at 1890¹⁰. The action in rem accordingly existed in South African Admiralty law at that stage and has remained a feature of the law in terms of sub-section 3 (4) of the 1983 Act.

2. THE LAW APPLICABLE TO DETERMINATION OF THE CONCEPT IN SOUTH AFRICA:

The action in rem has never been statutorily defined. Thus, in order to determine what is meant by the concept, the decisions of the Courts on the subject must be examined.

The question arises as to whether the South African Courts are bound by English Admiralty law in this regard, or whether they are unfettered. The conclusion reached in Chapter 2 is that the South African Courts are not bound by English decisions as far as the nature of the action in rem is concerned; but that neverthe-

⁸ The 1890 Act was replaced by the Courts of Judicature Act, 1964.

⁹ The 1890 Act was replaced by the Admiralty Act, 1973.

¹⁰ For a detailed summary of this proposition, see Chapter 2 infra.

less, those decisions would be persuasive.¹¹

3. THE FUNDAMENTAL NATURE OF THE CONCEPT:

118 It is trite to say that the fundamental feature of an action in rem is a proceeding against the res¹², which is usually a ship, but not necessarily so.¹³

But why is the proceeding brought against a res and what is the object of the action in rem? The answers given by the English and United States Courts are different and confused. Indeed, the approaches of these Courts differ markedly. An examination of these approaches is contained in Chapters 5 to 7.

4. HISTORICAL PERSPECTIVE:

Before these different approaches were introduced, it was thought necessary to sketch the history of the Admiralty Court in Chapter 3, so that the action in rem could be understood in its historical perspective. Because the concept is unique to English Admiralty law it should be examined in the context of the history of the Admiralty Court in England. Due to a jurisdictional

¹¹ This is otherwise as far as the maritime lien is concerned: see The Fidias 1986 (1) SA 714 (N).

¹² See for instance Beaver Marine (Pty) Ltd v Wuest supra 275A-B; Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 654f; The Henrich Bjorn (1886) 11 PD 270, 276f; The Burns [1907] P 137, 149; The Tolton [1946] P 137, 142; and The Banco [1971] P 137, 151 & 153.

¹³ See sub-section 3 (5) of the 1983 Act and D R Thomas Maritime Liens (1980) Chapter 1 and §94.

conflict between the Courts of Common Law and the Admiralty Court where the former saw the latter as a civil law usurper of jurisdiction that they alleged was rightfully theirs, the Admiralty Court went through a period of decline during the late 16th, 17th and 18th centuries. Little is known about its proceedings or procedure during this period. The seemingly credible explanation by Roscoe¹⁴, approved in The Beldis¹⁵ and further developed by Ryan¹⁶, indicates that the action in rem emerged during this period and that it was devised by the civilians who practised in the Admiralty Court at that time in order to retain some vestige of its former jurisdiction. It also appears from available historical records that the action in rem was unknown prior to the period of decline. Nevertheless, the proceeding "in rem" was referred to in certain 18th century Common Law prohibition cases and it certainly existed at the time of the revival of the Admiralty Court in the 19th century. Thus, it seems probable that the concept originated during the aforesaid period of decline. There are arguments against this proposition and the issue of the concept's origin is canvassed in Chapter 4.

¹⁴ E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903) 1-77.

¹⁵ The Beldis [1936] P 51.

¹⁶ E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173.

5. THE VARIOUS APPROACHES TO EXPLAINING THE CONCEPT:

There are difficulties associated with the approaches of the English and the American Courts. An attempt has been made in this dissertation to assess and balance these difficulties in an effort to reach a logical explanation of the concept of the action in rem which would be historically justifiable.

These approaches can be summarised briefly as follows:

W A procedural view of the action in rem is taken in England. According to this view the action in rem is seen as a procedural device to coerce the appearance of the res owner and to obtain pre-judgment security for the claim. This view is based on the arrest practice of the Admiralty Court during or about the reign of Elizabeth I. The action in rem is not distinguished from this early practice except that the res in an action in rem must be directly associated with the cause of action - any property of the res owner cannot be arrested in an action in rem¹⁷. Furthermore, the procedural view holds that in the event of the res owner entering an appearance to defend in the action in rem, extent of his liability is not limited to the value of the res, because by entering an appearance he "introduces his personal liability"¹⁸. In this event, the Privy Council has said that the

¹⁷ The Beldis [1936] P 51.

¹⁸ Per Sir Francis Jeune in The Dictator [1891-4] All ER Rep 360, 367.

action proceeds in rem against the res and in personam against the res owner¹⁹; but, as discussed in Chapter 6, this issue is somewhat confused²⁰. [The concept of the introduction of the res owner's personal liability on his appearance to defend, is said to be consonant with "a sense of justice".²¹]

On the other hand, since the 19th century, the United States Courts have adopted a personification approach to the action in rem which is based on the fiction that the res is a juristic person and the action in rem is a procedure to enforce a claim against the res personified as the defendant. However, because this approach is based on a legal fiction which has dubious historical validity, the personification concept has been criticised in the 20th century. But the Supreme Court of the United States has yet to reconsider its previous rulings in favour of the personification approach. [However, an alternative school of thought can be identified which views the maritime lien as a substantive or real right in the res with the corollary that the action in rem is a procedural device to enforce the maritime

¹⁹ See the decision of the Privy Council in this regard in The August 8th [1983] 1 Lloyd's Rep 351.

²⁰ Cf Milne JP's remarks in Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 654G-H, that the position was not "altogether clear".

²¹ Per Sir Samuel Evans P in The Dupleix [1912] P 8, 15. See also Thomas op cit §89, who refers to the "irresistible logic" that there can be no recovery beyond the value of the res being "subordinated to the higher purpose of effecting justice between litigants".

lien (ie the real right), and only a maritime lien, in the res. This alternative concept of the maritime lien seems to be currently more favourably accepted than the traditional procedural approach.²² This view is based on: (a) the principle that the maritime lien and the action in rem are concomitant, as suggested obiter in The Bold Buccleugh²³, which has been an accepted principle in that country for over a century; and (b) the principle that a maritime lien is a real right in the res²⁴, as mentioned supra.

According to either the traditional personification or the alternative "substantive" view, the res owner's liability does not exceed the value of the res, whether or not he enters an appearance to defend the action. This result is contrary to the result that follows the application of the English procedural view.

This difficulty has been statutorily overcome in South Africa by Rule 6 (3) of the 1986 Rules²⁵, which in effect limits the potential liability of a res owner who enters an appearance to defend to the value of the res, and costs. It is suggested that this is

²² D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424.

²³ The Bold Buccleugh (1851) 7 Moo PC 267, 284f.

²⁴ See The Young Mechanic 30 Fed Cas 873 (1855).

²⁵ Published: R2415 in GG10522 of 21st November 1986, and which came into effect on 1st December 1986.

similar to treating the symptom and not the cause because the concept of the action in rem appears to have been imperfectly understood in South Africa. This misunderstanding has been compounded by some of the provisions of the 1983 Act and the 1986 Rules. This is discussed in Chapters 8 and 9.

6. THE SIGNIFICANCE OF THIS STUDY:

The need for an acceptable explanation of the action in rem, free of confusion and readily understandable, is essential for the development of Admiralty law, so that it can properly serve the legitimate needs of those whose conduct the law is designed to regulate.

In his minority judgment in The Paz²⁶, Didcott J said: 

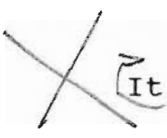
"It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo."

This was said in the context of a question of policy relating to whether or not the Courts should be inclined to implement the security arrest provisions of subsection 5 (3) of the 1983 Act; but, it is submitted that the sentiment implicit in these words is of equal application to the action in rem, because the concept includes the element of arrest. Thus, it is of importance that

²⁶ Katagum Wholesale Commodities Co Ltd v The Paz 1984 (3) SA 261 (N) 269H-270E.

the action in rem is applied, or is permitted to be applied by statutory regulation, only in those circumstances where this is warranted.

Misconceptions of the concept can lead to difficulties. For instance, it has been submitted in Chapter 5 that the creation of the so-called "statutory rights of actions in rem" in England was probably based on a misconception of the nature of the action in rem. If this submission is sound, then it illustrates the need for an acceptable explanation of the action in rem as mentioned supra. Furthermore, although a detailed consideration of the associated ship provisions of the 1983 Act²⁷ is beyond the scope of this dissertation, a query has been raised in Chapter 9 as to the wisdom of providing for an extension of the application of the action in rem in this regard.

 It is submitted in this dissertation that the action in rem is a procedure which should be confined to the enforcement of a real right in the res in Admiralty proceedings. Such a real right would include, but not exclusively, the maritime lien. The nature of the maritime lien's right has been correctly construed by the South African Courts as a real right²⁸. This proposed concept of the action in rem seems to accord with its

²⁷ Sub-sections 3(6) and (7).

²⁸ See for instance Gulf Oil v Fund of the MV Emerald Transporter 1985 (4) SA 133 (N) 142B-C; and The Khalij Sky 1986 (1) SA 485 (C).

probable historical origin and, furthermore, seems to offer a rational explanation that is free of confusion and legal fiction. If this submission is sound, then there are certain provisions of the 1983 Act and 1986 Rules that would require revision. These have been detailed in Chapter 9.

An attempt has been made to cover the law on this subject as at the end of November 1986.

CHAPTER 2

THE LAW TO BE APPLIED IN DETERMINING THE CONCEPT IN SOUTH AFRICA

1. THE POSITION PRIOR TO THE 1983 ACT:

Prior to the commencement of the 1983 Act on 1 November 1983¹, the several divisions of the Supreme Court of South Africa ("the South African courts"), sitting as Admiralty Courts² under the provisions of the 1890 Act³, applied English Admiralty law⁴

¹ Proc R162 GG8937 of 21 October 1983 (Reg Gaz 3631).

² "... the adjective "Colonial" is no longer applicable to any of our courts sitting as Admiralty Courts": per Trollip J.A. in Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A) 274E-F.

³ 53 & 54 Vic c 27. The South African courts, sitting as Admiralty Courts, had the status and jurisdiction of Colonial Courts of Admiralty in terms of section 2(1) of the 1890 Act: Trivett & Co v Wm Brandt's Sons & Co Ltd and Others 1975 (3) SA 423 (A) 436F-G.

⁴ Crooks & Co v Agricultural Co-Operative Union Ltd 1922 AD 423 per Innes CJ at 429-30, Juta JA at 441, de Villiers JA at 450, cf Mason AJA dubitante 456. Followed in subsequent South African cases: eg Beaver Marine (Pty) Ltd v Wuest supra 434G; and The Melina Tsisiris 1981 (3) SA 950 (N) 953A. In Magat and Others v MV Houda Pearl 1982 (2) SA 37 (N) 39B-C, Friedman J said that "English Law" was applied: see also H Staniland 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 4 LMCLQ 462, 464 and H Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' 1984 Acta Juridica 271. However, a distinction should be drawn between English Admiralty Law and the general jurisdiction conferred on the Admiralty Division of the High Court by the Judicature Acts of 1873 and 1874: The Camosun 1909 AC 579; which was approved in Crooks & Co v Agricultural Co-Operative Union Ltd supra 430 and followed in The Matoria 1979 (3) SA 616 (C). In The Matoria, 623G, Friedman J said: "... [a]ll that was conferred on a Colonial Court of Admiralty by the 1890 Act was the Admiralty jurisdiction of the English High Court ..." not the general jurisdiction, referred to supra, as well. The Caracas Bay 1979 (4) SA 945 (C) was not approved and was overruled in this regard by The Matoria supra 624A.

as it existed at the time when the 1890 Act was passed.⁵

As far as the South African courts were concerned, the Rules

⁵ The Yuri Maru 1927 AC 906, 915. In this case the Privy Council decided that section 2(2) of the 1890 Act conferred on the Colonial Courts of Admiralty, the Admiralty Jurisdiction of the High Court in England "as it existed at the time when the Act was passed". There is some doubt as to whether the relevant date was when the 1890 Act was passed (ie 25th July 1890) or whether it was the date when that Act became law (ie 1st July 1891): Clare Dillon & J.P. van Niekerk South African Maritime Law & Marine Insurance: Selected Topics (1983) 18, fn 98. The issue has not been contentious in South African cases, but the assumptions made have waivered. In Tharros Shipping Corporation SA v The Owner of the Ship Golden Ocean 1972 (4) SA 316 (N) 322f, The Yuri Maru was approved, but the issue was not addressed. Similarly, in Beaver Marine (Pty) Ltd v Wuest *supra*, The Yuri Maru was followed. However, Trollip JA said: "According to ... The Yuri Maru ... the jurisdiction of a Colonial Admiralty Court is governed by the admiralty jurisdiction of the English High Court as it existed in 1890". This view was followed in: The Matoria *supra* 621A-B; The Melina Tsiris *supra* 953A; The Houda Pearl *supra* 39B-C; The Aegean Sun 1982 (4) SA 625 (C) 627F; and Katagum Wholesale Commodities Co Ltd v The MV Paz 1984 (3) SA 261 (N) 264E. But cf The Caracas Bay *supra* 950C-E where Hofmeyr AJ was uncommitted either way; and Southern Steamship Agency Inc & Another v The MV Khalij Sky 1986 (1) SA 485 (C) 486B and Alahaja Mai Deribe & Sons v The Ship Golden Toga 1986 (1) SA 505 (N) 507E, where it was assumed, but not decided, that the relevant date was that on which the 1890 Act became law: see also H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' *op cit* 464, fn 24; H Staniland 'Developments in South African Jurisdiction and Maritime Law' *op cit* 271; and The South African Law Commission, Report on the review of the law of Admiralty Jurisdiction (1982) 6. But it is submitted that the correct view, consistent with the ratio in The Yuri Maru (and the statement in Wuest's case and the cases which followed it *supra*) is that the relevant date was that on which the 1890 Act was passed. In The Yuri Maru, Lord Merrivale only referred to the relevant date as the date on which the 1890 Act became law in his outline of the respondent's contention in this regard at the outset of his judgment: 960. He then proceeded to consider the subject matter, origin & scope and apparent policy of the 1890 Act before concluding that the relevant date was that on which the 1890 Act was passed: 915.

of Court which governed procedure under the 1890 Act⁶ were the Vice-Admiralty Court rules of 1883 established under the Vice-Admiralty Courts Act, 1863.⁷

Crooks and Co's case⁸ decided that English Admiralty Law was to be applied by the South African courts sitting as Admiralty courts. "English Admiralty Law" means the principles and practice of the Admiralty Division of the High Court in England.⁹ Thus, it is submitted that English Admiralty Law, the principles and practice thereof as at 1890, modified as to practice (where appropriate) by the Vice-Admiralty Court Rules of 1883, was applied by the South African courts aforementioned. This was the position immediately prior to the commencement of the 1983 Act.

The need for reform was clear. The applicable law was out of

⁶ In terms of section 16(3) of the 1890 Act.

⁷ 26 Vic c 24. See Tharros Shipping Corporation SA v Owner of The Ship Golden Ocean *supra* 319 A-B. Cf Dillon and van Niekerk *op cit* 19, who mistakenly say that: "...the practice and rules applicable in local admiralty courts are those that applied in England in 1890, namely the Vice-Admiralty Court Rules of 1883" (emphasis added). These Rules applied to the colonies, not to England. For an account of the Vice-Admiralty Court Rules of 1883 see *inter alia*: H Booysen 'Admiralitieshowe in die Suid-Afrikaanse reg' (1973) 36 THRHR 241; G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30, 43; and Dillon and van Niekerk *op cit* 14-15.

⁸ Crooks & Co v Agricultural Co-Operative Union Ltd 1922 AD 423.

⁹ See Crooks and Co's case, particularly the judgement of de Villiers JA, 448.

date. What is more, international developments in maritime law since 1890 had no application in South Africa,¹⁰ because the applicable law was fixed as at 1890. Complaints were also voiced that the applicable law was not readily accessible to South African lawyers.¹¹

2. THE POSITION SUBSEQUENT TO THE 1983 ACT:

1. IN TERMS OF THE ACT:

Sub-sections 6(1)(a) and (b), and 6(2) of the 1983 Act provide:

- (1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall -

- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the

¹⁰ The South African Law Commission op cit 10. Of particular importance as far as the action in rem is concerned were (a) the International Convention relating to the Arrest of Sea-Going Ships and (b) the International Convention on certain Rules concerning Civil Jurisdiction in Matters of Collision, both signed at Brussels on 10th May 1952. The former comprised the basis, along with the "sister ship" statutory provisions of English law, of the associated ship provisions of the 1983 Act: sub-sections 3 (6) & (7).

¹¹ Alan Rycroft 'Changes in South African Admiralty Jurisdiction' (1985) 4 LMCLQ 417, who adds that the law was "confusing". See also Advocate 'Farewell Victoria! Admiralty Law' (1983) 13 Businessman's Law 84-85; and D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45, 53. For an account of the debate which preceeded the 1983 Act on the law that should be applied, see H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' op cit 464f.

- United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
- (b) with regard to any other matter, apply the Roman Dutch law applicable in the Republic.

- (2) the provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

Thus, in respect of those "matters" contemplated by sub-section 6(1)(a), English Admiralty law as at the commencement of the 1983 Act, namely 1st November 1983, is applicable¹².

A question arises as to whether the words "any matter" and "any other matter" in sub-sections 6(1)(a) and (b) respectively, confine the interpretation of these sections to causes of

¹² Sub-section 6 (1) (a) has been erroneously construed as providing for the application of English Admiralty law as at 1890: Advocate 'Farewell Victoria! Admiralty Law' op cit 85; A Beck 'Admiralty Jurisdiction: a new direction' 1984 (47) THRHR 472,473; and B.R. Bamford The Law of Shipping and Carriage in South Africa 3 ed (1983) 195. It is suggested that the words "at such commencement" can only refer to the earlier words "before the commencement of this Act". The words "this Act" seem to refer to the 1983 Act. If the words "that Act" were used, the Legislature could conceivably have had the 1890 Act in mind and the law would have remained unaltered save for the caveat at the end of s 6(1)(a): "... in so far as that law can be applied" read with the injunction set out in s 6(2). But such an interpretation would be fallacious because the 1890 Act was repealed by s 16(1) read with the Schedule to the 1983 Act. See substantially the same reasoning by H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' op cit 466 fn 35; also cf Friedman op cit 58.

action¹³ or the so-called "heads of jurisdiction"; or whether these words are wide enough to include procedural matters in the ambit of these sub-sections.

This distinction is of importance because of the conclusion reached in this dissertation that the action in rem is a procedural matter. If this conclusion is correct, then it is submitted that the concept does not fall within the ambit of section 6.

To answer the question posed supra, the so-called "presumption of legislative intent" - that words and expressions bear the same meaning throughout an enactment¹⁴ - is pertinent. There are several instances in the 1983 Act where the words "matter" or "matters" are employed. In each instance, the words seem to be synonymous with a cause or causes of action, as the case may be. For instance:

(a) Sub-section 1(1)(ii)(z) the words "any matter" are used in the sense of causes of action which would give rise to a 'maritime claim'. It provides:

1(1) In this Act, unless the context indicates otherwise -
 (i) ...
 (ii) "maritime claim" means -

¹³ Including, but not exhaustively, those causes of action defined as 'maritime claims' by subsection 1(1)(ii)(a)-(z) of the 1983 Act.

¹⁴ See for instance: Minister of the Interior v Machado-dorp Investments (Pty) Ltd 1957 (2) SA 395 (AD) 404 and Estate Smith v CIR 1960 (3) SA 375 (AD) 379-80.

- (a) ...
- (z) any claim not falling under any of the previous paragraphs ... relating to any matter in respect of which any Court of the Republic is empowered to exercise Admiralty Jurisdiction.¹⁵

(b) Sub-section 5(2)(a) the words "any matter" refer to those causes of action which do not fall under the definition of a 'maritime claim', but nevertheless arise in connection with any maritime claim. It provides:

5(2) A court may in the exercise of its Admiralty Jurisdiction -

- (a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that such matter may not be one which would give rise to a maritime claim.¹⁶

(c) The word "matter" is used in sub-sections 7(2) and (5) in a sense synonymous with a cause of action.

Furthermore, at first sight, it would seem that the language of sub-sections 6(1)(a) and (b) would have been more precise had the words "maritime claim" been employed instead of "matter". But had this been done, the provisions of sub-section 5(2)(a)¹⁷ would not have been reconcilable with sub-section 6(1)(b). As it is,

¹⁵ Emphasis added.

¹⁶ Emphasis added.

¹⁷ Sub-section 5(2) provides: "A court may in the exercise of its admiralty jurisdiction - (a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim ... (b) ..."

these sections can be reconciled because sub-section 6(1)(b) prescribes that Roman Dutch law shall be applied in any consideration and decision relating to those causes of action arising in connection with a "maritime claim" contemplated by sub-section 5(2)(a).

Lastly, although the question posed was not addressed by the writers who have commented on sub-sections 6(1)(a) and (b) to date¹⁸, the interpretation given to the sub-sections by these writers seems to suggest that they relate to causes of action only. Sub-section 6(1) is said to relate to the so-called "1890 heads of jurisdiction"¹⁹ and sub-section 6(1)(b), to the so-called "extended heads of jurisdiction" in terms of the 1983 Act.²⁰

For the reasons given above, it seems that the answer to the question posed supra is that sub-sections 6(1)(a) and (b) do not

¹⁸ For example, H Booyesen 'South Africa's new Admiralty Act: A Maritime Disaster?' (1984) 6 Modern Business Law 75, 83; Rycroft op cit 417, 418; Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' op cit 271, 274 and 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' op cit 462, 465-6; and Friedman op cit 68.

¹⁹ The 1890 heads of jurisdiction are listed by Bamford op cit 180ff and discussed by Dillon & van Niekerk op cit 22ff and also by Hofmeyr 'Admiralty Jurisdiction in South Africa' supra 39-40.

²⁰ The extended heads of jurisdiction include claims relating to charterparties: subsection 1(1)(ii)(i); and to marine insurance: subsection 1(1)(ii)(r). Both the 1890 heads of jurisdiction and the extended heads of jurisdiction are contained (but not differentiated) in subsection 1(1)(ii)(a)-(z).

prescribe the law to be applied to the procedural aspects of the 1983 Act.

2. THE RULES:

Section 4 of the 1983 Act, which addresses "procedure and rules of court", provides that:

- (1) Subject to the provisions of this Act the provisions of the Supreme Court Act, 1959 (Act No 59 of 1959), and the rules made under section 43 of that Act shall mutatis mutandis apply in relation to proceedings in terms of this Act except in so far as those rules are inconsistent with the rules referred to in sub-section (2).
- (2) The rules of the courts of admiralty of the Republic in force in terms of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, immediately before the commencement of this Act, shall be deemed to be rules made under section 43(2)(a) of the Supreme Court Act, 1959, and shall apply in respect of proceedings in terms of this Act.
- (3) The power of the Chief Justice to make rules under section 43 of the Supreme Court Act, 1959, shall include the power to make rules prescribing the following ...

The rules contemplated by sub-section 4(2) supra are the Vice-Admiralty Court Rules of 1883 ("the 1883 Rules").²¹ Judge Friedman once aptly remarked that the application of these Rules was "like driving a spanking new car with old spark plugs".²²

²¹ Tharros Shipping Corporation SA v Owner of The Ship Golden Ocean supra 318f; Hofmeyr op cit 47-8; The South African Law Commission Report op cit §7.7, 16; and Friedman op cit 54.

²² Friedman op cit 54.

However, "new" rules repealing and superseding the 1883 Rules came into effect on 1st December 1986 ("the 1986 Rules")²³.

The 1986 Rules give no indication of what law is to be applied in relation to the procedural concept of the action in rem. But, for the following reasons, it is suggested that while the South African courts may not be bound by English Admiralty law in this regard²⁴, it would nevertheless be a primary persuasive source of law on the subject:

(a) The concept of the action in rem is peculiar to English Admiralty law²⁵ and the Admiralty law of those countries which inherited English Admiralty law during England's colonial

²³ Published: R2415 in GG10522 of 21st November 1986. These Rules have been slow to appear. According to the judgment of Milne JP in Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 645D-E, Mr Shaw QC, one of the counsel in that case and who was described by Friedman J in The Paz 1984 (3) SA 261 (N) 263I, as the person "who was to a large extent the author of the Admiralty Jurisdiction Regulation Act", informed the court that "new" rules had been drafted at that stage: ie 13th June 1984.

²⁴ This seems to be the approach adopted by Milne JP in Euromarine International of Mauren v The Ship Berg and Others supra, and although the provisions of section 6 were cited at 652B-D, the issue of what law was applicable to the concept was not discussed. However, as far as maritime liens are concerned, English Admiralty law as at 1st November 1983 is applicable: The Fidias 1986 (1) SA 714 (D) 717I-J and text supra. See also H Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350, 353f.

²⁵ Beaver Marine (Pty) Ltd v Wuest supra 275A.

history, of which South Africa was one²⁶. Importantly, the concept is alien to Roman-Dutch law²⁷.

(b) Prior to the repeal of the 1883 Rules, it is suggested that the South African courts would have looked to English Admiralty law as at 1st November 1983 to determine any theoretical issue relating to the concept of the action in rem. The grounds for this proposition are as follows. Rule 2 of the 1883 Rules stated:

2. Actions shall be of two kinds, actions in rem and actions in personam.

"Action" was defined as follows by Rule 1:

1. ...
"Action" shall mean any action, cause, suit, or other proceeding instituted in the Court.²⁸

And Rule 207 provided as follows:

207. In all cases not provided for by these rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

It is possible that sub-section 4 (2) of the 1983 Act, read with

²⁶ See Chapter 1 and supra.

²⁷ The development of the concept by the English civilians was probably based on principles derived from Roman law: E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173, 189f; Hofmeyr op cit 38; and see Chapters 3 and 4 infra. Nevertheless, the concept is sui generis and peculiar to English Admiralty law: see supra.

²⁸ "Court" should be read as referring to each provincial and local division, including a circuit local division, of the Supreme Court of South Africa exercising its admiralty jurisdiction in terms of section 2 of the 1983 Act.

Rule 207 could be interpreted to mean that, in matters relating to practice and procedure where the 1883 Rules are silent, the practice of the Admiralty Division of the High Court of Justice of England as at 25th July 1890 is to be followed by the South African courts. This interpretation is based on the assumption that, immediately prior to the commencement of the 1983 Act, the provisions of Rule 207 would have been interpreted as referring to the practice of the Admiralty Division aforesaid as at 25th July 1890. But it is submitted that this interpretation would be erroneous, because it could not have been the Legislature's intention to update the substantive law on the one hand and on the other, leave the law relating to the enforcement of those rights languishing as at 1890. Interpretatio quae parit absurdum, non est admittenda²⁹. In The Houda Pearl³⁰ Friedman J said that the English Admiralty Court has (not had) power to grant amendments. The tense employed seems to indicate an interpretation consonant with the one proposed supra:

"Rule 207 of the Vice-Admiralty Court Rules provides that, where those Rules are silent on any matter, the practice of the Admiralty Courts³¹ of England is to be followed, and it was common cause that, in English practice, the Courts have an almost unlimited power to grant amendments."

²⁹ L C Steyn Die Uitleg van Wette 3 ed (1963) 114.

³⁰ The Houda Pearl 1982 (2) SA 37 (N) 38H.

³¹ The plural is probably a misprint.

In any event, a remedial statute, such as the 1983 Act is³², should be given a wide construction.³³ Thus, it is submitted that the correct interpretation should be that, whatever the interpretation would have been prior to the commencement of the 1983 Act, thereafter and until its repeal, Rule 207 referred mutatis mutandis to the practice of the High Court of England in the exercise of its Admiralty jurisdiction as at the commencement of the 1983 Act, namely 1st November 1983.

3. CONCLUSION:

It is suggested that neither the 1983 Act nor the 1986 Rules prescribe what law should be applied to the concept of the action in rem. But since the concept was inherited from English Admiralty law and that system is a primary persuasive source of law on the subject, it is logical that any analysis of the concept should commence with an examination of English Admiralty law. The history of the Admiralty Court is sketched in the next Chapter and the origin of the action in rem is discussed in Chapter 4.

³² Euromarine International of Mauren v The Ship Berg and Others supra 666G-H, where Leon J called the 1983 Act "a remedial measure" - cited without dissent on appeal: 1986 (2) SA 700 (AD) 711D-E.

³³ Looyen v Simmer and Jack Mines, Ltd 1952 (4) SA 547 (AD) 554; Kinekor Films (Pty) Ltd v Dial-A-Movie 1977 (1) SA 450 (AD); and The Berg 1984 (4) SA 647 (N) 666.

CHAPTER 3

HISTORICAL PERSPECTIVE

1. INTRODUCTION:

The long and complex history of the English Admiralty jurisdiction has been addressed by numerous writers¹. What follows is an outline of this history which is merely intended to provide an historical perspective for the discussion of the origin and evolution of the action in rem in the Chapters which follow.

¹ This list is not exhaustive: A Browne A Compendious View of the Civil Law and of the Law of the Admiralty Vol 2 (1802); T E Scrutton The Influence of the Roman Law on the Law of England (1885); Selden Society Select Pleas in the Court of Admiralty Vols 1 and 2, Ed R G Marsden (1894); R G Marsden 'Six Centuries of the Admiralty Court' (1898) 67 The Nautical Magazine 85 & 169; Williams and Bruce Admiralty Practice 3 ed, Eds The hon Mr Justice Bruce, C F Jemmett, G G Phillimore (1902); T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo American History Vol 2 (1908) 312 - This essay forms the introductory chapter of E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903); J M Ashton 'The Genealogy of Our Maritime Law' (1915) 22 Case and Comment 93; W Senior 'Admiralty Matters in the Fifteenth Century' (1919) 35 LQR 290; W Senior 'The First Admiralty Judges' (1919) 35 LQR 73; W Senior 'Early Writers on Maritime Law' (1921) 37 LQR 323; W Senior Doctor's Commons and the Old Court of Admiralty (1922); F R Sanborn Origins of the Early English Maritime and Commercial Law (1930); E S Roscoe Studies in the History of the Admiralty and Prize Courts (1932); L H Laing 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 Michigan LR 163; W Senior 'The History of Maritime Law' (1952) 38 Mariner's Mirror 260; Sir William Holdsworth A History of English Law 7 ed (1956) Vol 1; Joanne Mathiasen 'Some Problems of Admiralty Jurisdiction in the 17th Century' (1958) 2 Am JLH 215; E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: an Historical Perspective' (1968) Western Ontario LR 173; F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970); G F Steckley 'Merchants and the Admiralty Court During the English Revolution' (1978) 22 Am JLH 136; The Black Book of the Admiralty Vols 1 to 4, Ed Sir Travers Twiss (1985 reprint); C W O'Hare 'Admiralty Jurisdiction' (1979) 6 Monash Univ LR 91ff & 195ff; G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30.

2. THE BEGINNING:

The origins of the civil jurisdiction of the Admiralty Court are obscure².

It is probable that civil matters were heard during the medieval period as the cases of Sampson c Curteys and Gernesey c Henton seem to suggest.³ However, very little is known about Admiralty civil matters during this period because of the absence of all court records relating to Admiralty proceedings.⁴ What became of these records, or whether they existed at all, is unknown.⁵

² As to when the Admiralty court first commenced hearing civil matters has been the subject of much debate among historians: Williams and Bruce op cit 3. For example, Sir Travers Twiss, The Black Book of the Admiralty, Vol 1, op cit, 69 fn3, said that an Ordinance of Edward I that: "... any contract made between merchant and merchant, or merchant and mariner beyond the sea, or within the flood marke, shal be tryed before the admirall and noe where else ..." seemed to be the starting point of the Admirals' jurisdiction in civil suits. But Marsden, Select Pleas in the Court of Admiralty, Vol 1, op cit, xiv, said that the origin of the Court can be traced "with tolerable certainty" to the period between 1340 and 1357 during the reign of Edward III. But whatever this date, it is probable that the Admiralty Court commenced hearing civil cases prior to the start of the 15th Century: see infra.

³ Both cases are reprinted in Select Pleas in the Court of Admiralty, Vol 1, op cit 149 and 165 respectively. These cases were removed from the Admiralty Court and were brought into Chancery by a writ of certiorari: Sanborn op cit 301.

⁴ Marsden, in Select Pleas in the Court of Admiralty Vol 1 op cit liii; Marsden 'Six Centuries of the Admiralty Court' op cit 91; Mears op cit 343; W Senior 'Admiralty Matters of the Fifteenth Century' op cit 290; and Laing op cit 171-4.

⁵ Marsden 'Six Centuries of the Admiralty Court' op cit 91, wrote: "There are no court records, no sentences, pleadings, or warrants belonging to the fifteenth century; and incidental

However, it seems that during the early part of the 15th Century the jurisdictions of the several Admirals were merged into a "Principle" or "High" Court of Admiralty.⁶

Until the beginning of the 16th Century, England was a commercially backward country compared with those countries bordering the Mediterranean. As a consequence, the maritime law that was applied in England was imported from abroad.⁷ From very early times, merchants and mariners regulated their affairs by a set of customs and rules known as the Law Merchant, Law Marine or Customs of the Sea.⁸ This Law Merchant became prominent in those

notices of the court in other documents during that period are meagre." See Select Pleas in the Court of Admiralty Vol 1 op cit xlv, where Marsden said that in about 1364 it appeared that the Admiral's Court was regarded as a court of record by the courts at Westminster: see also Sanborn op cit 302. Nevertheless, according to Senior 'The History of the Maritime Law' op cit 269, the records relating to this period were lost. Joanne Mathiasen op cit 216 expressed the view that it is impossible to determine whether or not the old court was one of record: cf Sanborn op cit 302.

⁶ Marsden 'Six Centuries of the Admiralty Court' op cit 268f; Senior 'History of Maritime Law' op cit 268f. According to Marsden in Select Pleas in the Court of Admiralty Vol 1 op cit lv, and Laing op cit 172, the earliest extant patent of a judge of this early court reflects that William Lacy was appointed in 1482. However, according to William Prynne Animadversions (1669) "The Sixth Table", Henry Bole is listed as the first judge, appointed in 1408. His second judge is listed as William Lacy - appointed 74 years later!: see Senior 'The First Admiralty Judges' op cit 80.

⁷ Senior 'The History of Maritime Law' op cit 263. See also Marsden 'Six Centuries of the Admiralty Court' op cit 173.

⁸ T S Scrutton op cit 170; and Holdsworth op cit 526.

countries bordering the Mediterranean which had been under Roman rule. At about the time of the Crusades⁹, the Consular courts were functional in these countries. The proceedings in these courts were based on the civil law, meaning the law merchant¹⁰, which in turn was founded on the civil law of Rome.

In due course, several codes of maritime law came into existence in the principle centres of marine activity. These codes were not of statutory origin, but evolved from the decisions of the consuls or "prud'hommes de la mer" who decided in disputed cases what the customs were.¹¹

As far as early English maritime law was concerned, the most important of these codes was the Laws of Oleron. This body of judgments was compiled by the prud'hommes of the Commune of Oleron in the 12th Century.¹² There is some doubt as to when this code was adopted in England¹³; but, although the evidence is sketchy, it seems that early English maritime law was based

⁹ Williams and Bruce op cit 4.

¹⁰ Marsden in Select Pleas in the Court of Admiralty Vol 2 op cit xliii.

¹¹ Senior 'The History of Maritime Law' op cit 262.

¹² Mears op cit 325.

¹³ It is disputed whether or not it was introduced by Richard the Lionheart on his return from the Fourth Crusade: see Mears op cit 325ff; and Twiss in The Black Book of the Admiralty Vol 1 op cit lvii et seq.

on the Laws of Oleron.¹⁴

Prior to the establishment of the Admirals' courts, this law was administered by the Borough Courts.¹⁵

The establishment of the Admirals' courts soon led to a dispute with the courts of common law concerning jurisdiction. The genesis of this dispute, as far as the extant records reveal, is found in the cases of Sampson c Curteys and Gernesey c Henton¹⁶. An important observation is that both these cases indicate that the Admirals' courts during the late 14th Century were not confined merely to matters of piracy and prize as they previously had been, but to civil matters as well¹⁷. Both cases were removed from the Admirals' court and brought into Chancery by

¹⁴ Sanborn op cit 269. He added, 272, that as the law was administered according to the Laws of Oleron, this points to the conclusion that commerce in England at that time was not very advanced. Holdsworth op cit 527.

¹⁵ Mears op cit 324. Holdsworth op cit 530ff. See also Sanborn op cit 269, fn54, where he quoted Senior Doctor's Commons and the Old Court of Admiralty op cit 20. More fully, Senior said: "When the Laws of Oleron first had authority in English seaports is uncertain, but there is no doubt that they were the recognized code in matters within their scope in the courts of the boroughs long before those of the Admirals came into being."

¹⁶ See Select Pleas in the Court of Admiralty Vol 1 op cit 149 and 165 respectively.

¹⁷ As far as civil cases were concerned, the mediveal records of the Admirals' courts were extremely scanty: Sanborn op cit 293; and see infra.

a writ of certiorari.¹⁸

The well-known statutes, 13 Rich II c 5 and 15 Rich II c 3 followed shortly afterwards. They were passed to curtail the irregularities that appeared to have been committed by the judge of the Admiral of the West's court¹⁹ and Marsden²⁰ adds:

" ... both Acts were passed in consequence of petitions to the King and parliament which refer unmistakably to one or both cases abovementioned²¹."

13 Rich II c 5 provided:

"Item, forasmuch as a great and common clamour and complaint hath been often times made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice to our lord the King, and the common law of the realm, and in diminishing of divers franchises, and in accorded and assented, That the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done done upon the sea, as it has been used in the time of the noble prince King Edward, grandfather of our lord the King that now is."

Two years later 15 Rich II c 3 provided more precisely:

" ... That of all manner of contracts, pleas and quarrels, and all other things rising within the bodies

¹⁸ Sanborn op cit 301.

¹⁹ Marsden in Select Pleas in the Court of Admiralty Vol 1 op cit 1.

²⁰ Marsden 'Six Centuries of the Admiralty Court' op cit 90.

²¹ Sampson c Curteys and Gernesey c Henton supra.

of the counties, as well by land as by water, and also of wreck of the sea, the admiral's court shall have no power of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of the counties, as well as by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied by the laws of the land, and not before nor by the admiral nor his lieutenants in any wise. Nevertheless, of the death of a man, and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the King and of the Realm; saving always to the King all manner of forfeitures and profits thereof coming; and he shall have also jurisdiction upon the said flotes, during the said voyages only, saving always to the lords, cities, and boroughs their liberties and franchises."

It seems that it became necessary to dissuade those who wished to proceed in the Admirals' courts from exceeding the Admirals' jurisdiction as defined in the above-mentioned statutes. Consequently, a penalty, payable by a litigant who pursued his case before an Admiral's court in contravention of the above-mentioned statutes, was created by 2 Hen IV c 11. This statute provided:

"Our said Lord the King will and granteth, That the said statute²² be firmly holden and kept, and be put in due execution. And moreover, the same our Lord the King, by the advice and assent of the lords spiritual and temporal, and at the prayer of the said commons, hath ordained and established, That as touching a pain to be set upon the admiral, or his lieutenant, that the statute and the common law be holden against them; and that he that feeleth himself grieved against the form of the said statute shall have his action by writ grounded upon the case against him that dōth persue in the admiral's court; and recover his double damages against the pursuant; and the same shall incur the pain of ten pounds to the King for the pursuit so made, if

²² 13 Rich II c 5.

he be attained."

These statutes²³ attempted to draw a distinction between things done in the realm and on the high seas. They illustrate the seminal efforts by the common law courts to curtail the Admiralty Court's jurisdiction.²⁴

Reference has been made infra to the Laws of Oleron. In addition, the leading maritime codes of Europe at that time were the Consolato del Mare²⁵ and the Laws of Wisby.²⁶ These codes all influenced the formation of English Admiralty law.

Eventually, The Black Book of the Admiralty,²⁷ came into existence in England. It consists of a collection of admiralty rules

²³ 13 Rich II c 5 and 15 Rich II c 3.

²⁴ Mears op cit 335.

²⁵ " ... the outstanding example of a body of maritime rules accepted by many different peoples ... dating from near the end of the 13th century (cf Holdsworth op cit 527, who says it was probably drawn up in the 15th Century), which became the commercial code of the whole northern shore of the Mediterranean": Senior 'The History of Maritime Law' op cit 261

²⁶ Holdsworth op cit 528.

²⁷ This collection of documents was discovered at the bottom of a chest containing private papers of a former Registrar of the Admiralty Court in a cellar during the 19th Century: Twiss in The Black Book of the Admiralty op cit Vol 3, vii; Scrutton op cit 171; Marsden 'Six Centuries of the Admiralty Court' op cit 91; and Williams and Bruce op cit 4 fn i.

and precedents.²⁸ It is thought to have been compiled during the 15th Century although the composition and date of some of the documents appear to be much earlier.²⁹

It is interesting to note that The Black Book of the Admiralty contains an unfinished tract on practice and procedure called the "Ordo Judiciorum".³⁰ According to Twiss, the author was a civilian of the school of Bologna and the introductory article was based on the Tractatus de Ordine Judiciorum of Bartolus.³¹ It seems that, from the beginning of its existence, the procedure of the Admiralty Court was based on Roman civil law.³²

This procedure was summary and devoid of technicalities. Furthermore, trial by jury, which was a central feature of the

²⁸ Marsden 'Six Centuries of the Admiralty Court' op cit 91 wrote: "... it is rather a monument of antiquity than an authoritative statement of the law, or a record of actual events. It does, in fact, give little trustworthy information as to the history and doings of the Admiralty Court."

²⁹ Marsden in Select Pleas in the Court of Admiralty Vol 1 op cit lx; and Marsden 'Six Centuries of the Admiralty Court' op cit 91.

³⁰ See The Black Book of the Admiralty Vol 1 op cit 178.

³¹ The Black Book of the Admiralty Vol 1 op cit 178, fn 2.

³² This seems to be the consensus among the writers, but Sanborn op cit 292 is more cautious. In his opinion, the civil law was not in use until the mid-15th Century. But he does concede that prior to that date, the Admiralty was "considering" the civil law procedure. The civil law proceedings of the Admiralty Court were acknowledged in Greenway and Barker's Case (1613) Godbolt 260.

common law procedure, was not employed by the civil law.³³ From very early times, merchants and mariners desired swift justice in their disputes³⁴ and the civil law procedure was well suited to their needs.

Story J said in De Lovio v Boit³⁵:

"The forms of its proceedings were borrowed from the civil law and the rules by which it was governed, were, as is everywhere avowed, the ancient laws, customs and usages of the seas. In fact, there can scarcely be the slightest doubt, that the admiralty of England, and the maritime courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects as the consular courts of the Mediterranean."

One of the reasons underlying the dispute between the Common Law Courts and the Admiralty Court, was that the Admiralty Court proceeded according to the civil law. In particular, the common law lawyers disapproved of the exclusion by the civil law of their revered institution of trial by jury.³⁶ This ancillary

³³ Sanborn op cit 309; and Mears op cit 335. The summary procedure is set out by J Godolphin A View of the Admiral Jurisdiction (1661) 41; Sir Thomas Ridley A View of the Civile and Ecclesiasticall Law 3 ed (1662) 126-7; and R Zouch The Jurisdiction of the Admiralty of England (1663) 139ff.

³⁴ See The Domesday Book of Ipswich in The Black Book of the Admiralty Vol 2 op cit 23: "... the plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that adydene not but her tyde, shuldene ben pleted from tyde to tyde." Much later, W Wynne The Life of Sir Leoline Jenkins (1724) lxxxii, reported that Sir Leoline Jenkins said: "Not one cause in ten comes before that court but some of the parties or witnesses in it are pressing to go to sea with the next tide."

³⁵ 7 Fed Cas 418 (1815) 419.

³⁶ Mears op cit 335; and Laing op cit 169.

reason was given by Senior³⁷ for the common lawyers' aversion to the civil law -

"... the ancient dislike of the English lawyer to acknowledge his borrowings."³⁸

3. THE TUDOR PERIOD:

Marsden³⁹ wrote:

"The real beginning of the Admiralty Court as one of the principal commercial tribunals of the country was made about the middle of the reign of Henry VIII⁴⁰..."

The extant records of the Admiralty Court begin in 1524.⁴¹ This followed the reorganization of the Admiralty Court in the Tudor period. The "age of discovery" brought with it a concomitant increase in international commercial trade. Sanborn writes:

"The old mercantile society underwent a metamorphosis, the Middle Ages came to an end, and the modern era began."⁴²

³⁷ 'The History of Maritime Law' op cit 265.

³⁸ This dislike was echoed in Svenden v Wallace 13 QBD 69, 73 who rejected the suggestion that the law of England should be brought into line with the laws of other countries: "no English Court has any mission to adapt the law of England to the laws of other countries; it has only authority to declare what the law of England is."

³⁹ Marsden 'Six Centuries of the Admiralty Court' op cit 92.

⁴⁰ A Merriam-Webster Webster's Biographical Dictionary (1966) 1678, states that the reign of Henry VIII was from 1509 to 1547.

⁴¹ Marsden in Select Pleas in the Court of Admiralty Vol 1 op cit lx.

⁴² Sanborn op cit 262.

An important feature of the Admiralty Court was the people who appeared in and presided over the court. These people were civil lawyers. The civilians had earlier established themselves in the Admiralty Court.⁴³ But in 1551, the College of Advocates was founded.⁴⁴ The Fellows of the College were experts in the civil law. They were not admitted to the College unless they had obtained, after a prolonged period of study, a doctorate in civil law from either Oxford or Cambridge.⁴⁵ Their chambers were known as the Doctors' Commons. It is important to record that, until 1859⁴⁶, these civilian lawyers had an exclusive right of appearance in the Admiralty and Ecclesiastical Courts.⁴⁷

The common law in England during the middle ages was narrow, insular, and altogether inadequate to meet the requirements of the increase in commerce that the new age brought with it.⁴⁸ However, the Admiralty Court, with its civil law base, was better equipped to attend to the increase in commercial litigation which

⁴³ Laing op cit 169.

⁴⁴ Senior Doctors' Commons and the Old Court of Admiralty op cit 72f.

⁴⁵ See generally Senior Doctors' Commons and the Old Court of Admiralty op cit.

⁴⁶ See infra.

⁴⁷ Senior Doctors' Commons and the Old Court of Admiralty op cit 59ff; and Roscoe Studies in the History of the Admiralty and Prize Courts op cit 2.

⁴⁸ Marsden 'Six Centuries of the Admiralty Court' op cit 173.

came about during this period.

An additional advantage of the Admiralty Court over the common law courts during the Tudor period, was that it was in favour with the Crown. Accordingly, Henry VIII adopted the practice of including a non obstante statuto clause in the Admiral's patent and granted the Admiral wide powers of jurisdiction.⁴⁹ This enabled the Admiralty Court to avoid the restrictions placed on its jurisdiction by the earlier statutes of 13 Rich II c 5 and 15 Rich II c 3.⁵⁰ It seems, as Holdsworth points out⁵¹, from the wide variety of matters listed by Marsden⁵², that its jurisdiction "practicably comprised all mercantile and shipping cases". Marsden adds:

"Even marriage contracts and wills made abroad are occasionally met with as the subjects of suits in Admiralty."⁵³

Consequently, the Admiralty Court thrived during this period.

⁴⁹ The non obstante statuto clause read: "Aliquibus statutis actibus ordinationibus sive restrictionibus in contrarium actis editis ordinatis sive provisus non obstantibus" - any statutes, acts, ordinances, or restrictions to the contrary passed, promulgated, ordained, or provided notwithstanding: see Marsden in Select Pleas in the Court of Admiralty Vol 1 op cit lviii.

⁵⁰ See infra.

⁵¹ Holdsworth op cit 552.

⁵² Select Pleas in the Court of Admiralty Vol 1 op cit lxxv-lxxi.

⁵³ Select Pleas in the Court of Admiralty Vol 1 op cit lxx.

In the circumstances, it is not surprising that the Courts of Common law renewed their efforts to suppress the Admiralty Court. Apart from their distaste for the civil law procedure employed by the Admiralty Court⁵⁴ and the Tudor insistence of prerogative government, they saw the very real probability of losing the lucrative mercantile litigation to the Admiralty Court.⁵⁵ Also very importantly, the judges of that time derived their incomes not only from their salaries, but also from fees.⁵⁶

4. THE PERIOD OF DECLINE:

With the decline of the Crown's power in the latter years of the reign of Elizabeth I⁵⁷, the Courts of Common Law were in a position to resume the curtailment of the Admiralty Court's jurisdiction with renewed vigour in an attempt to appropriate that jurisdiction to themselves.

They succeeded in their efforts with the aid of:

- a. the power of statutory interpretation; and
- b. the power to issue writs of prohibition.⁵⁸

⁵⁴ See supra.

⁵⁵ Ryan op cit 176.

⁵⁶ Holdsworth op cit 254; and Ryan op cit 176.

⁵⁷ Webster's Biographical Dictionary op cit 1678, states that the reign of Elizabeth I was from 1558 to 1603.

⁵⁸ Ryan op cit 176.

A few prohibitions are to be found among the early 16th Century records of the Admiralty Court; but, by the end of that century, it seems that such writs were frequently directed at the Admiralty Court.⁵⁹

In 1575, an agreement was apparently reached between the common law and admiralty judges concerning their respective jurisdictions and the issue of prohibitions.⁶⁰ Notwithstanding the doubtful authenticity of this agreement, it seems that until Lord Coke's elevation to the bench in 1606, there was a period of relative peaceful co-existence between the courts.⁶¹

In the early 17th Century, with Lord Coke in command of the Common Law Courts' assault on the Admiralty Court's jurisdiction, a "torrent of prohibitions ... poured forth."⁶² Lord Coke's objection against the Admiralty Court was summed up by Holds-

⁵⁹ Steckley op cit 143.

⁶⁰ The text of this agreement is reproduced by William Prynne Animadversions (1669) 98. Marsden in Select Pleas in the Court of Admiralty Vol 2 op cit xiv, fn 3, said the 1574 Act Book, in which this agreement was said to have been entered, is missing. Marsden loc cit seems to doubt that the agreement was reached; but Browne op cit 77f accepts its existence. Lord Coke, 4 Institutes 136, asserted that the agreement never existed, alternatively the alleged copies thereof were not signed and, in any event, even if they were, the agreement was against "the laws and statutes of this realm".

⁶¹ Steckley op cit 143.

⁶² Browne op cit 85.

worth⁶³ as follows:

"He denied that the court was a court of record. He denied it the necessary power to take stipulations for appearance, and performance of the acts and judgments of the court. He denied that it had any jurisdiction over contracts made on land, either in this country, or abroad, whether or no they were to be performed upon the sea; and similarly he denied its jurisdiction over offences committed on land, either in this country, or abroad."

In Buller J's opinion⁶⁴:

"(Lord Coke) seems to have entertained not only a jealousy of, but an enmity against, (the Admiralty Court's) jurisdiction."

Lord Coke retired in 1629⁶⁵. Although he did not succeed in putting an end to the Admiralty Court; he succeeded in severely curtailing its jurisdiction. In 1632, a compromise was reached which was contained in certain resolutions which restored a measure of the Admiralty Court's former jurisdiction.⁶⁶

But these resolutions did not put an end to the jurisdictional dispute which continued into the time of the Revolution. An Ordinance was passed by the rebel Long Parliament in April 1648

⁶³ Holdsworth op cit 553.

⁶⁴ Smart, Pearson and Brymer v Wolff (1789) 3 TR 323, 348.

⁶⁵ Mears op cit 357.

⁶⁶ These resolutions are set out by William Prynne Animadversions (1669) 101; cf Zouch op cit 125 and Browne op cit 79 who seems to agree with Zouch's version.

which basically restated the 1633 agreement.⁶⁷ As a result, the Admiralty Court regained some of the jurisdiction that had been excluded by the efforts of Lord Coke and his confederates.

Thus, until the Restoration⁶⁸, the Admiralty Court enjoyed a short period of respite, although "prohibitions dropped in occasionally".⁶⁹

After the Restoration, the Cromwellian Ordinance of 1648 was officially nullified, the number of prohibitions increased and the Admiralty Court soon found itself with a jurisdiction much curtailed.⁷⁰

In 1669-70 a Bill was introduced in Parliament to reinstate the Admiralty Court's jurisdiction in similar terms to the Cromwell-

⁶⁷ This Ordinance, quoted by Williams and Bruce op cit 11, provided: "That the Court of Admiralty shall have cognizance and jurisdiction against the ship in all causes which concern the repairing, victualling, and furnishing of provisions for the setting of such ships to sea; and in all cases of bottomry, and likewise in contracts made beyond the seas concerning shipping, or navigation, or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter-parties or contracts for freight, bills of lading, mariners' wages, or damage to goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of buoys."

⁶⁸ In 1660: Webster's Biographical Dictionary op cit 1678.

⁶⁹ Marsden 'Six Centuries of the Admiralty Court' op cit 173.

⁷⁰ Steckley op cit 167; and Marsden 'Six Centuries of the Admiralty Court' op cit 174.

ian Ordinance of 1648.⁷¹ But despite the merchants' petition to Parliament⁷² and the argument of Sir Leoline Jenkins in its favour⁷³, the Bill failed.

The civil jurisdiction of the Admiralty Court did not recover until The Admiralty Court Act of 1840⁷⁴ increased the jurisdiction of the court.⁷⁵

Marsden⁷⁶ says:

"Of the history of the court during the 18th and early (19th) century there is little to be said ... the instance or civil business was trifling⁷⁷, and occupied the judge only for an hour or two once or twice a

⁷¹ According to Holdsworth, op cit 557, this Bill proposed that: "... the jurisdiction of the (Admiralty) court should extend to all suits respecting contracts made or other matters done beyond or upon the sea concerning shipping or goods shipped, freight, mariners' wages, and breach of charter-parties; to suits for building, mending, saving or victualling ships if brought against the ship; and to suits connected with the navigation of navigable rivers below bridges."

⁷² Steckley op cit 171.

⁷³ See W Wynne The Life of Sir Lionel Jenkins (1724) lxxvi-lxxv.

⁷⁴ 3 & 4 Vic c 65.

⁷⁵ D C Jackson 'Current English Admiralty Jurisdiction and Practice' 1982 Acta Juridica 5.

⁷⁶ Marsden 'Six Centuries of the Admiralty Court' op cit 174.

⁷⁷ H C Coote The New Practice of the High Court of the Admiralty of England (1860) wrote in his Preface: "When ... the court came to be presided over by Lord Stowell, such was the paucity of its legal business, that it could be said to afford that great legal luminary little else than an occasional morning's occupation."

week."

On the other hand, the Napoleonic wars provided the Admiralty Court with numerous prize matters. At this time the court was presided over by Lord Stowell, the eminent judge who is remembered for his masterful contribution to the development of international and prize law. During this period the civilians enjoyed a prosperous⁷⁸ but "short St Martin's summer"⁷⁹.

5. THE REVIVAL:

In 1832 a commission was appointed to inquire into the workings of the Ecclesiastical and Admiralty Courts. Its report was presented the following year recommending the extension of the jurisdiction of the Admiralty Court's jurisdiction.⁸⁰ As a result, The Admiralty Court Act 1840⁸¹ ("the 1840 Act") was passed.

Marsden⁸² says that when this Act was passed:

"... owing to the decrepitude of the Admiralty Court on its instance or civil side, not very much was known about its jurisdiction or history and much of the law applicable to the few matters in which its jurisdiction

⁷⁸ Marsden 'Six Centuries of the Admiralty Court' op cit 174.

⁷⁹ See Senior 'The History of Maritime Law' op cit 272.

⁸⁰ This recommendation is set out in Williams and Bruce, op cit 12 fn q.

⁸¹ 3 & 4 Vic c 65.

⁸² Marsden 'Six Centuries of the Admiralty Court' op cit 175-6.

was acknowledged was very misty."

Reporting of the decisions of the Admiralty Court recommenced in 1798⁸³ during the time of Lord Stowell. The civil business of the court at that time was so meagre that when reporting was first proposed by members of the Admiralty bar, Lord Stowell is said to have hesitated " ... lest the Reports should expose the nakedness of the land."⁸⁴ According to Coote⁸⁵, after Lord Stowell's time, civil business declined still further until the appointment of Dr Lushington as Judge of the Admiralty in 1838.⁸⁶ Thereafter, the fortunes of the Admiralty Court began to revive.

Marsden⁸⁷ says that the "immediate cause" of this revival was:

"... (t)he immense increase in shipping and the expansion of commerce which followed the introduction of free trade."

He adds:

" ... steam navigation and the expansion of commerce had largely increased the number of cases of col-

⁸³ Decisions during the time of Sir George Hay and Sir James Marriott (1776-1779) are collected in a volume of cases usually abbreviated "Hay & M": published in British Maritime Cases Vol 1. But the Admiralty Reports were established by the then King's Advocate, Sir Christopher Robinson, in 1798: see note to The Neptune (1824) 1 Hag Adm 227, 235.

⁸⁴ Coote op cit Preface.

⁸⁵ Loc cit.

⁸⁶ D M Walker The Oxford Companion to the Law (1980) 789.

⁸⁷ Marsden 'Six Centuries of the Admiralty Court' op cit 175.

lision⁸⁸, towage and salvage."

The years 1857 and 1859 saw the end of the civilian practitioners' monopoly of the Admiralty Court. As mentioned supra, the civilians, whose college was known as the College of Advocates and whose chambers were housed at the Doctors' Commons, had exclusive rights of appearance in the Ecclesiastical and Admiralty courts. In 1857 an Act⁸⁹ was passed which dissolved the College of Advocates' corporate existence⁹⁰ and in 1859 another Act⁹¹ was passed, in terms of which, in Senior's ⁹² words:

"... the right of audience in the Court of Admiralty, the advocates' last preserve of importance, was thrown open to the ordinary bar."

In 1860, the sittings of the Admiralty Court, which had been held in the Common Hall of the Doctors' Commons since 1664, with a short interruption due to the Fire of London, were transferred to

⁸⁸ See the remarks, perhaps exaggerated, of an anonymous author in (1861) 10 Law Magazine and Review 262, 262-3, about "... the wearying sameness of the causes ventilated in (the Admiralty Court), which ... appears to sit from ante-meridian morning to dewy evening, through all the seasons of the legal year, exhausting its energies over Collision Cases and little else."

⁸⁹ 20 & 21 Vic c 77.

⁹⁰ It seems that the College of Advocates was founded in 1511: Senior Doctors' Commons and the Old Court of Admiralty op cit 72-3; although it was incorporated in 1768: Scrutton op cit 2. On the statutory dissolution, see Senior op cit 110-12; Senior loc cit added: "It is said that (on dissolution) the rooks, which some held to embody the spirits of departed civilians, forsook the trees in the college garden".

⁹¹ 22 & 23 Vic c 6.

⁹² Senior Doctors' Commons and the Old Court of Admiralty op cit 110-2.

Westminster.⁹³ And finally, in 1861, the Doctors' Commons was sold and the building demolished.⁹⁴

In 1861, The Admiralty Court Act, 1861⁹⁵, was passed. This statute revised and extended the jurisdiction and practice of the Admiralty Court.

6. THE CONSOLIDATORY PERIOD:

The next major event in the history of the Admiralty Court was The Supreme Court of Judicature Act, 1873⁹⁶ and The Supreme Court of Judicature (Commencement) Act, 1874⁹⁷ ("the Judicature Acts"). Accordingly, on 1st November 1875⁹⁸ the Admiralty Court was consolidated and united with the Superior Courts of Common Law at Westminster, the Court of Chancery, the Court of Probate and the Divorce Court. The High Court of Justice was constituted with five divisions, one of which consisted of two judges and was styled the Probate, Divorce and Admiralty Division. This division had assigned to it all causes and matters which would

⁹³ Scrutton op cit 2.

⁹⁴ Scrutton Doctors' Commons and the Old Court of Admiralty op cit 110-2.

⁹⁵ 24 Vic c 10.

⁹⁶ 36 & 37 Vic c 83.

⁹⁷ 37 & 38 Vic c 83.

⁹⁸ Williams and Bruce op cit 13; cf Roscoe Studies in the History of the Admiralty and Prize Courts op cit 4 who says these Acts came into operation on 2nd November 1875.

have been within the exclusive cognizance of the High Court of Admiralty had the Act not been passed.⁹⁹

The Judicature Acts were the culmination of the transition from a system which, in Roscoe's words:

"... was administered solely by civil lawyers, to one which the Common Law and the Civil Law were assimilated, and which was in the hands solely of common lawyers."¹⁰⁰

He adds that certain technical forms derived from the Civil Law continued to distinguish the procedure in the Admiralty actions, but many points of common law procedure became applicable.¹⁰¹ In this regard, Roscoe probably had the action in rem in mind as one of the "technical forms" derived from the Civil Law.¹⁰²

Sir Robert Phillimore, who succeeded Dr Lushington in August 1867¹⁰³, was the last civilian to preside over the Admiralty Court. He retired¹⁰⁴ in March 1883 shortly after the Common Law Courts and the Admiralty Court were transferred from Westminster, and the Chancery Courts from Lincoln's Inn, to the Strand Law

⁹⁹ 36 & 37 Vic c 66, sections 31 & 34.

¹⁰⁰ Roscoe Studies in the History of the Admiralty and Prize Courts op cit 6.

¹⁰¹ Roscoe ibid.

¹⁰² Cf The Dupleix [1912] P 8, 15, where the action in rem was referred to as "a technicality".

¹⁰³ Roscoe op cit 4.

¹⁰⁴ (1884) 76 Law Times 286.

Courts in January 1883.¹⁰⁵ His successor was Sir Charles Butt, a common law lawyer; but, nevertheless, he was apparently highly regarded by the shipping community.¹⁰⁶

7. THE MODERN PERIOD:

In the 20th Century, an important statute as far as the action in rem was concerned, was The Administration of Justice Act, 1956.¹⁰⁷ This statute redefined the Admiralty jurisdiction of the High Court of Justice¹⁰⁸ and gave effect by domestic legislation to the International Convention relating to the Arrest of Sea-going Ships and the International Convention on certain Rules concerning Civil Jurisdiction in Matters of Collision¹⁰⁹.

Briefly and very broadly stated, section 3(4) of the Administration of Justice Act, 1956, attempted to give effect to the concept that, in certain circumstances, an action in rem could be

¹⁰⁵ Roscoe Studies in the History of the Admiralty and Prize Courts op cit 4-5.

¹⁰⁶ See the remarks made by an anonymous author in (1884) 76 Law Times 286.

¹⁰⁷ 4 & 5 Eliz II c 46.

¹⁰⁸ The Act also specifically preserves any other jurisdiction vested in the High Court of Admiralty immediately prior to the commencement of the Supreme Court of Judicature Act, 1873 supra. This preservation is perpetuated by sub-section 20(1)(c) of The Supreme Court Act, 1981: 29 & 30 Eliz II c 54 infra.

¹⁰⁹ Cmnd 8954. The U.K. Government ratified both Conventions on 18th March 1959.

brought against a ship (a "sister ship"¹¹⁰), other than the ship in respect of which the claim arose, provided that both ships had a common owner. This was a radical departure from the concept of the action in rem as previously understood in English law. The Beldis¹¹¹ decided that an action in rem was confined to the ship in respect of which the claim arose.

Another important innovation in the Administration of Justice Act, 1956, was the classification of claims in which the Admiralty jurisdiction of the High Court could be invoked by the action in rem. This was a distinct departure from section 35 of the 1861 Act which stated in general terms that:

"The Jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by Proceedings in rem or by proceedings in personam."

Finally, the Supreme Court Act, 1981¹¹², consolidated, with amendments, the provisions of the Administration of Justice Act, 1956.

¹¹⁰ In South African law, the Admiralty Jurisdiction Regulation Act No 105 of 1983, sub-sections 3(6) & (7), the term "associated ship" is used for a similar concept based on the English "sister ship" provisions.

¹¹¹ The Beldis [1936] P 51.

¹¹² 29 & 30 Eliz II c 46.

CHAPTER 4

THE ORIGIN OF THE ACTION IN REM

1. INTRODUCTION:

The origin of the action in rem is a controversial issue. Various theories, associated with attempting to explain the origin of the maritime lien, have been proposed in this regard.¹ But these theories unfortunately "inextricably intertwine"² the concepts of the maritime lien and the action in rem. This is possibly because of the view taken in the United States that the two concepts are concomitant³ - where there is an action in rem there always is a maritime lien and the maritime lien is only enforced by an action in rem. This view is ironically based on an obiter by Sir John Jervis in The Bold Buccleugh⁴ which has not been approved in subsequent English cases⁵ primarily because of the existence in England of so-called "statutory rights of actions in rem"⁶. There is little consensus and much confusion as to the origin of the action in rem.

¹ See generally D R Thomas Maritime Liens (1980) §§8f.

² F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 155.

³ See The Rock Island Bridge 73 US (6 Wall) 753 (1867).

⁴ The Bold Buccleugh (1851) 7 Moo PC 267, 284f.

⁵ See The Henrich Björn (1886) 11 PD 270, 276 & 285f; The Tolton [1946] P 137, 144; The Banco [1971] P 137, 150; The Halcyon Isle [1980] 2 Lloyd's LR 325, 328 (CA)

⁶ See Chapter 6 for a critical appraisal of the extension of the action in rem to these statutory rights.

The cause of this confusion can possibly be ascribed to the Admiralty Court's period of decline⁷ during the late 16th, 17th and 18th centuries - the "darkness of an earlier age", as it was aptly described by McLachlan⁸ - where there were no records of the Admiralty Court's proceedings and the Court was confined to a very limited jurisdiction by the Courts of Common law.⁹

Based on the historical evidence available, it is submitted that the concept of action in rem probably came into being during this period of decline when it was adapted from principles of the civil law by the civilians who practiced in the Admiralty Court at that time. According to the Conflict Theory¹⁰, the civilians developed the action in rem in order to protect the vestiges of the Admiralty Court's civil jurisdiction and to protect this jurisdiction from being denied by the Courts of Common Law's writs of prohibition. It is suggested that this is an acceptable explanation of the reasons for the concept's genesis.

Prior to this period of decline, available historical evidence seems to suggest that the action in rem was not a distinct

⁷ See Chapter 3.

⁸ D McLachlan The Treatise on the Law of Merchant Shipping 3ed, 65, quoted by T E Scrutton The Influence of the Roman Law on the Law of England (1885) 184.

⁹ See Chapter 3.

¹⁰ So-called by Thomas op cit §8; and see Infra.

concept in Admiralty procedure. Clerke¹¹ did not differentiate between actions in rem and those in personam¹². Most importantly, there is no mention eo nomine of the action in rem in his work¹³. Marsden¹⁴ has described this early procedure as follows:

¹¹ The first edition of F Clerke's Praxis Supremae Curiae Admiralitatis was published in 1667. Together with his work relating to Ecclesiastical practice, these comprised the first systematic collection of rules of procedure of the English courts. Subsequently, several editions appeared. The 1829 edition, with a translation by Rowghton, is referred to in this dissertation.

¹² F L Wiswall 'Admiralty: Procedural Unification in Retrospect and Prospect' (1968) 35 Brooklyn LR 36, 38, and The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 160, discounted the authenticity of Clerke's account of the early Admiralty procedure. In the former work he said of Clerke's Praxis: "a rather poor work of Elizabethan origin which nonetheless dominated Admiralty jurisprudence for two centuries." And at 39 he said Clerke's Praxis contained "misconceptions as to substance and procedure". In both works he quoted an article written by an anonymous author in "(1855) 17 L Rev 421, 423", a reference which could not be traced, which derogatorily refers to Clerke's Praxis as a "miserable compilation ...". But this is not convincing. Lord Hardwicke in Sir Henry Blount's Case 1 Atkins 296, referred to Clerke as "an author of undoubted credit". And according to W Senior 'Early Writers on Maritime Law' (1921) 37 LQR 323, 329: "... it is recorded that in the seventeenth century both Dr Eden (who 'flourished' under Charles I) and Dr Robert Wiseman (the well-known author of 'The Excellency of the Civil Law', published in 1657, and a prominent civilian after the Restoration) possessed copies of the Praxis made in their respective handwritings."

¹³ The following words appear in the translation of the heading of Title 28 of F Clerke Praxis Supremae Curiae Admiralitatis tr Rowghton (1829 ed) 61: "Of the Warrant to be impetrated in rem where the debtor absconds, or is absent from the Realm". But this reference to proceedings "in rem" does not appear in the Latin original and seems to be a gloss by the 19th century translator, Rowghton.

¹⁴ Selden Society Select Pleas in the Court of Admiralty R S Marsden ed, Vol 1 (1894) lxxi-lxxii.

"The ordinary mode of commencing the suit was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the admiral's jurisdiction at the time of the arrest. As pointed out below, the admiral at this period asserted and exercised a jurisdiction over all public streams, rivers, and waters, whether the same were within the body of a country or not. Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien¹⁵; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgement should be satisfied. The form of the article upon the first decree shows that the defendant was always cited 'at' - apud - the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the res."

It must be emphasised that the arrest procedure described by Clerke and Marsden related to the early practice of the Admiralty Court - the procedure of the Court from probably pre-1524¹⁶ to the late 17th Century.

During the period of the Admiralty Court's decline, there were no reported cases of the Court's proceedings and little is known

¹⁵ This sentence indicates that there is a distinction between the early practice, described by Marsden in this quotation, and the later practice of the Admiralty Court relating to the enforcement of a maritime lien by the action in rem.

¹⁶ The extant records of the Admiralty Court begin in 1524: see Chapter 3 supra. Mears op cit 343 says that Clerke's Praxis probably "deals with the state of things that had been in force for a considerable period before the first edition of his work" viz 1667: see Roscoe op cit 13.

about the Court's practice and procedure. However, some 18th century reported cases of the Courts of Common Law, which addressed the issue of prohibitions, mention that the Admiralty Court proceeded "in rem"¹⁷. But these decisions do not elaborate on the nature of those proceedings. All that can be gathered from these cases is confirmation that during this period of decline, the concept of the action in rem must have existed.

If the concept of the action in rem did not exist prior to the Admiralty Court's period of decline, as the works of Clerke and Marsden suggest¹⁸, it is probable that the concept must have come into being at some stage during this period, because at the turn of the 19th century Browne¹⁹ was able to write:

¹⁷ For instance Menetone v Gibbons (1789) 3 TR 267, 269f. F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 160, said that "the action in rem" was described by counsel in Greenway and Barker's Case (1613) Godbolt 260. This was a prohibition case and the counsel cited by Wiswall in arguing for the prohibition is reported to have said: "They cannot take a recognisance; and by the civil law, if the party render his body the sureties are discharged; and the execution ought to be only of the goods; for the ship only is arrested; and the libel ought to be only against the ship and the goods, and not against the party, 19 H 6 acc." No mention was made of "the action in rem". It is suggested that the statement merely refers to the early procedure of the court which included the arrest of the "res" in the first instance to coerce the appearance of the defendant and to obtain pre-judgment security: see distinction between the early procedure and the action in rem infra.

¹⁸ Supra.

¹⁹ A Browne A Compendious View of the Civil Law and of the Law of the Admiralty Vol 2 (1802) 99.

"This remedy in rem against the ship or goods is founded on the practice of the civil law, which gives an actio in rem to recover or obtain the thing itself, the specific possession of it ... the admiralty jurisdiction gives this remedy in rem to a person having only an hypothecatory right, as in the case of seamen's wages."

It is clear that the "remedy in rem" referred to by Browne supra was different from the early arrest procedure, because after describing the latter, Browne²⁰ lamented:

"This salutary proceeding has in latter times gone into disuse in England."

The nature of the "hypothecatory right" referred to by Browne supra will be discussed infra²¹, but it suffices to indicate at this stage that the "remedy in rem", described by Browne, was probably employed to enforce a real right in the res²². Although the origin of the maritime lien is beyond the scope of this dissertation, it is probable that these real rights in the res developed into the concept of the maritime lien²³ which was first articulated by Story J in The Nestor²⁴ in 1831.²⁵ In

²⁰ Browne op cit 434-5.

²¹ See Chapter 8.

²² See Browne op cit 397f for the instances where the author said an action in rem could be brought. These instances all seem to imply the existence of a real right in the res if they gave rise to an "hypothecatory right": cf 99.

²³ See the remarks of Lord Diplock in The Halcyon Isle [1980] 2 Lloyd's LR 325, 327; and R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 363f.

²⁴ The Nestor 18 Fed Cas 9 (1831).

²⁵ See E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173, 200.

England, after some vacillation and confusion on the issue by Dr Lushington, the maritime lien was formally and comprehensively conceptualised in English Admiralty law by Privy Council in The Bold Buccleugh²⁶ in 1851.²⁷

Gorell Barnes J recognised that the action in rem was different from the early arrest procedure when he said in The Ripon City²⁸:

"Whatever may have been the origin of the maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against that property in the hands of an innocent purchaser."

Regrettably, this distinction has not prevailed in English Admiralty law. As mentioned infra, it is thought that the object of action in rem is synonymous with that of the early procedure; save that, as decided in The Beldis²⁹, only the res connected with the cause of action may be proceeded against in an action in rem to achieve this objective.

In the premises, as submitted supra, if the concept did not exist

²⁶ The Bold Buccleugh (1851) 7 Moo PC 267.

²⁷ The Tervaete [1922] P 259, 270; D R Thomas Maritime Liens (1980) §10.

²⁸ The Ripon City [1897] P 226, 241.

²⁹ The Beldis [1936] P 51.

before the Admiralty Court's period of decline, but was mentioned by the Courts of Common Law during this period and was acknowledged Admiralty procedure on the Court's revival, the logical conclusion is that it must have been developed at some stage during this period of decline. But as mentioned at the outset, this issue is not settled.

A review follows of those theories that can be identified in this regard.

2. THE VARIOUS THEORIES AS TO THE ORIGIN OF THE ACTION IN REM:

1. THE CONFLICT THEORY:

It has been suggested that the civilians who practised in the Admiralty Court developed the concept of the action in rem in order to retain some measure of jurisdiction after the severe curtailment thereof by the Courts of Common Law referred to supra.

This view, known as the Conflict Theory³⁰, was first advanced by Roscoe³¹ and more recently elaborated upon by Ryan³². It has

³⁰ So-called by D R Thomas Maritime Liens (1980) §9.

³¹ E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903) 1-61. Although Roscoe is usually given the credit for advancing this view, see for instance The Beldis [1936] P 51, 74, and Thomas op cit §9, it was T L Mears who wrote the relevant portion of Roscoe's book. A reprint of Mears' contribution appeared in Select Essays of Anglo-American Legal History (1908) 312-364. Nevertheless, in this dissertation, for the sake of consistency the Conflict Theory will be attributed to Roscoe.

received judicial approval in The Beldis³³. This theory is in consonance with the submission advanced supra that the action in rem was developed during the period of the Admiralty Court's decline.

2. THE PROCEDURAL THEORY:

In England, it has been, and still is, generally thought that the action in rem was merely a development of the early procedure of the Admiralty Court described by Clerke and Marsden, which as mentioned supra, provided for the arrest of the defendant or any property of his - not only that property connected with the cause of action. It seems that the object of arrest according to this early procedure was to coerce the appearance of the defendant in the action and, alternatively or, obtain pre-judgment security. The Procedural Theory, holds that the object of the action in rem is no different to that of the early arrest procedure, except

³² E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173.

³³ The Beldis [1936] P 51, 70, where Sir Boyd Merriman said: "It will be recalled that Mr Marsden draws the conclusion that arrest was mere procedure, and that its only object was to obtain security that the judgment should be satisfied. It may be that this was not the only, or indeed the primary, object, and that the original object of arrest, as Mr Roscoe suggested ... was to found jurisdiction at a time when any attempt to assume jurisdiction was prohibited by the common law lawyers." With respect, although Sir Boyd Merriman P approved of Roscoe's theory, he misunderstood it. See T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 349 fn 4, which clearly draws a distinction between the early procedure, described by Clerke and Marsden, and the later procedure which embodied the developed concept of the action in rem.

that the property arrested must be connected with the cause of action³⁴.

The view taken by the Procedural Theory will be referred in greater detail in subsequent chapters³⁵; but suffice it to say at this stage that it will be submitted that the failure to distinguish between the action in rem and the early procedure of the Admiralty Court is incorrect and based on a misconception of the nature of the action in rem. [It is suggested that while both the action in rem and the early practice involve the element of arrest, their respective objectives are different. The acceptance of the Procedural Theory in England has resulted in several jurisprudential difficulties³⁶. The existence of these difficulties: (a) strengthens the view that the Procedural Theory is based on a misconception of the nature of the action in rem; and (b) raises a doubt as to the proposition that the action in rem had its origin in, and was merely a development of, the early arrest procedure³⁷.

3. THE UNITED STATES THEORIES:

Before addressing the suggestions associated with the two

³⁴ The Beldis [1936] p 51.

³⁵ See Chapters 6 and 7.

³⁶ Discussed in Chapter 7.

³⁷ Cf J Mansfield 'Maritime Lien' 1888 LQR 379, 385; and the discussion in Chapter 7 of The Alexander Larson (1841) 1 Wm Rob 288 and The Volant (1842) 1 NC 503.

principal theories, the Personification and Substantive Theories, as to the origin of the action in rem; the proposition that the action in rem has been a feature of English Admiralty law since ancient times, should be examined.

According to Wiswall³⁸:

"The action in rem seems to have been employed in Admiralty before the Elizabethan era³⁹, but only by the nineteenth century had it become the dominant Admiralty procedure."

This view, also held by Holmes⁴⁰ and Mayers⁴¹, seems to have as its foundation certain passages in The Black Book of the Admiralty⁴² and some early cases of the Courts of Common Law⁴³ dealing with the question of prohibitions, where the language employed appears to personify the res as the "defendant"⁴⁴.

³⁸ F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 155.

³⁹ The reference is clearly to Elizabeth I. According to A Merriam-Webster Webster's Biographical Dictionary (1966) 1678, Elizabeth I's reign was from 1558-1603.

⁴⁰ O W Holmes Jr The Common Law (1882) 33f.

⁴¹ E C Mayers Admiralty Law and Practice in Canada (1916) 8; and see E C Mayers 'Maritime Liens' (1928) 6 Canadian Bar Review 516.

⁴² The Black Book of the Admiralty ed Sir Travers Twiss (1985 reprint) Vols 1-4 - discussed infra.

⁴³ In particular, Greenway and Barker's Case (1613) Godbolt 260; but Mayers op cit also referred to Clay v Sudgrave (1700) 1 Salk 33, and Justin v Ballam (1711) 2 Ld Raym 806.

⁴⁴ Holmes, op cit 26f, said: "It is only by supposing the ship to have been treated as if endowed with a personality, that the seemingly arbitrary peculiarities of the maritime law can be made intelligible, and on that supposition they at once become

For instance, Wiswall relies on certain passages from The Black Book of the Admiralty⁴⁵ where the phrase, "the ship has to pay", is found. These passages come from "The Customs of the Sea", translated in the 19th Century⁴⁶ and which are included in Twiss' edition of The Black Book of the Admiralty⁴⁷. The passages address the issue of compensation where goods carried aboard a ship are lost or damaged. But it is clear that the "managing owner" had to personally compensate the merchants for such loss or damage. Only if he was unable to do so, was he required to sell the ship to compensate the merchants, subject to the mariners' wages having preference, but without any preference in favour of any part-owners or creditors⁴⁸. No mention was made in these passages of the limitation of the "managing owner's"

consistent and logical." He suggested that the practice of arresting (or in his terminology, "seizing") a vessel had its origins in the ancient concept of deodand, elements of which could be traced to the noxal action in Roman law. But as G Gilmore and H Black The Law of Admiralty 2 ed (1975) have said, Holmes' theory " ... was more ingenious than sound."

⁴⁵ The Black Book of the Admiralty ed Sir Travers Twiss (1985 reprint) Vol 3, 103, 160, 245, and "345". These passages are also relied on by Holmes op cit 30. The last reference should be to page 343 - they both made the same error in this regard. Holmes cited these passages in support of the doubtful proposition that: "By the maritime law of the Middle Ages the ship was not only the source but the limit of liability."

⁴⁶ See Twiss The Black Book Of the Admiralty Vol 3, lxxiii-lxxiv.

⁴⁷ Op cit Vol 3, 35 et seq.

⁴⁸ See The Black Book of the Admiralty Vol 3, Chap xviii (page 93) which should be read with Holmes' citations viz Chap xxvii (page 103), Chap cxli (page 243), and Chap clxxxii (page 344-5).

liability to the value of the ship, as Holmes suggested⁴⁹. Like other passages from The Black Book of the Admiralty⁵⁰ concerning collisions, the practice of saying that "the ship must pay" appears to have been no more than an expedient metaphoric expression.

Wiswall⁵¹ also referred to Greenway and Barker's Case⁵² in support of his proposition that the action in rem was a feature of Admiralty Law from ancient times.⁵³ As far as Greenway and Barker's Case was concerned, Wiswall relied exclusively on this statement attributed to Serjeant Nichols:

⁴⁹ Op cit 30.

⁵⁰ For example, according to Item 20 of 'The Blacke Booke of the Admiralty' The Black Book of the Admiralty op cit Vol 1, 37-8, in the case of wilful damage by "a ship or vessell of the ffleete" to "any other ship or vessell of the ffleete" (a metaphoric expression), "hee whoe endammageth and splits others" in other words, the person who is responsible for the damage, is liable. Similar expressions are used in Item 15 of 'The Laws of Oleron' The Black Book op cit Vol 1, 109; cf Art 14 'The Customs of Oleron and of the Judgements of the Sea' The Black Book op cit Vol 2, 229 and Art 14 'Rolle of Olayron' op cit 449. See also Chpt clv-clvii 'The Customs of the Sea' The Black Book op cit Vol 3, 283-9 especially the warning in the last 7 lines of Chpt clvii which is clearly addressed to the managing owner (see Chpt clviii) notwithstanding the metaphoric personification of the vessels in the example given. That the master at fault, rather than "the ship", should be liable, is clear from Art XXVII of 'The Laws of Wisby' The Black Book of the Admiralty op cit Vol 4, 273; cf Art 29 'The Gotland Sea-Laws', op cit Vol 4, 87, which ascribed liability to the master and his crew.

⁵¹ F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 160, 162 & 170.

⁵² Greenway and Barker's Case (1613) Godbolt 260.

⁵³ Holmes, op cit 33f, also relies on this case with regard to Admiralty procedure.

" ... execution [of a judgment at law] ought to be only of the goods, for the ship only is arrested ..." ⁵⁴.

This case concerned the application for a writ of prohibition against the Admiralty Court because sureties were arrested personally to compel payment. Serjeant Nichols unsuccessfully argued in favour of the prohibition. It will be recalled from Chapter 3 that the Courts of Common Law sought to limit the Admiralty Court's jurisdiction wherever they could, but allowed a limited jurisdiction where no remedy could be given at common law; for instance, where a ship could be arrested to compel payment of a bottomry bond ⁵⁵. This appears to have been the context in which Serjeant Nichols' statement was made. Accordingly, the statement does not support Wiswall's proposition that the action in rem was in existence at the time. ⁵⁶ In any event, if the concept of the action in rem was in existence, it is strange that the procedure was not referred to as such in this case or, for that matter, by Clerke ⁵⁷.

⁵⁴ Serjeant Nichols' reported argument from which Wiswall's extract was taken is: "They cannot take a recognisance; and by the civil law, if the party render his body the sureties are discharged; and the execution ought to be only of the goods; for the ship only is arrested; and the libel ought to be only against the ship and the goods, and not against the party." (Emphasis added to indicate Wiswall's extract supra.)

⁵⁵ See for example Corset v Husely (1688) Comb 135.

⁵⁶ A similar argument can be raised in respect of the cases cited by E C Mayers Admiralty Law and Practice in Canada (1916) 8: Clay v Sudgrave (1700) 1 Salk 33, Justin v Ballam (1711) 2 Ld Raym 805, and Lipson v Harrison 2 WR 10.

⁵⁷ F Clerke Praxis Supremae Curiae Admiralitatis tr Rowghton (1829 ed). Wiswall op cit 165f ventured that the action in rem was in existence in Clerke's day concurrently with the

Consequently, it is submitted that the historical evidence, advanced by those who support the proposition that the action in rem has been a feature of Admiralty procedure since ancient times, is unconvincing and should be treated with caution.

During the 19th century the American courts developed what has become known as the Personification Theory⁵⁸. This theory is based on a fiction that the res is endowed with a juristic personality independent of that of the res owner. Therefore, the res is responsible for any delictual or contractual liability which is attributed to it. As discussed in Chapter 8, the Personification Theory had its origin in the interpretation by the United States Courts of certain early 19th century forfeiture statutes which provided for the forfeiture of vessels as a penalty for contravening their provisions. X

Holmes⁵⁹ attempted to justify the historical validity of the Personification Theory by suggesting that the Admiralty practice

procedure Clerke described, but for some reason omitted from the Praxis because of the passages from The Black Book and Greenway and Barker's Case mentioned supra. See comment supra on Wiswall's apparent unfounded criticism of Clerke's Praxis.

⁵⁸ See Chapter 8.

⁵⁹ Op cit 25-34.

of "seizing"⁶⁰ a vessel had its origins in the ancient law of deodand⁶¹, where "a thing in motion" could be seized and forfeited if that thing caused the death of a person. Accordingly, in such instances, the personal liability of the owner of the thing was immaterial. The thing was regarded as the "wrongdoer". Holmes suggested that this concept lent itself to ships and he cited a passage from Rawghton's 'De Officio Admiralitatis' - part of The Black Book of the Admiralty⁶² - which provided that a ship could be forfeited if a man was killed or drowned at sea by the motion of the ship.

But the concept of deodand was not strange to the Admiralty court because deodands were one of the perquisites of the Admiralty⁶³. Sir Leoline Jenkins⁶⁴, for instance, said that deodands "belong to the Admiral". He defined these as:

"... either such Things as are immediately instrumental to the Death of a Man on Ship-board, or else

⁶⁰ The use of this word suggests that Holmes was attempting to historically justify forfeiture of vessels in terms of the statutes supra, which was later extended to civil cases by the courts on the dubious and vague grounds of ancient and general maritime practice: see Chapter 8 for a full discussion on the origin of the Personification Theory.

⁶¹ Elements of which, Holmes op cit 28 suggested, could be traced to the noxal action in Roman law.

⁶² The Black Book of the Admiralty Vol 1, 242. An English translation of the Latin text can be found as an annexure to the 1829 ed of F Clerke Praxis Supremae Curiae Admiralitatis.

⁶³ See Browne op cit 45.

⁶⁴ William Wynne The Life of Sir Leoline Jenkins (1724) lxxxix.

such Goods, Moneys, or Jewels, as are found upon a dead Man's Body, that is cast a-shore by the Sea."

There is, furthermore, no historical evidence that the concept of deodand ascribed any form of legal personality to a ship⁶⁵, or to any other res for that matter. But Holmes seems to think it did. He said⁶⁶:

"The reader sees how motion gives life to the object forfeited."⁶⁷

And in his view⁶⁸:

"A ship is the most living of inanimate things. Servants sometimes say "she" of a clock, but every one gives a gender to vessels."

With respect, the metaphoric expression⁶⁹ which ascribes the female gender to ships is a somewhat tenuous confirmation of the suggestion that a ship is endowed with a legal personality of its own. It would seem that this expression is merely metonymical.

⁶⁵ E C Mayers Admiralty Law and Practice in Canada (1916) 22, suggests that the lack of evidence is due to "the long period of eclipse" - the Period of Decline set out in Chapter 3 supra. Mayers, 'Maritime Liens' (1928) 6 Canadian Bar Review 516, 517-9, expanded on this theme and went so far as to say that the ascription of personality to an inanimate object, particularly an offending one, had its roots in very deep seated human feelings - he gives the example of a man having to restrain himself from kicking a chair against which he has hit his shin!

⁶⁶ Op cit 26.

⁶⁷ With respect, this appears to be highly speculative. This conclusion does not follow from Holmes' examples. The forfeiture, or deodand, could simply have been a penalty and nothing more.

⁶⁸ Op cit 26.

⁶⁹ See R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 369.

In the premises, it is suggested that Holmes' justification of the historic origin of the Personification Theory is at best questionable.

There are certain American cases, such as The Nestor⁷⁰, The Young Mechanic⁷¹ and The John G Stevens⁷², which seem to favour the view that the action in rem, the procedure used to enforce the maritime lien, drew on civil law principles in its evolution. It is not clear from these decisions when the concept evolved, but it can be inferred that the concept was not thought to have been in existence since ancient times. [The emphasis in these cases was not on the personification of the res as such, but on the nature of the maritime lienholder's right, the concomitance of the action in rem and the maritime lien, and the consequent sole purpose of the action in rem to enforce this right.] These cases form the foundation of the Substantive Theory of the maritime lien⁷³. This theory advocates that the action in rem is only employed to enforce the maritime lienholder's real right in the res. The action in rem is therefore not understood as a procedural device to compel the appearance of the res owner or to obtain pre-judgment security, as in English Admiralty law; nor as an

⁷⁰ The Nestor 18 Fed Cas 9 (1831).

⁷¹ The Young Mechanic 30 Fed Cas 873 (1855).

⁷² The John G Stevens 170 US 113 (1898).

⁷³ See D. R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 426f.

action against the res which is fictionally personified as the defendant.

3. CONCLUSION:

These theories as to the origin and evolution of the action in rem are not merely of historical interest. They each embody theoretical principles, misconceived or otherwise, that determine a perceived concept of the nature of the action in rem and its special relationship to the maritime lien. The application of the various theories have led to different results, particularly with regard to the extent of the res owner's liability in an action in rem. In American Admiralty law, liability of the res owner is limited to the value of the res. Whereas in English Admiralty law the res owner's liability is limited to the value of the res only if he does not enter an appearance to defend the action; but if he does appear, he thereby "introduces his personal liability"⁷⁴ with the consequence that, subject to any statutory limitation of liability, his total liability may exceed the value of the res.

There are historical difficulties with both the Procedural and Personification Theories' explanation of the origin of the action in rem, as discussed supra.

⁷⁴ Per Sir Francis Jeune in The Dictator [1891-4] All ER Rep 360, 367I.

It was initially submitted that the concept of action in rem came into being during the Admiralty Court's period of decline by the adaptation of principles drawn from the civil law which were applied by the civilians who practised in the Admiralty Court at that time. This accords with the Conflict Theory and those decisions on which the Substantive Theory is based. It also accords with the historical evidence that the concept was unknown at the time Clerke wrote his Praxis but was accepted Admiralty practice at the turn of the 19th century.

The English procedural view of the action in rem will be discussed in the next Chapter.

CHAPTER 5

THE PROCEDURAL THEORY

1. INTRODUCTION:

In England, the action in rem is understood as a procedural device employed in Admiralty proceedings to coerce the appearance of the res owner¹ and to obtain pre-judgment security² in respect of the claim advanced. If the res owner does not appear, the action remains as one in rem³ with the consequence that the res owner's liability is limited to the value of the res and no additional personal liability, if any, can be established against

¹ It is axiomatic that although the action in rem is theoretically brought against the res, it obviously affects those with interests in the res, usually the res owner: cf D C Jackson 'Current English Admiralty Jurisdiction and Practice' 1982 Acta Juridica 5, 14. Because the Procedural Theory places emphasis on the person rather than the res (cf D C Jackson Enforcement of Maritime Claims (1985) 212; and H Staniland 'Arrest of Associated Ship Not Retrospective in Operation' [1986] 3 LMCLQ 279, 281) it has been said that the res owner is "indirectly impleaded" in an action in rem: The Parlement Belge (1880) 5 PD 197, 217 per Brett LJ; The Burns [1907] P 137, 147; The Jupiter [1924] P 236; cf D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45, 51. But see The Tervaete [1922] P 259, 274, where Atkin LJ was of the opinion that the res owner was "directly impleaded". Subsequently, both he and Lord Wright held the same opinion in The Cristina [1938] AC 485, 491 and 504f respectively.

² Brandon J in The Cap Bon [1967] 1 Lloyd's Rep 543, 547, was of the opinion the the "sole purpose" of the action in rem was: "... to provide security for the plaintiff in respect of any judgment which he may obtain as a result of the hearing and determination of the claim." See also Re Aro Co Ltd [1980] 1 All ER 1067, 1074.

³ The Banco [1971] P 137, 151D, Lord Denning MR said: "If no appearance is entered, however, the action remains, as it begun, an action in rem only, operating only against the ship arrested."

him in that action⁴. On the other hand, if the res owner does appear, by doing so he "introduces his personal liability"⁵ and the action, according to the Privy Council⁶, continues as one in rem against the res and in personam against the res owner himself⁷.

It is suggested that this is the essence of the Procedural

⁴ See generally The Longford (1889) 14 PD 34; The Burns [1907] P 137, 149; The Dupleix [1912] P 8; The Joannis Vatis (No.2) [1922] P 213; The Beldis [1936] P 51; The Banco [1971] P 137, 151. However, this does not preclude a subsequent action in personam: Nelson v Gouch (1863) LJ (CP) 46, 48; The Orient (1871) LR 3 PC 696; and The Joannis Vatis (No.2) [1922] P 213.

⁵ Per Sir Francis Jeune in The Dictator [1891-4] All ER Rep 360, 367.

⁶ The August 8th [1983] 1 Lloyd's Rep 351, 355. But nevertheless, this issue is uncertain - see the following footnote.

⁷ Lord Brandon delivered the opinion of the Privy Council in The August 8th [1983] 1 Lloyd's Rep 351. However, as Milne JP observed in The Berg 1984 (4) SA 647 (N) 654G-H, the position is not "altogether clear". Lord Brandon cited The Gemma [1899] P 285, 292, as authority for the view set out in the text supra. But in that case A L Smith LJ said: "... the action, though originally commenced in rem, becomes a personal action against the defendants upon appearance." This statement therefore does not support what Lord Brandon said. But it does support the view taken in The Banco [1971] P 137, 151, by Lord Denning MR that: "If the defendant enters an appearance, the action in rem proceeds just as an action in personam" and the same view taken by Sheen J in The Lloydiana [1983] 2 Lloyd's Rep 313, 317f, who cited The Gemma in support thereof. Cf D C Jackson 'Current English Admiralty Jurisdiction and Practice' 1982 Acta Juridica 5, 14. However, in The Broadmayne [1916] P 64, 77, Bankes LJ considered that the true view was that the action in rem proceeds only as if it were an action in personam while still retaining the characteristics of an action in rem. This case would seem more in consonance with what Lord Brandon said. This is but one illustration of the confusion in English Admiralty law introduced by the Procedural Theory.

Theory.

2. THE BASIS OF THE PRINCIPLE IN THE DICTATOR^a:

It is generally thought⁹ that the Procedural Theory originated with the decision of Sir Francis Jeune in The Dictator¹⁰, which was decided in 1892¹¹. But as discussed infra, while the theory was formally articulated in The Dictator, the procedural view can be detected in Admiralty jurisprudence ever since the revival of the Court.

In The Dictator, Sir Francis Jeune advanced the principle, albeit obiter¹², that the liability of a res owner who entered an

^a The Dictator [1891-4] All ER Rep 360.

⁹ See for instance: P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381; F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 159; and D R Thomas Maritime Liens (1980) §92 fn 41.

¹⁰ The Dictator [1891-4] All ER Rep 360.

¹¹ The Procedural Theory is sometimes incorrectly ascribed to Marsden, probably because his well-known passage in The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) lxxi - lxxii, has been quoted in support of the theory - see for instance The Dupleix [1912] P 8, 13f. See for instance P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 385 and G Price The Law of Maritime Liens (1940) 8f fn (b) & 14; and D R Thomas Maritime Liens (1980) §8, who all attribute the theory to Marsden. But Marsden merely described the early practice of the Admiralty Court.

¹² The issue before the court related to salvage where the liability of the res owner could not have exceeded the value of the res: see The Dictator [1891-4] All ER Rep 360, 362; Williams and Bruce Admiralty Practice 3 ed (1902) 19; and F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 182. See generally Kennedy's Civil Salvage 4ed K C McGuffie ed (1958) 162.

appearance in an action in rem was not necessarily limited to the value of the res and costs¹³ as had previously been the position¹⁴.

As Williams and Bruce¹⁵ correctly point out, the basis of this principle is the early practice of the Admiralty Court as described by Clerke¹⁶ and Marsden¹⁷ and referred to in Chapter 4. After examining the views of several contemporary writers which all concurred substantially with Clerke's description of

¹³ See The John Dunn (1840) 1 Wm Rob 159, 161f, Dr Lushington explained that the reason that costs could be awarded notwithstanding that the total indebtedness would thereafter exceed the value of the res, was based on equity - if the owner took "the chance of the litigation, and a decree in his favour, he is fairly liable for the expenses occasioned by his defence." See also The Volant (1842) 1 NC 503, 512; The Temiscouta (1855) 2 Sp Ecc & Adm 208, 211 (cf The Mellona (1848) 3 Wm Rob 16); and The Freedom (1871) LR 3 A&E 495.

¹⁴ See The Hope (1840) 1 Wm Rob 154, 158; The Volant (1842) 1 NC 503, 509f; The Kalamazoo (1851) 15 Jur 885, 886; The Wild Ranger (1863) B&L 84. See also The Monte A 12 F 331 (1882), 334f; H C Coote The New Practice of the High Court of Admiralty (1860) 8; F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 173; D R Thomas Maritime Liens (1980) §92 fn 39. But cf The Aline (1839) 1 Wm Rob 111, 116f; The Zephyr (1864) 11 LT 351; and The Dictator [1891-4] All ER Rep 360, 365-7.

¹⁵ Williams and Bruce Admiralty Practice 3 ed (1902) 19. See also P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 392; G Price 'Maritime Liens' 1941 LQR 409, 413; and F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 159.

¹⁶ F Clerke Praxis Supremae Curiae Admiralitatis tr Rowghton (1829 ed).

¹⁷ The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) lxxi-lxxii.

the early practice, Sir Francis Jeune concluded¹⁸:

"It would appear, therefore, that under the earlier practice the distinction between the actions in personam and the actions in rem depended on whether the person or the property of the defendant was arrested in the first instance, but if the defendant appeared the procedure and the effect of the action in rem became those of an action in personam. But several changes in law or practice took place."

It is clear that Sir Francis Jeune thought that the action in rem was part of the early practice of the Admiralty Court and that in accordance with this early practice the res owner's liability was not limited to the value of the res where he appeared. He proceeded to analyse the various 19th century cases which "changed" this early practice by limiting the res owner's liability to the value of the res, even once an appearance to defend had been entered. He concluded that the principle set out in these cases was incorrect.

3. THE PRINCIPLE'S DUBIOUS HISTORICAL VALIDITY:

Sir Francis Jeune's view that the nature and object of the action in rem was essentially the same as the early practice of arrest, save that the action in rem is confined to the res connected to the cause of action¹⁹; has been, and still is, a distinctive

¹⁸ The Dictator [1891-4] All ER Rep 360, 363f.

¹⁹ See The Ripon City [1897] P 226, 241; and The Beldis [1936] P 51. This should not be confused with the statutory right to proceed against a so-called "sister ship" - see s 3(4) of the Administration of Justice Act, 1956, now s 21(4) of the Supreme Court Act, 1981; cf s 3(6) & (7) of the Admiralty Jurisdiction Regulation Act, No 105 of 1983 - the "associated ship" provisions.

feature of the Procedural Theory²⁰.

However, it is submitted that this view does not have a sound historical basis. It will be recalled that there was no distinction in the early practice between actions in rem and those in personam; indeed, it appears from research done subsequent to The Dictator²¹, that the historical evidence available suggests that the concept of action in rem was unknown at that stage²². Arrest of the defendant's res was only employed to coerce the appearance of the defendant²³ and, according to Marsden²⁴:

²⁰ See for instance The Dupleix [1912] P 8, 13; The Tervaeete [1922] P 259, 270; The Jupiter [1924] P 236, 242f; The Banco [1971] P 137, 150f; The Father Thames [1979] 2 Lloyd's Rep 364, 368.

²¹ Notably The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894); E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903) the relevant section of the Introduction was written by Mears reprinted as: 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 312; and E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173.

²² See T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 312, 348f; and E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173, 190. Cf the contrary views, discounted in Chapter 4 of F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 155; O W Holmes Jr The Common Law (1882) 25-35; and E C Mayers Admiralty Law and Practice in Canada (1916) 8.

²³ The interpretation given to Clerke's Praxis by Sir Francis Jeune in The Dictator [1891-4] All ER Rep 360, 363; and see Williams and Bruce Admiralty Practice 3 ed (1902) 19.

²⁴ Loc cit. See also L H Laing 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 Mich LR 163, 173.

" ... to obtain security that judgment should be satisfied."

It is suggested, as proposed in Chapter 4, that a distinction should have been drawn between the early practice and the action in rem because the latter probably evolved at a later stage in the history of the Admiralty Court. What is more, its object was different from that of the early arrest procedure in that it was probably employed during the Admiralty Court's period of decline²⁵, to realise a real right in the res²⁶.

Alternatively, some critics²⁷ of Sir Francis Jeune's decision in The Dictator²⁸ have argued that the principle is historically unsound on the basis that "the action in rem" has been confined to the res since ancient times. On this basis, these critics concluded that the res owner's liability is confined to the value of the res. It suggested that the conclusion reached by these critics is probably correct; but, as discussed in Chapter 4, the premise that the action in rem has been in existence since ancient times, cannot be sustained by the authorities cited in support of it.

²⁵ See Chapter 3.

²⁶ See Chapters 4 and 6.

²⁷ Notably E C Mayers Admiralty Law and Practice in Canada (1916) 10ff; P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 385ff; and F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 155ff.

²⁸ The Dictator [1891-4] All ER Rep 360.

4. OTHER FACTORS CONTRIBUTING TO THE EVOLUTION OF THE PROCEDURAL THEORY:

While the principle of the Procedural Theory was first articulated in The Dictator²⁹, it is suggested that the seeds of the theory were present in the approach of the Admiralty Court ever since its revival - particularly in the approach of Dr Lushington who was judge of the Admiralty Court from 1838 to 1867³⁰.

According to Marsden³¹, when the 1840 Act³² was passed:

"... owing to the decrepitude of the Admiralty Court on its instance or civil side, not very much was known about its jurisdiction or history and much of the law applicable to the few matters in which its jurisdiction was acknowledged was very misty."

This was the age of advent of steam navigation, industrialisation and territorial expansionism; not to mention, commercial growth and prosperity. As a result the business of the Admiralty Court increased, particularly in respect of collision, towage and

²⁹ The Dictator [1891-4] All ER Rep 360.

³⁰ The Oxford Companion to the Law Appendix I, 1332.

³¹ R G Marsden 'Six Centuries of the Admiralty Court' (1896) 67 The Nautical Magazine 85ff & 169ff, 175f. Williams and Bruce Admiralty Practice 3 ed (1902) 11 fn o, cite Pepys' Diary 17th March 1663, in support of the proposition that the court "seems to have fallen into a feeble and neglected condition". See also W Senior 'The History of Maritime law' (1952) 38 Mariners' Mirror 260, 270ff; and G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 AJ 30, 35.

³² The Admiralty Court Act, 1840, 3 & 4 Vic c 65.

salvage matters³³. An anonymous author wrote in 1861, in typical Victorian parlance, that the Admiralty Court appeared:

" ... to sit from ante-meridian morning to dewy evening, through all the seasons of the legal year, exhausting its energies over collision cases and little else."³⁴

The factors sketched supra - the imprecise understanding of the legal principles applicable in Admiralty matters and the increase in the Admiralty Court's work-load - coupled with Dr Lushington's apparent desire to dispose of the matters before him in a summary fashion³⁵, all provided the ideal climate for the propagation of

³³ See R G Marsden 'Six Centuries of the Admiralty Court' (1896) 67 The Nautical Magazine 85ff & 169ff, 175.

³⁴ Anon 'The Prospects of the Admiralty Court' (1861) 10 L Mag and Rev 262, 262f.

³⁵ See for instance Dr Lushington's remarks in The Mellona (1848) 3 Wm Rob 16, 20; and the terseness of many of his ex tempore judgments. It should be added that the Admiralty Court traditionally proceeded in a summary fashion. In The Domesday Book of Ipswich, reproduced in The Black Book of the Admiralty ed Sir Travers Twiss (1985 reprint) Vol 2, 23, it is recorded that: "... the plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that adydene not but her tyde, shuldene ben pleted from tyde to tyde." Much later, Sir Leoline Jenkins is reported to have said: "Not one cause in ten comes before that court but some of the parties or witnesses in it are pressing to go to sea with the next tide": William Wynne The Life of Sir Leoline Jenkins (1724) lxxxii. The summary procedure is set out in F Clerke Praxis Supremae Curiae Admiraltatis tr Rowghton (1829 ed); J Godolphin A View of the Admiral Jurisdiction (1661) 41f; T Ridley A View of the Civil and Ecclesiastical Law 3ed (1662) 94; and R Zouch The Jurisdiction of the Admiralty (1663) 139ff. See also T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 312, 343ff; W Senior 'The History of Maritime law' (1952) 38 Mariners' Mirror 260, 262f; and G F Steckley 'Merchants and the Admiralty Court During the English Revolution' (1978) 22 Amer J Leg Hist 136, 172.

the misconception of the nature of the action in rem which was finally articulated in The Dictator³⁶.

There are several aspects relating to Admiralty procedure dealt with by Dr Lushington where the seeds of this misconception can be identified. These include primarily: (a) those cases dealing with the limitation of the res owner's liability to the value of the res; (b) the analogy drawn between foreign attachment and the action in rem; and (c) the introduction of what have become known as "statutory rights of actions in rem" into English Admiralty law.

5. THE CASES DEALING WITH THE LIMITATION OF THE RES OWNER'S LIABILITY:

These cases, and in particular the trilogy of The Hope³⁷, The Volant³⁸ and The Kalamazoo³⁹, have been cited by critics of the Procedural Theory⁴⁰ to advance the argument that The Dictator⁴¹ departed from a definite line of precedent which established the principle that in an action in rem the res owner's liability

³⁶ The Dictator [1891-4] All ER Rep 360.

³⁷ The Hope (1840) 1 Wm Rob 154

³⁸ The Volant (1842) 1 NC 503.

³⁹ The Kalamazoo (1851) 15 Jur 885.

⁴⁰ Notably E C Mayers Admiralty Law and Practice in Canada (1916) 12ff; and F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 173.

⁴¹ The Dictator [1891-4] All ER Rep 360.

cannot exceed the value of res whether he appears or not. Although prima facie these cases appear to support this argument, the aforesaid principle was based, not on the nature of the action in rem as such, but on other considerations: namely, (a) the form of the process used by the Admiralty Court; and (b) certain statutory provisions limiting the res owner's liability⁴². It further appears from these cases that there is an emphasis on the arrest element of the action in rem and the consequent equation of the action in rem with the early practice of the Admiralty Court. The thread of this failure to distinguish between the two forms of proceeding seems to have begun in Lord Stowell's time⁴³, see for example The Dundee⁴⁴ discussed infra. It continued until The Dictator⁴⁵, where it manifested itself as a major factor in the theoretical basis of the Procedural Theory; and thereafter it has continued to the present⁴⁶.

⁴² For a summary of these provisions, see Lord Tenterden Abbott's Law of Merchant Ships and Seamen 14ed (eds J P Aspinall, B Aspinall, H S Moore) (1901) 1045ff. Cf The Zephyr (1864) 11 LT 351, where Dr Lushington is reported to have thought that s 15 of the Admiralty Court Act, 1861, might permit the court to extend the res owner's liability beyond the value of the res: not approved in The Dictator [1891-4] All ER Rep 360, 367.

⁴³ Lord Stowell (previously Sir William Scott) was judge of the Admiralty Court from 1798 to 1828: The Oxford Companion to the Law Appendix I, 1332.

⁴⁴ The Dundee (1823) 1 Hag Adm 109.

⁴⁵ The Dictator [1891-4] All ER Rep 360.

⁴⁶ See eg The Banco [1971] P 137, 150f.

These cases will now be examined.

Firstly, there is the doubtful case of The Truine⁴⁸ decided by Sir John Nicholl in 1834. The report of this case is sketchy, but it appears that the negligence of the master, who was also a part-owner of The Truine, was the cause of a collision between The Truine and The Triton. Proceedings in rem were instituted against The Truine and it seems that the master appeared. After The Truine was sold there was a deficiency of £400 and a monition was decreed against the master to pay that sum. Little can be gathered from this decision, because, as Wiswall⁴⁹ correctly pointed out:

"... no reasoning and no citation of authority was given by Sir John Nicholl in support of his judgment."⁵⁰

⁴⁸ The Triune (1834) 3 Hag Adm 114.

⁴⁹ F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 172.

⁵⁰ Wiswall continued: "Moreover in the same year, Nicholl made the statement that 'the ship is liable for wages and costs' [The Margaret (1835) 3 Hag Adm 238], which, if expressio unius est exclusio alterius, would indicate that the owner had no personal liability in a wages suit in rem." The decision in The Margaret (1835) 3 Hag Adm 238 is sketchy. But there appears to have been no attempt in this case to make the res owner liable for more than the value of the res. It seems that all Sir John Nicholl intended to say was that seamen could look to the ship for payment of their wages if they were not paid, which in any event was a long settled principle: see The Black Book of the Admiralty ed Sir Travers Twiss (1985 reprint) Vol 3, 261-3 & 449; Wells v Osman (1704) 2 Ld Raym 1044, 1045; Clay v Sudgrave (1700) 1 Salk 33.

Nevertheless, this case is of some importance in that, according to Williams and Bruce⁵¹, it is the only case, prior to the decision in The Gemma⁵², in which defendants appearing in an action in rem were made liable beyond the value of the res. But this case, imperfectly reported as it is⁵³, does not illustrate any theoretical principle and Dr Lushington declined to follow it in The Volant⁵⁴.

In The Aline⁵⁵, Dr Lushington appeared to equate the action in rem with the early practice of the Admiralty Court when he is reported to have said:

"In these courts, however, where the proceedings are in rem (a mode of remedy not originally given as the measure of the damage, but as the best security for an indemnity that could be obtained, as the owner may be beyond the reach of the law) ..."

He went on to say that liability was limited to the value of the res "by municipal regulation". This was the sole reason given for the limitation of liability. No consideration was given to the possibility that the principle of limitation of liability may have had the nature of the action in rem as its foundation; nor was this suggested.

⁵¹ Williams and Bruce Admiralty Practice 3 ed (1902) 25.

⁵² The Gemma [1899] P 285.

⁵³ See the comments of Story J in Citizens' Bank v Nantucket Steamboat Co (1811) 5 Fed Cas 719, 733, to this effect. He declined to follow this case.

⁵⁴ The Volant (1842) 1 NC 503.

⁵⁵ The Aline (1839) 1 Wm Rob 111, 117.

The above-mentioned passage was cited by Sir Francis Jeune in The Dictator⁵⁶, who said that Dr Lushington's words were "almost an echo" of what Lord Stowell said in The Dundee⁵⁷. Both Lord Stowell and Dr Lushington seemed to think that the action in rem was synonymous with the early procedure, save that the extent of the res owner's liability was subsequently limited by statute⁵⁸.

⁵⁶ The Dictator [1891-4] All ER Rep 360, 365f.

⁵⁷ The Dundee (1823) 1 Hag Adm 109, 121 & 124: "The quantum or reparation due in such cases [cases of damage] has been differently measured in the maritime laws of different commercial countries, and of the same commercial country, among others our own, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the commercial principle applying to personas undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed ... It is an admitted fact that this mode of initiating a suit by arrest of ship, tackle, apparel and furniture, is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than the statutes restrict it. By the initiatory terms, tackle, apparel and furniture, founded the suit sufficiently to embrace all the objects which the statutes left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends."

⁵⁸ Cf E C Mayers Admiralty Law and Practice in Canada (1916) 11, and F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 177f. However, Lord Stowell appears to have regarded the action in rem (the procedure employed in The Dundee) and the early arrest procedure of the Admiralty Court as essentially embracing the same "ancient formula" with identical results, save for statutory limitation. Although Lord Stowell's view cannot be sustained, it does support Sir Francis Jeune's conclusion that prior to statutory inter-

In both cases, as in The Dictator⁵⁹, no distinction was drawn between the action in rem and the early procedure of the Admiralty Court.

The decision in The Hope⁶⁰ is a firm decision that the liability of the res owner cannot exceed the value of the res. But the reasons for this principle do not appear from the report. All Dr Lushington is reported to have said was⁶¹:

"Looking to the general principles upon which the proceedings in this court are conducted, it is, I apprehend, wholly incompetent for the Court to engraft a personal action against the master as part-owner of this vessel upon the proceedings which have already taken place in this cause. It may be true, as stated, that the proceeds of The Hope will prove inadequate to answer the full amount of damage which the owners of The Nelson have sustained. If so, it is undoubtedly a hardship upon these owners; but this circumstance will not entitle me to exercise a jurisdiction in their behalf, which, according to my own impression, I clearly do not possess. I am not aware of any case in this Court, in a proceeding of this kind⁶², has ever been engrafted upon it a further proceeding against the owners⁶³, upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage pronounced for."

In this case, it was found that due to the negligence of the

vention, the res owner's liability was unlimited, contrary to the contention of Mayers and Wiswall.

⁵⁹ The Dictator [1891-4] All ER Rep 360.

⁶⁰ The Hope (1840) 1 Wm Rob 154.

⁶¹ At 158.

⁶² ie in rem.

⁶³ ie in personam.

master who was also a part owner of The Hope, the vessel collided with The Nelson, causing damage beyond the value of The Hope. The owners of The Nelson sought to make the master personally liable for the excess because he was also a part-owner of The Hope. In reply it was argued⁶⁴ that the court had pronounced its decision in an action in rem and accordingly the owners of The Hope were liable to the value of the res. Accordingly, it was submitted, the attempt to "engraft" a personal action against the master upon the finalised proceedings in rem was "unsustainable in principle and wholly unprecedented in the practice of the court." The decision in The Truine⁶⁵ was not referred to by Dr Lushington, nor was his attention drawn to it.

Dr Lushington did not elaborate on "the general principles upon which the proceedings of this court are conducted" which he applied in not making the master personally liable for the amount in excess of the value of the res. However, one can speculate that he may have been under the impression, as he was in The Aline⁶⁶, supra, that the principle of limiting liability to the value of the res was based on "municipal regulation", ie statute. Accordingly, Sir Francis Jeune was probably correct in thinking that what Dr Lushington said:

" ... falls short of saying that apart from statute the

⁶⁴ By Dr Addams, 158.

⁶⁵ The Triune (1834) 3 Hag Adm 114.

⁶⁶ The Aline (1836) 1 Wm Rob 111.

owners were not liable in an action in rem for damages beyond the value of the res."⁶⁷

Furthermore, regarding his remark about "engrafting"⁶⁸ an action in personam onto an action in rem, he may have had in mind what Sir William Scott is reported to have said in The Fortitudo⁶⁹, namely:

"The warrant of arrest is confined to the ship; it goes no further. It appears to me, therefore, that no personal liability beyond that value could be engrafted upon such a mode of proceeding [ie proceedings in rem]; and for this obvious reason, that, if I were to engraft such personal responsibility upon the owner, the original process would not justify such proceeding. Not only the original process, but the appearance given by the individual himself, would not justify it, because he has appeared only to protect his interest in the ship, both by the form of the warrant and by the form of his appearance."

It seems that in this case Sir William Scott emphasised the form of the warrant, rather than any principles relating to the nature of the action in rem⁷⁰, in arriving at this rule.

Dr Lushington repeated obiter his opposition to "engrafting" proceedings in personam on to an action in rem in The Kalamazoo⁷¹; but, as in The Hope, he did not elaborate on the principle underlying this view. Once again he possibly relied on The

⁶⁷ The Dictator [1891-4] All ER Rep 360, 366.

⁶⁸ An expression which recurred in some of Dr Lushington's later judgments - see infra.

⁶⁹ The Fortitudo (18) 2 Dods 58.

⁷⁰ Cf Nelson v Couch (1863) 33 LJ (CP) 46, 48; and The Joannis Vatis (No.2) [1922] P 213, 221f.

⁷¹ The Kalamazoo (1851) 15 Jur 885, 886.

Fortitudo⁷² as establishing this rule. Indeed, there is no indication in either The Hope or The Kalamazoo that Dr Lushington thought the approach of Sir William Scott in The Fortitudo was incorrect.

As mentioned *supra*, in The Hope, the decision in The Truine⁷³ was neither referred to in argument, nor by Dr Lushington in his decision. However, Dr Lushington had occasion to consider The Truine in an important, reserved judgment of his in The Volant⁷⁴. In this case he examined *inter alia* the extent of an appearing *res* owner's liability in proceedings *in rem* - or as they were referred to by Dr Lushington, "proceedings by the arrest of the ship"⁷⁵. He did not follow The Truine and held that an appearing *res* owner's liability was limited to the value of the *res*.

Before discussing Dr Lushington's reasons for the limitation of liability, his approach to the nature of proceedings against the *res* should be mentioned. In this regard, it seems that Dr Lushington, like Sir Francis Jeune in The Dictator⁷⁶, did not distinguish between the action *in rem* and the early procedure.

⁷² The Fortitudo 2 Dods 58.

⁷³ The Triune (1834) 3 Hag Adm 114.

⁷⁴ The Volant (1842) 1 NC 503, 509.

⁷⁵ The Volant (1842) 1 NC 503, 508f.

⁷⁶ The Dictator [1892] P 304.

He is reported to have said⁷⁷ that in the Admiralty Court:

" ... arrest of the vessel is only one mode of proceeding⁷⁸. The damage is not, in the proper sense of the term a lien upon the vessel doing it⁷⁹, and the arrest is the mode which is most generally resorted to for the purpose of obtaining compensation, because it offers the best security for ready payment."

It will be recalled that Dr Lushington's reason given for a proceeding against the res - "that it offers the best security for ready payment" - was according to Marsden⁸⁰, the object of the Admiralty Court's early procedure in arresting the goods of the defendant. It will be observed that Dr Lushington did not refer to the proceedings against the res as proceedings in rem, but by implication it is clear from the context of the report that he had such proceedings in mind.

Secondly, as far as the principle of the limitation of liability

⁷⁷ The Volant (1842) 1 NC 503, 508.

⁷⁸ The others, in the case of collision damage: " ... either against the owner, or the master, personally, or against the ship itself": 508.

⁷⁹ Dr Lushington vacillated on this issue. In The Druid (1842) 1 Wm Rob 391, he left the issue open; but, in The Bold Buccleugh (1850) 3 Wm Rob 220, 229, he decided in favour of a lien for collision damage, which was affirmed on appeal by the Privy Council in The Bold Buccleugh (1851) 7 Moo PC 267. It should be noted that A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2, 143, observed: "The torts of the master cannot be supposed to hypothecate the ship; nor in my humble judgment, in strictness of speech, to produce any lien upon it." It seems that The Bold Buccleugh (1851) 7 Moo PC 267 is correctly regarded as the source of the maritime lien for damage in English Admiralty law: see D R Thomas Maritime Liens (1980) §205.

⁸⁰ The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) lxxii.

of an appearing res owner in an action in rem was concerned, Dr Lushington looked to (a) the wording of the process; and (b) certain statutory provisions; not to any principles relating to the nature of the proceedings, in order to determine the basis of this principle. He is reported to have said with regard to the wording of the process⁸¹:

"The owners are only called to answer⁸², therefore, with respect to any right, title, or interest they have in the vessel, and when they appear they intervene for their interest in the vessel and no further ... The warrant of arrest is confined to the ship; it goes no further. It appears to me, therefore, that no personal liability beyond that value could be engrafted upon such a mode of proceeding, and for this obvious reason: that, if I were to engraft such personal responsibility upon the owner, the original process would not justify such proceeding. Not only the original process, but the appearance given by the individual himself, would not justify it, because he appeared only to protect his interest in the ship, both by the form of the warrant and by the form of his appearance."

Consequently, in language virtually identical to that used by Sir William Scott in The Fortitudo⁸³, although this case was not referred to specifically, Dr Lushington seems to have placed emphasis on the form of the warrant, rather than any principles relating to the nature of the action in rem, as the first reason underlying the principle of limitation of liability.

⁸¹ The Volant (1842) 1 NC 503, 509.

⁸² Dr Lushington is reported to have said (509) that the process " ... directs the ship to be arrested, and that you cite the parties, and all persons in general, 'who have, or pretend to have, any right, title, or interest therein, to appear before the Judge of our High Court of Admiralty in England, in a cause of damage, civil and maritime'."

⁸³ The Fortitudo (18) 2 Dods 58.

The second reason was "municipal regulation"⁸⁴, or statute limiting the liability of the res owner⁸⁵. Dr Lushington referred to the application of s 1 of an Act, 53 Geo 3, c 159, in the common law case of Wilson v Dickson⁸⁶, and said that that statute applied equally to Admiralty matters. In explaining The Volant in The Temiscouta⁸⁷, Dr Lushington is reported to have said:

"I was of the opinion that I could not enforce payment of damage beyond the amount of bail; but then, bail was given for the whole value of the ship, and I considered myself to be restrained by the Act of Parliament."

Thus, the alternative that the nature of proceedings in rem may have been the fundamental reason for such limitation of liability was not investigated, nor even addressed by Dr Lushington, as it seems he merely regarded such proceedings as similar to the early arrest procedure. As mentioned supra, this was the same historically unsound premise adopted by Sir Francis Jeune in The Dictator⁸⁸.

⁸⁴ cf The Aline (1836) 1 Wm Rob 111, 117.

⁸⁵ The Volant (1842) 1 NC 503, 510ff.

⁸⁶ Wilson v Dickson (1818) 2 B & Ald 2.

⁸⁷ The Temiscouta (1855) 2 Sp Ecc & Adm 208, 210.

⁸⁸ The Dictator [1891-4] All ER Rep 360.

Dr Lushington did not alter his views expressed in The Volant⁸⁹, when he decided The Mellona⁹⁰. He is reported to have said⁹¹:

"Now I apprehend that, originally, whatever may have been the practice in later days⁹², the main object in arresting a vessel in a cause of damage was to secure an appearance on the part of the owners of such vessel to answer for any damage done to the vessel proceeding in the cause⁹³. By the ancient law, as it stood prior to the passing of the statute, the owners of the vessel doing the damage were liable to the full amount of the damage done, without reference to the value of the ship; and not only might proceedings be taken against them to the fullest extent in the Courts of common law, but if the owners had been proceeded against personally in this Court⁹⁴, there can, I conceive, be no doubt that, in the case of a conviction, a similar decision would have followed. Whether or not at that period⁹⁵ it would have been competent to proceed against the ship in this Court, and afterwards engraft upon those proceedings a further responsibility against the owners, as was done by Sir John Nicholl in The Truine, it is unnecessary to consider in the present instance, as the Act of Parliament has limited the responsibility of the owners, and by the law as it now stands they are only responsible to the value of the vessel and its appurtenances, together with the freight and the costs which may have been incurred. Such being the law as it now exists with respect to the liability of shipowners, it is, I apprehend, perfectly clear, that as regards the vessel arrested in this case, the process of this Court may be enforced against the owners to the full extent of the ship and its appurtenances ... "

⁸⁹ The Volant (1842) 1 NC 503.

⁹⁰ The Mellona (1848) 3 Wm Rob 16.

⁹¹ The Mellona (1848) 3 Wm Rob 16, 20f.

⁹² What "the object" in "later days" was, was not mentioned.

⁹³ This is correct: cf The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) lxxi-lxxii.

⁹⁴ "If" the Admiralty Court was not prohibited.

⁹⁵ In The Volant (1842) 1 NC 503, as mentioned supra, he declined to accept that decision of The Triune (1834) 3 Hag Adm 114 reflected the current practice.

It is clear from the passage supra that Dr Lushington saw statutory limitation of liability as the sole contemporary reason limiting the res owner's liability. He did not depart from this view in the later cases eg The Temiscouta⁹⁶ and The Clara⁹⁷.

Finally, in The Zephyr⁹⁸, he seemed to think that section 15 of the 1861 Act⁹⁹ would permit the Admiralty Court to allow the issue of a monition to compel the res owner to pay any damages in excess of the bail given. But, once again, the extent of the res owner's liability was thought to depend on a consideration extraneous to the nature of the action in rem¹⁰⁰.

6. THE ANALOGY DRAWN BETWEEN PROCEEDINGS BY FOREIGN ATTACHMENT AND THE ACTION IN REM:

"Foreign attachment" proceedings existed by virtue of the Charters of cities such as London and Dublin and applied to persons not in those cities but whose assets were in the possess-

⁹⁶ The Temiscouta (1855) 2 Sp Ecc & Adm 208, 211f.

⁹⁷ The Clara (1855) Swab 1, 3.

⁹⁸ The Zephyr (1864) 11 LT 351.

⁹⁹ The Admiralty Court Act, 1861. (24 Vict c 10).

¹⁰⁰ Cf The Dictator [1891-4] All ER Rep 360, 367, where Sir Francis Jeune said that he was unable to agree with Dr Lushington's interpretation of this section.

ion of a third party within the jurisdiction¹⁰¹. It was a procedure designed merely to compel the appearance of the defendant in a personal action; upon appearance, the attachment ceased¹⁰².

Browne¹⁰³ described the early procedure of the Admiralty Court, which he later said had gone into disuse, and said that this early procedure was:

"... analogous to the proceedings by foreign attachment under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance."

Wiswall¹⁰⁴ said that the early procedure set out by Browne:

"is certainly the same procedure described by Clerke and erroneously identified by Sir Francis Jeune as a proceeding in rem, upon which he based the procedural theory."

Williams and Bruce¹⁰⁵ also said that the early proceedings "described by Clerke" were analogous to proceedings by foreign attachment "under Charters of the City of London".

¹⁰¹ See W Tetley 'Attachment, the Mareva injunction and saisie conservatoire' [1985] 1 LMCLQ 58, 68.

¹⁰² The Bold Buccleugh (1851) 7 Moo PC 267, 283; see also F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 165.

¹⁰³ A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2, 434f.

¹⁰⁴ F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 164.

¹⁰⁵ Williams and Bruce Admiralty Practice 3 ed (1902) 19.

However, in The Johann Friederich¹⁰⁶ Dr Lushington is reported to have said:

"It is said, however, that the proceedings in this Court are in rem, a mode of proceeding peculiar to this Court, and not the usual course adopted by the Courts in this country in the first instance. But admitting this to be true, analogous cases exist, as in that of foreign attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail in the action; and if such a process is open to a foreigner in that case, it is difficult to understand the grounds of disputing the jurisdiction of this Court in the present instance."¹⁰⁷

Sir John Jervis disapproved of this analogy in The Bold Buccleugh¹⁰⁸ but added:

"For the purpose for which that allusion¹⁰⁹ was made, viz. the liability of the property of foreigners to be arrested by process out of the Courts of the city of London, the two proceedings may be analogous; but in other respects they are altogether different."

However, it is suggested that the fact the analogy was drawn is further illustration of the failure by Dr Lushington to disting-

¹⁰⁶ The Johann Friederich (1839) 1 Wm Rob 36, 37.

¹⁰⁷ Cf the argument of Mr Willes in Taylor v Best (1854) CP 14 CB 487, 510, where he is reported to have said in drawing a distinction between the common law of England and the law of "those countries where the civil law obtains": "There is nothing in this country analogous to the proceedings of those Courts ad fundandam iusisdictionem, except the proceedings by what is called foreign attachment in the Lord Mayor's Court of London (practically extended to the whole Kingdom by 17 & 18 Vict c 125 ss 60-7.)"

¹⁰⁸ The Bold Buccleugh (1851) 7 Moo PC 267, 282.

¹⁰⁹ ie Dr Lushington's aforesaid analogy.

uish between the early procedure and the action in rem.¹¹⁰

Accordingly, it is suggested that this provided further impetus for the misconception of the nature of the action in rem articulated in The Dictator¹¹⁰.

7. THE INTRODUCTION OF "STATUTORY RIGHTS OF ACTIONS IN REM"
INTO ENGLISH ADMIRALTY LAW:

It will be recalled from the discussion in Chapter 3 supra, that the Admiralty Court Acts of 1840 and 1861, increased the jurisdiction of the Admiralty Court.

The 1840 Act did not provide for the method of enforcement of those rights flowing from the causes of action incorporated in the Court's extended jurisdiction; but section 35 of the 1861 Act did. This section provided:

"The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

¹¹⁰ For other illustrations of this approach see the discussion of the cases dealing with the limitation of liability discussed supra. See also The Alexander Larson (1841) 1 Wm Rob 288, 294, where Dr Lushington is reported to have said, discussing the question of necessities and the extension of jurisdiction in this regard by the 1840 Act: "The statute therefore simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing payment; it might be by arresting the person of the owner if he is resident here [cf his remarks to the contrary in this regard in The Clara (1855) Swab 1, 3] or by arresting the property in case a necessity occurred." This is very a close description of the early procedure.

¹¹⁰ The Dictator [1891-4] All ER Rep 360.

It will be observed that this section is broadly worded. It does not specify that proceedings in rem were confined to any particular heads of jurisdiction, eg those giving rise to real rights in the res like maritime liens¹¹¹, or whether the action in rem could be resorted to in respect of any cause of action which the Admiralty Court had jurisdiction to determine.

As it happened, the action in rem was not confined by the Courts in the interpretation of the abovementioned Acts.

The action in rem was applied (a) to those rights giving rise to what became known as "a maritime lien"¹¹² and the enforcement of other real rights¹¹³; and (b) other rights over which the Admiralty Court had jurisdiction by virtue of the abovementioned Acts.

The latter have been called "statutory liens"¹¹⁴ and "statutory

¹¹¹ See Lord Watsons obiter remarks in The Henrich Björn (1886) 11 PD 270, 278 - "It may be at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action in rem, except at the instance of the plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the Bar appear to me to bear out that proposition ..." And see infra.

¹¹² The Bold Buccleugh (1851) 7 Moo PC 267.

¹¹³ See infra.

¹¹⁴ Per Hewson J in The Zafiro [1960] P 1, 13. See also E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903) 64 fn f; E C Mayers Admiralty Law and Practice in Canada (1916) 25;

rights in rem"¹¹⁵. But like Hewson J in The St Merriel¹¹⁶, Brandon J in The Monica S¹¹⁷ said that he preferred the expression "statutory rights of actions in rem", which term is probably the most accurate expression of these rights.

* Before discussing the origin of these rights, the distinction between them and maritime liens should be indicated.

A detailed discussion of the origin and evolution of the maritime lien is beyond the scope of this dissertation. Like the origin of the action in rem, this is a contentious issue¹¹⁸. However, it should be noted that the term "maritime lien" did not appear in any English case prior to the decision in The Bold Buccleugh¹¹⁹. In this case, Sir John Jervis relied on the articu-

Halsbury's Laws of England 4ed, Vol 43, 1140.

¹¹⁵ G Price 'Statutory Rights in rem in English Admiralty Law' (1945) J of Comp Leg (3rd Series) 21ff. Cf Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A) 275E, where Trollip JA referred to s 4 read with s 35 of the 1861 Act and said that these sections confer "in admiralty law a limited kind of statutory lien or statutory right in rem ..."

¹¹⁶ The St Merriel [1963] P 247.

¹¹⁷ The Monica S [1968] P 741, 768.

¹¹⁸ See generally D R Thomas Maritime Liens (1980) §8 and Chapter 4.

¹¹⁹ The Bold Buccleugh (1851) 7 Moo PC 267. Scrutton LJ said in The Tervaete [1922] P 259, 279, that the maritime lien "does not appear eo nomine in cases of collision in the reports till The Bold Buccleugh was heard in 1851." Cf F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 156, who said, citing A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2, 143, that

lation of the concept in the United States by Story J in The Nestor¹²⁰. [The Nestor was probably the first case in either England or the United States to use the words "maritime lien" to draw the distinction between those special rights that were recognised only in the Court of Admiralty and possessory liens of the common law.¹²¹] It can reasonably be concluded that prior to the 19th century the modern concept of the maritime lien, as finally articulated in The Nestor and The Bold Buccleugh, was still in the process of evolution¹²². Some of the constituent characteristics of the maritime lien can be discerned in several early cases relating to bottomry, seamen's wages, salvage and collisions¹²³.

the concept of the maritime lien was "well established" prior to The Bold Buccleugh. This is dubious because Browne simply referred to a "lien" without any of the specific characteristics attributed to the concept of the "maritime lien".

¹²⁰ The Nestor 18 Fed Cas 9 (1831).

¹²¹ E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173, 200.

¹²² See also C W O'Hare 'Admiralty Jurisdiction' (1979) 6 Monash Univ LR 91ff & 195ff, 199, said that the concept had been "germinating" since "the 17th century". This may have been so, but the doubtful case of Hartfort v Jones 1 Ld Raym 393, cited by the author, does not seem to support his proposition. This was an early salvage case where, it may be mentioned, the "lien" contemplated was no different in principle from common law possessory liens. Cf the dubious views, discussed in Chapter 4, of O W Holmes Jr The Common Law (1882) 25-35, followed by E C Mayers Admiralty Law and Practice in Canada (1916) 21ff, who ascribed the origin of the damage lien to the ancient laws of deodand.

¹²³ See E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173, 194ff.

An analysis of the nature of the maritime lienholder's right is also beyond the scope of this dissertation. This is also a contentious subject¹²⁴. Nevertheless, notwithstanding the decision in The Halcyon Isle¹²⁵, the general consensus of opinion seems to be that this right is what a South African lawyer¹²⁶ would describe as "a real right"¹²⁷.

¹²⁴ See D R Thomas Maritime Liens (1980) §§27 & 28.

¹²⁵ The Halcyon Isle [1980] 2 Lloyd's LR 325. In The Khalij Sky 1986 (1) SA 485 (C) 490E, Munnik JP expressly declined to follow this decision.

¹²⁶ See Munnik JP's remarks in this regard in The Khalij Sky 1986 (1) SA 485 (C) 489C.

¹²⁷ It has been variously described as (a) "a ius in re aliena" by Gorell Barnes J in The Ripon City [1897] P 226, 242 and by Howard J in The Emerald Transporter 1985 (4) SA 133 (N) 142B. See also The Fidias 1986 (1) SA 714 (N) 715I-J. (b) "a ius in re" by Curtis J in The Young Mechanic 30 Fed Cas 873 (1855); and approved of by W N Hohfeld Fundamental Legal Conceptions (1923) 89; G Price 'Maritime Liens' 1941 LQR 409, 410; G H Longenecker 'Developments in the law of Maritime Liens' (1971) 45 Tulane LR 574, 575; but cf The Tobago (1804) 5 C Rob 218, 222, where Sir William Scott said it was a ius in rem and not a ius in re. (c) "a proprietary interest in the res" by J K Beach 'Relative Priority of Maritime Liens' (1923-24) 33 Yale LJ 841, P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 404ff, R E Burke 'Maritime Liens: an American view' [1978] LMCLQ 269. See also Lord Diplock's tentative remarks in this regard in The Halcyon Isle [1980] 2 Lloyd's LR 325, 329. (d) "a right in the res itself" by G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30, 39. See also Anon 'History of Admiralty Jurisdiction in the Supreme Court of the United States' (1871) 5 Am L Rev 581, 606. (e) "a nexus upon the ship ... a real right against the ship" by Lord Watson in The Sara (1889) 14 App Cas 209, 218. (f) "an hypothecation" giving a interest "in" the ship - Gorell Barnes J in The Veritas [1901] P 304, 314.

Although the maritime lien has not been statutorily defined¹²⁸, its characteristics are "reasonably well understood"¹²⁹.

* Sir John Jervis' classic definition of the maritime lien in The Bold Buccleugh is:

"... a maritime lien is well defined ... to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr Justice Story¹³⁰ explains that process to be a proceeding in rem, and adds, that whenever a lien or claim is given upon a thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem¹³¹, a process to make perfect a right inchoate¹³² from the moment the lien attaches; and

¹²⁸ Sheen J in The Father Thames [1979] 2 Lloyd's Rep 364, 368, remarked that this was not surprising as a maritime lien is "more easily recognised than defined."

¹²⁹ D R Thomas Maritime Liens (1980) para 12.

¹³⁰ The Nestor 18 Fed Cas 9 (1831).

¹³¹ It is suggested that this statement must be read in the context of the whole sentence in which Sir John Jervis expressed the view that the maritime lien and the action in rem were concomitant, see infra. It does not mean that "all actions in rem had their genesis in maritime liens": F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 157. See also Halsbury's Laws of England 4ed, Vol 1, §305, description of the origin of the action in rem which seems to assume that a maritime lien existed prior to the genesis of the action in rem. In fact, it seems that the Court proceeded "in rem" long before the concept of the maritime lien was articulated: see eg Brown v Wilkinson (1846) 15 M & W 391. Cf Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 653C-G, where Milne JP adopted Halsbury's statement as "the historical origins of the action in rem" to illustrate the distinction between actions in rem and those in personam.

¹³² This feature was well illustrated in In re Australian Direct Steam Navigation Co (1875) LR 20 Eq 325, an insolvency matter. See also Wells v The Gas Float Whitton No 2 [1897] AC 337.

whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process.¹³³ This claim or privilege travels with the thing, into whosoever possession it may come, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

X [The main distinction between the maritime lien and the statutory right of action in rem is that the former involves a substantive or real right in the res, whereas a statutory right of action in rem is essentially a procedural remedy.] Other features distinguishing a statutory right of action in rem from a maritime lien are: (a) the res owner's personal liability is a pre-requisite for the former to arise whereas this is not always the case as far as the latter is concerned¹³⁴; (b) the exact date of accrual of the former is uncertain¹³⁵, but it does not accrue from the moment of the circumstances giving rise to the latter - it accrues at a later date¹³⁶; (c) the former is defeated by a sale of the res to a bona fide purchaser for value, unlike the

¹³³ The concomitance of the maritime lien and the action in rem suggested in this passage will be dealt with infra.

¹³⁴ G Price 'Statutory Rights in rem in English Admiralty Law' (1945) J of Comp Leg (3rd Series) 21, 22.

¹³⁵ See D R Thomas Maritime Liens (1980) §§47ff.

¹³⁶ See for instance The Two Ellens (1872) LR 4 PC 161; The Pieve Superiore (1874) LR 5 PC 482; The Heinrich Björn (1885) 10 PD 44, 54; and The Cella (1888) 13 PD 82, 87.

latter¹³⁷; and (d) in ranking, the former is subject to other claims subsisting at the time of the institution of the action, unlike the latter¹³⁸.

* The object of a statutory right of action in rem is to enable a claimant to found jurisdiction and to provide the res as security for the claim¹³⁹. Furthermore and importantly, as mentioned supra, the personal liability of the res owner is a necessary pre-requisite for the availability of a statutory right of action in rem¹⁴⁰.

It follows that the Procedural Theory of the action in rem accords logically with the concept of statutory rights of actions in rem.

The question arises whether the employment of the action in rem

¹³⁷ See for instance The Heinrich Björn (1885) 10 PD 44, 54; The Pieve Superiore (1874) LR 5 PC 482; and The Aneriod (1877) 2 PD 189.

¹³⁸ The Cella (1888) 13 PD 82.

¹³⁹ The Pieve Superiore (1874) LR 5 PC 482, 491f. See also The Henrich Björn (1885) 10 PD 44, 51; The Cella (1888) 13 PD 82, 87; The Igor [1956] 2 Lloyd's Rep 271, 272; The Monica S [1968] P 741, 768; and G Price 'Statutory Rights in rem in English Admiralty Law' (1945) J of Comp Leg (3rd Series) 21, 25.

¹⁴⁰ D R Thomas Maritime Liens (1980) para 65. See also G Price 'Statutory Rights in rem in English Admiralty Law' (1945) J of Comp Leg (3rd Series) 21, 22. This is not so in the case of a maritime lien in respect of a bottomry or respondentia bond - see eg Stainbank v Shepard (1853) 13 CB 418; The Royal Arch (1857) Swab 269; Cargo ex Sultan (1859) Swab 504.

in this manner was justified?

Firstly, the concept of a statutory right of action in rem appears to be at variance with the decision of the Privy Council in The Bold Buccleugh¹⁴¹. Secondly, the 1840 and 1861 Acts do not appear to have created the concept of statutory rights of actions in rem, as Brandon J suggested in The Monica S¹⁴². These rights appear to have arisen as a result of the interpretation of these Acts by the Courts, prompted to a large extent by Dr Lushington's procedural view of the action in rem¹⁴³.

These criticisms are amplified as follows:

In The Bold Buccleugh Sir John Jervis said that the action in rem and the maritime lien were concomitant¹⁴⁴:

"A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

¹⁴¹ The Bold Buccleugh (1851) 7 Moo PC 267, 284.

¹⁴² The Monica S [1968] P 741, 749.

¹⁴³ See infra.

¹⁴⁴ In The Banco [1971] P 137, 150, Lord Denning MR uses the word "coterminous"; but this word does not accurately reflect the concept Sir John Jervis expressed. Cf The Beldis [1936] P 51, 70, where the more accurate word "coincidence" was used.

This passage, albeit obiter, expressed a concomitance between the maritime lien and the action in rem, which was approved by the United States Supreme Court in The Rock Island Bridge¹⁴⁵ and is still the position in that country today¹⁴⁶.

Accordingly, The Bold Buccleugh suggested that the action in rem is only employed to enforce a maritime lien - the corollary being that causes of action which do not give rise to maritime liens (which include statutory rights of actions in rem) cannot be enforced by the action in rem.

But this passage of The Bold Buccleugh relating to the concomitance of the action in rem and the maritime lien has been criticised as being incorrect¹⁴⁷ because (a) of the existence of statutory rights of actions in rem¹⁴⁸; and (b) it seems an action

¹⁴⁵ The Rock Island Bridge 73 US (6 Wall) 213 (1867). See also The Lottawanna 88 US (21 Wall) 558 (1874).

¹⁴⁶ See the remarks of Lord Diplock in The Halcyon Isle [1980] 2 Lloyd's LR 325, 328. See also R E Burke 'Maritime Liens: an American view' [1978] LMCLQ 269; and D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 426.

¹⁴⁷ Scott LJ in The Tolton [1946] P 137, 144, said the decision in The Bold Buccleugh in this regard was erroneous but did not give any reasons for this conclusion.

¹⁴⁸ See The Two Ellens (1872) LR 4 PC 161. The Banco [1971] P 137, 150; The Halcyon Isle [1980] 2 Lloyd's LR 325, 328. See also R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 370. C W O'Hare 'Admiralty Jurisdiction' (1979) 6 Monash Univ LR 91ff & 195ff, 199, who said in this context that the action in rem was no longer "synonymous" with the maritime lien. The concepts were never "synonymous". They were thought to be concomitant, which is what it seems the author intended to

in rem was available in the Admiralty Court prior to the 1840 Act in cases other than involving a lien where a claimant had "a right of property or other real interest in [the res]"¹⁴⁹.

The latter point of criticism is probably valid. As such, it seems that the point of concomitance in The Bold Buccleugh was misconceived¹⁵⁰. If this is so, it serves to highlight a defect in the approach of the United States Courts.

The former point of criticism prompts the question whether the 1840 and 1861 Acts were correctly interpreted to permit the creation of statutory rights of actions in rem?

In discussing the interpretation of these statutes, the following "rule" has been mentioned by Sir Boyd Merriman in The Beldis¹⁵¹:

"In my opinion the only safe rule is to assume that

convey.

¹⁴⁹ Per Lord Watson in The Henrich Björn (1886) 11 PD 270, 276f & 278. Counsel argued (at 275) that prior to the 1840 Act some proceedings in rem were independent of the maritime lien eg actions between co-owners, of possession and restraint. It seems that this proposition was accepted and that it was on this basis that the statement in The Bold Buccleugh as to the concomitance of the action in rem and the maritime lien was disapproved. See in particular, Lord FitzGerald at 286; and Lord Bramwell at 283. See further, A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2, 396f, who mentions causes of action other than those based on liens which proceedings in rem were said to have been applicable.

¹⁵⁰ See R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 370; cf G Price 'Maritime Liens' 1941 LQR 409, 415.

¹⁵¹ The Beldis [1936] P 51, 69.

Parliament intended that the jurisdiction and practice then existing, but as extended and improved by the specific enactments of the statute, should thenceforth be the jurisdiction and practice of the Admiralty Court."¹⁵²

As far as the practice of the Admiralty Court at that time was concerned, Lord Watson remarked in The Henrich Bjorn¹⁵³:

"The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattle in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right in property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises ... It may be that at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action in rem, except at the instance of the plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the Bar appear to me to bear out that proposition ..."

However, it will be recalled from the analysis supra of the cases dealing with the limitation of the res owner's liability, that Dr Lushington did not draw a distinction between the early practice of arrest employed by the Admiralty Court and the concept of the action in rem. He saw the object of the action in rem as similar, if not identical, to the early arrest procedure where the goods of the defendant were arrested for the sole purpose of

¹⁵² Cf Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A) 277D-H.

¹⁵³ The Henrich Björn (1886) 11 PD 270, 276f & 278.

coercing his appearance in the action and obtaining pre-judgment security. In other words, Dr Lushington saw the action in rem as a procedural device.

This approach was evident in the first case to consider the provisions of the 1840 Act¹⁵⁴. The question arose in The Alexander Larsen¹⁵⁵ whether the 1840 Act contemplated that the supply of necessaries to a ship gave rise to "a lien". Dr Lushington ruled that it did not. He is reported to have said¹⁵⁶:

"... the statute does not not create a lien upon the vessel at all; the debt has no foundation upon the statute. The effect of the statute is expressly declared in the sixth section in these terms, 'That the Court of the Admiralty shall have jurisdiction to decide all claims and demands whatever for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof.' The statute therefore simply confers on the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise in enforcing payment; it might be by arresting the person of the owner if he were resident here¹⁵⁷, or by arresting the property in case a necessity occurred."

This decision is significant in that Dr Lushington held although

¹⁵⁴ In argument in The Ella A Clark (1863) B&L 32, 34, Messrs Milward and Lushington said that The Alexander Larson (1841) 1 Wm Rob 288 was the first case that considered the provisions of the 1840 Act.

¹⁵⁵ The Alexander Larson (1841) 1 Wm Rob 288.

¹⁵⁶ The Alexander Larson (1841) 1 Wm Rob 288, 294.

¹⁵⁷ Cf his remarks in The Clara (1855) Swab 1, 3, where he is reported to have said that the arrest of the person "has for many years been obsolete". He thought the last time that this occurred was in 1780, but he was vague on this point.

the statute did not confer a lien for necessities, it nevertheless, conferred the right to make such a claim in the Admiralty Court which could be enforced by "arresting" the res; in other words, by proceeding in rem. This decision was probably the genesis of the concept of statutory rights of actions in rem. Dr Lushington equated the early practice employed by the Admiralty Court with the practice applicable at the time of his decision. Therefore, as far as the action in rem was concerned, he merely saw the concept in the light of the early "arrest" of the res.¹⁵⁸ It follows that, from the outset, statutory rights of actions in rem were regarded as procedural in nature.

In The Gustaf¹⁵⁹ he is reported to have said:

"... claims for necessities moreover do not possess, ab origine, a lien; but carry only a statutory remedy against the res, which is essentially different."

But in The Ella A Clerke¹⁶⁰ he seems to have been aware of the decision in The Bold Buccleugh. Since it was stated in The Bold Buccleugh that the action in rem and the maritime lien were

¹⁵⁸ Dr Lushington attempted to explain the passage from The Alexander Larson (1841) 1 Wm Rob 288, in The Ella A Clark (1863) B&L 32, 36, where he is reported to have said: "I intended to state that there might be a distinction between a provision for proceedings by arrest of the ship and the express creation of a lien, and to leave all such questions open." This explanation is difficult to understand; indeed, it is incomprehensible. No conclusions can safely be drawn from this explanation because it is quite probable that the report is defective.

¹⁵⁹ The Gustaf (1862) Lush 506, 508.

¹⁶⁰ The Ella A Clark (1863) B&L 32.

concomitant and since the 1861 Act permitted proceedings in rem, Dr Lushington seems to have thought in The Ella A Clerke that a claim for necessities would give rise to a maritime lien. This conclusion prompted the reporter to record in the headnote:

"Semble - Where the British Legislature has given the Court of Admiralty jurisdiction to proceed in rem for certain claims, such claims are to be treated as maritime liens."

But he dispelled any speculation of a departure from his original opinion when he confirmed in The Pacific¹⁶¹ that there was no lien for necessities in terms of the 1861 Act, "only a right to proceed against the ship".

The procedural nature of Dr Lushington's approach was summed up, with approval, in the opinion of the Privy Council given by Sir Montague E Smith in The Pieve Superiore¹⁶² who said:

"... the object of the statute is only to found a jurisdiction against the owner who is liable for the damage, and to give the security of the ship, the res, from the time of the arrest."

Thus, in cases other than those involving the enforcement of a maritime lien, namely, those involving so-called statutory rights of actions in rem, the action in rem became a kind of "hybrid

¹⁶¹ The Pacific (1864) B&L 243, 247. Reaffirmed in The Troubadour (1866) LR 1 A&E 302 and approved by the Privy Council in The Two Ellens (1872) LR 4 PC 161.

¹⁶² The Pieve Superiore (1874) LR 5 PC 482, 491f.

maritime security device"¹⁶³. This was based on the notion initiated by Dr Lushington that the action in rem was merely a modern version of the old arrest practice of the Admiralty Court. This idea persisted in later cases¹⁶⁴.

As suggested supra, the equation of the old arrest procedure of the Admiralty Court with the concept of the action in rem was misconceived. If this submission is correct, then the entire foundation of statutory rights of actions in rem is defective. The fundamental objection is the application of the action in rem in the enforcement of these rights. However, had Dr Lushington drawn a clear distinction between the action in rem and the early arrest procedure and held that the latter applied to the enforcement of those rights created by the 1840 and 1861 Acts, the conceptual difficulties relating to the action in rem¹⁶⁵ would probably have been averted. It is of interest to note that such a distinction appears to have been drawn in the United States

¹⁶³ D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 427.

¹⁶⁴ See eg The Two Ellens (1872) LR 4 PC 161; and also The Henrich Björn (1885) 10 PD 44, 54, where Fry LJ said in relation to statutory rights of actions in rem: "(the arrest) offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment." The Cella (1888) 13 PD 82, 86, where Lord Esher MR said: "... the moment that the arrest takes place, the ship is held by the court as a security for whatever may be adjudged by it to be due to the claimant." And The Zafiro [1960] P 1, 13, Hewson J said: "As I see it, The Cella ... is still good law, that arrest in such cases (ie claims for necessities) creates a statutory lien, making the holder a secured creditor."

¹⁶⁵ Discussed infra.

where a procedure resembling the early arrest procedure of the Admiralty Court is called "maritime" or "admiralty" attachment¹⁶⁶. It is suggested that such a distinction is probably well founded.

8. CONCLUSION:

The Procedural Theory rests on an historical misconception of the nature of the action in rem. In this Chapter an attempt has been made to illustrate that the roots of the procedural view of the action in rem can be traced to an approach by the Admiralty Court which existed since the Court's revival, although the view was formally articulated in The Dictator.

It was suggested that the primary error in Dr Lushington's approach in particular, followed almost consistently in English Admiralty jurisprudence ever since, was his failure to distinguish between the concept of the action in rem and the early arrest procedure of the Admiralty Court. The difficulties which have arisen because of the procedural approach to the action in rem, will be discussed in the following chapter.

¹⁶⁶ See F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 165; and W Tetley 'Attachment, the Mareva injunction and saisie conservatoire' [1985] 1 LMCLQ 58, 71ff, who refers to the early arrest procedure of the Admiralty Court as "Admiralty Attachment" and suggests that this procedure may be dormant in English Admiralty law and its derivatives.

CHAPTER 6

WEAKNESSES OF THE PROCEDURAL THEORY

1. INTRODUCTION:

According to the Procedural Theory, the action in rem is seen as a procedural device to coerce the res owner to appear in the action and to provide pre-judgment security for the claim advanced. As indicated in Chapter 5 supra this view of the action in rem is apposite in relation to the so-called statutory rights of actions in rem.

But the action in rem is not confined to these rights. It is also employed to enforce maritime liens and, in accordance with the inherent jurisdiction of the Admiralty Court, other real rights in the res as well. It is with regard to these matters that the Procedural Theory has encountered jurisprudential difficulties. These difficulties include:

2. RIGHTS IN REM WHICH ACCRUE INDEPENDENTLY OF THE RES OWNER'S PERSONAL LIABILITY:

If the res owner's personal liability was a necessary prerequisite for the accrual of all rights in rem, the procedural analysis of the action in rem as a means to enforce those rights would be theoretically acceptable. Although the res owner's personal liability is a pre-requisite as far as all statutory

rights of actions in rem are concerned¹, it is not the case in respect of the enforcement of all maritime liens².

Bottomry and Respondentia bonds give rise to a maritime lien on the res. By their nature they are independent of the liability of the res owner who is never personally responsible.³

It may be that these bonds are not resorted to in modern times due to technological advances made particularly in the field of electronic communications⁴, but this does not allow them to be discounted in any jurisprudential analysis of the action in rem or the maritime lien.

¹ See Chapter 5.

² There are cases that seem to indicate that the res owner's liability is a necessary prerequisite for a maritime lien to arise: see eg The Castlegate [1893] AC 38, 52. But, as Gorell Barnes J attempted to explain in The Ripon City [1897] P 226, 242, "... I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the res are personally liable in respect of the claim." These statements related to the specific maritime liens concerned and were probably not intended as general statements of law: see D R Thomas Maritime Liens (1980) §14; and H Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350, 354.

³ G Price 'Maritime Liens' 1941 LQR 409, 412.

⁴ According to Lord Merrivale in The St George [1926] P 217, 229, bottomry bonds were "uncommon" at the time ie 1926; the continued existence of bottomry bonds was suggested in The Conet [1965] 1 Lloyd's Rep 195. See generally D R Thomas Maritime Liens (1980) §371f. But cf Halsbury's Laws of England 4ed, Vol 1, §345, records: "Today they are obsolete in practice."

Thomas⁵ wrote that the Procedural Theory has:

" ... had a profound influence on the development of the law. Nonetheless the thesis has its limitations and would appear to be inapplicable to rights in rem which accrue under maritime liens which arise independently of the personal liability on the part of the res owner."

This "limitation" of the Procedural Theory is one illustration of its failure to satisfactorily explain the concept of the action in rem.

Furthermore, it is a well known feature of the maritime lien that it travels with the res until it is extinguished by payment of the claim or otherwise⁶, or pursuant to proceedings in rem it is replaced by bail or judicially sold⁷. Thus, it is conceivable that an action in rem may be brought to enforce a maritime lien where the res has been sold to a bone fide purchaser without notice of the maritime lien⁸. Accordingly, in this situation, there is clearly no liability on the part of the res owner and,

⁵ D R Thomas Maritime Liens (1980) §64.

⁶ See D R Thomas Maritime Liens (1980) Chapter 11.

⁷ See inter alia The Bold Buccleugh (1851) 7 Moo PC 267, 284f; The Two Ellens (1872) LR 4 PC 161, 169; The Parlement Belge (1880) 5 PD 197, 218; The Ripon City [1897] P 226, 241; The Sara (1889) 14 App Cas 209, 225; The Colorado [1923] P 102, 110; The Acrux [1965] P 391, 404; and The Father Thames [1979] 2 Lloyd's Rep 364, 368.

⁸ Gorell Barnes J explained the policy behind this rule as follows in The Ripon City [1897] P 226, 246: " ... although it may be hard on an innocent purchaser, if it did not exist a person who was the owner at the time the lien attached could defeat the lien by transfer if he pleased."

as such, it is at variance with the Procedural Theory⁹. This troubled Atkin LJ in The Tervaete¹⁰, a collision case, who said:

"On the explanation of the origin of the maritime lien given by Jeune J in The Dictator, one may perhaps be allowed to wonder how such a right avowedly dependent upon the personal liability of the owner could be held to be enforceable against the new owner not in any way personally responsible for the collision."

He unsatisfactorily resolved this problem, not by reassessing the principle involved, but by resorting to the longevity thereof -

"It is too late to raise doubt as to this point after the decision of The Bold Buccleugh."

3. THE ARREST OF ANY PROPERTY BELONGING TO THE DEFENDANT:

One of the "essential corollaries"¹¹ of the Procedural Theory is that any property of the defendant should be capable of being arrested. This was the position under the old arrest procedure of the Admiralty Court¹². Accordingly, if this old procedure and the action in rem were similar, if not identical, in their objectives, then it should have followed logically that any property of the defendant could be arrested in an action in

⁹ See G Price The Law of Maritime Liens (1940) 16; and G Price 'Maritime Liens' 1941 LQR 409, 413.

¹⁰ The Tervaete [1922] P 259, 275.

¹¹ F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970) 169.

¹² See the description of this practice by F Clerke Praxis Supremae Curiae Admiralitatis tr Rowghton (1829 ed) and The Selden Society Select Pleas in the Court of Admiralty Vol 1 (Ed R G Marsden) (1894) lxxi-lxxii, discussed in Chapter 4 supra.

rem.¹³

Fry LJ in The Heinrich Bjorn¹⁴ said obiter that an action in rem to enforce a statutory right of action in rem may be brought against any property of the defendant.

The issue finally arose for decision in The Beldis¹⁵. In this case, Sir Boyd Merriman drew a distinction between the early procedure of the Admiralty Court and the action in rem. As such he was able to dispose of Fry LJ's obiter by saying that it was "an accurate statement of the practice of the old Admiralty Court in former days."¹⁶ He approved of the theory proposed by Roscoe¹⁷ that the action in rem originated as a result of the conflict between the Courts where the civilians who practised in the Admiralty Court looked to the civil law to devise a method of retaining some form of jurisdiction in the face of the onslaught of prohibitions from the Courts of Common law¹⁸. For various reasons, all of which essentially related to the accepted

¹³ Anon 'Personification of Vessels' (1964) 77 Harvard LR 1122, 1123.

¹⁴ The Heinrich Bjorn [1885] 10 PD 44, 54.

¹⁵ The Beldis [1936] P 51.

¹⁶ At 66.

¹⁷ E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903) 40ff. See also T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 312.

¹⁸ See generally Chapters 3 & 4 supra.

practice of the Admiralty Court during the 19th century that an action in rem was directed against the res connected with the cause of action, Sir Boyd Merriman P was of the opinion that this practice should not be altered, because if it was altered he feared that:

"... the innovation would be disastrous to the prestige of the Court."¹⁹

The decisions establishing the Procedural Theory, and in particular the principle that where a res owner appears in an action in rem his liability is not limited to the value of the res, namely: The Dictator²⁰ The Gemma²¹ The Dupleix²² and The Joannis Vatis No 2²³, were referred to with approval by Sir Boyd Merriman.²⁴ Thus, although the origin of the action in rem proposed by Roscoe was approved of and a distinction was drawn between the early practice and the action in rem²⁵, The Beldis nevertheless

¹⁹ At 76. This illustration of precedent reverence prompts the recollection of the words by an eminent Australian judge, Issacs J, who said in Australian Agricultural Co v Federated Engine-Driver's and Firemen's Association of Australasia (1913) 17 CLR 261, 278: "it is not ... better that the court should persistently be wrong than it should be ultimately right."

²⁰ The Dictator [1892] P 304.

²¹ The Gemma [1899] P 285.

²² The Dupleix [1912] P 8.

²³ The Joannis Vatis (No.2) [1922] P 213.

²⁴ At 75f.

²⁵ In this regard, G Price The Law of Maritime Liens (1940) 15, wrote: "[The Beldis] goes a long way to exploding the belief that in England the action in rem to enforce a maritime

endorsed the Procedural Theory without re-examining the basis on which the decisions establishing the Theory were based. The opportunity to place the action in rem on a sound theoretical basis in England was unfortunately eschewed. The slavish adherence to precedent in this case was an unsatisfactory reason not to reassess the law. As a consequence, the Procedural Theory has persisted in England²⁶, although Brandon J once hinted, in The Conoco Britannia²⁷, of a possible future reconsideration of the principles relating to the res owner's liability.

4. THE BOLD BUCCLEUGH:

The Procedural Theory is at variance with the decision of the Privy Council in The Bold Buccleugh²⁸ where the argument that the action in rem was procedural in its aims and analogous to foreign attachment²⁹ was rejected by Sir John Jervis.

5. THE REASONS FOR THE PROCEDURAL VIEW THAT THE RES OWNER'S LIABILITY IS NOT LIMITED TO THE VALUE OF THE RES IN THE

lien is analogous to a foreign attachment."

²⁶ See The Banco [1971] P 137; The Halcyon Isle [1980] 2 Lloyd's LR 325; and The August 8th [1983] 1 Lloyd's Rep 351.

²⁷ The Conoco Britannia [1972] 2 QB 543, 555.

²⁸ The Bold Buccleugh (1851) 7 Moo PC 267.

²⁹ The Johann Friederich (1839) 1 Wm Rob 36, where Dr Lushington drew this analogy was disapproved by Sir John Jervis. See Chapter 6 supra.

EVENT OF AN APPEARANCE BY THE RES OWNER:

The historical validity of the approach taken by the Procedural Theory is open to serious doubt. This was fully discussed in Chapter 5 supra.

However, there is another reason underlying this approach. This is a "sense of justice", as it was called by Sir Samuel Evans P in The Dupleix³⁰. Sir Francis Jeune said in The Dictator³¹:

"... if the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the Court by personal notice."

This sentiment was amplified by Sir Samuel Evans in The Dupleix³², who said, in the context of a claim for collision damages:

"... a sense of justice demands that persons should be liable to the full extent of the damage caused by them or their servants, and that no technicality should protect them from such a liability, or should prevent persons injured from obtaining judgment for the whole of their loss and from recovering it so far as possible by due process of execution."

There can be little objection to the general principle contained in this approach; but the method employed to achieve it is objectionable. Because the action in rem was misconceived, it was perceived as a mere "technicality" standing in the way of

³⁰ The Dupleix [1912] P 8, 15.

³¹ The Dictator [1891-4] All ER Rep 360, 368E.

³² The Dupleix [1912] P 8, 15.

achieving justice³³.

In England, subject to any statutory limitation of liability, a claimant had the option of proceeding in a subsequent action in personam, if an action in rem did not satisfy the full amount of the claim³⁴. It is understandable that "the sense of justice" mentioned supra incorporated the desire to avoid the circuitry of actions³⁵; but there is no reason that "justice" would not have been achieved if:

(a) the concept of the action in rem was understood, as proposed in this dissertation, as a procedure to enforce a real right in the res; and

(b) the incorporation of both proceedings in rem and in personam in a single Admiralty action, without the identity of each being obscured thereby, was permitted and incorporated in the Rules³⁶.

However, because of the procedural view of the action in rem,

³³ Cf E S Roscoe Studies in the History of the Admiralty and Prize Courts (1932) 6.

³⁴ See The Clara (1855) Swab 1, 3; The Orient (1871) LR 3 PC 696, 702; The Joannis Vatis (No.2) [1922] P 213, 222. As discussed in Chapter 4 supra the objection to "engrafting" an action in personam on to an action in rem was based, not on the nature of the action in rem, but on the content of the forms used by the Court: Nelson v Couch (1863) 33 LJ (CP) 46,48.

³⁵ See Sir Francis Jeune's remarks in this regard in The Dictator [1891-4] All ER Rep 360, 369G-H.

³⁶ As has been done in South Africa in terms of Rule 20(5) read with Forms 1 & 2 of the First Schedule: R2415 in GG10522 of 21st November 1986.

promoted as it was by Dr Lushington ab origine³⁷, the concept was misconceived and eventually relegated to a mere "technicality"³⁸ obstructing the course of "justice".

6. CONCLUSION:

In the premises, explanation of the action in rem tendered by the Procedural Theory is not free of difficulty. Apart from its doubtful historical validity, there are several jurisprudential difficulties, mentioned supra, that have not been satisfactorily dealt with.

Accordingly, it is suggested that the approach in English Admiralty law to the nature of the action in rem should be treated with caution.

The approach of the United States courts to the nature of the action in rem will be considered in the following chapter.

³⁷ See Chapter 6 supra.

³⁸ In The Dupleix supra.

CHAPTER 7

THE APPROACH OF THE UNITED STATES COURTS

1. INTRODUCTION:

According to the Admiralty law of the United States, the res is the limit of the res owner's liability, whether he enters an appearance to defend the action or not.

This is the result of a different conception of the nature of the action in rem by the United States Courts to that of the English Courts.

In the 19th and early 20th centuries, the principle that the value of the res was the limit of liability in an action in rem followed from an approach by the United States courts known as the Personification Theory¹. According to this theory the res was endowed with a juristic personality independent of that of the res owner². As a result of this fiction, the res owner's personal liability was irrelevant and thus the claim could not exceed the value of the res. This theory will be examined infra.

¹ This theory has been referred to as "The Historical Theory": see P. M. Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 382. But as pointed out supra, the Historical Theory is ascribed to Holmes and Meyers. Holmes attempted, unconvincingly it was suggested supra, to explain the historical validity of the the Personification Theory, particularly in relation to the damage maritime lien. See also G. Price The Law of Maritime Liens (1940) 6ff, who confuses these theories.

² D. M. Collins 'Comments on the American Rule of in rem Liability' (1985) 10 The Maritime Lawyer 71, 72.

The Personification Theory, based as it is on a fiction of the res' juristic personality, has not escaped criticism.³ However, there is another concept of the action in rem which appears to have originated in conjunction with the Personification Theory during the 19th century. This approach explains the nature of the action in rem in the context of the nature of the right it is employed to enforce - the maritime lien. It will be recalled from Chapter 5 that Sir John Jervis' observation in The Bold Buccleugh⁴ as to the concomitance of the action in rem and the maritime lien was accepted in the United States⁵ and is still the position in that country today, although as pointed out in Chapter 6 this observation was not accurate⁶. As a consequence, in the United States, an action in rem is only brought to enforce a maritime lien. It follows that there are no "sister" or "associated" ship statutory provisions or "statutory rights of actions in rem" in United States Admiralty law.⁷ The maritime lien is seen as a substantive or real right in the res and the

³ See infra.

⁴ The Bold Buccleugh (1851) 7 Moo PC 267, 284f.

⁵ The Rock Island Bridge 73 US (6 Wall) 213 (1867).

⁶ Not because of the existence of statutory rights of actions in rem; but because it appears the Admiralty Court had inherent jurisdiction to allow the enforcement of real rights, other than maritime liens, by the action in rem: see Chapter 7 infra.

⁷ D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 425f.

purpose of the action in rem is to enforce the maritime lienholder's substantive or real right. Consequently, in an action in rem, the res owner's liability is limited to the value of the res and he cannot be held personally liable unless he has been joined in the action⁸. In order to distinguish this approach from the traditional Personification Theory, for want of a better description, it is referred to in this dissertation as "The Substantive Theory"⁹. This theory will also be examined infra.

2. THE PERSONIFICATION THEORY:

Thomas described the Personification Theory as follows¹⁰:

"Under this theory a ship is personified and regarded as a distinct juristic entity with a capacity to contract and commit torts ... The ship is both the source and limit of liability ... The personification theory has had its greatest impact on the development of the Admiralty law of the United States although even in that body of jurisprudence the contemporary force of the theory may be of diminishing magnitude."

It seems that the Personification Theory originated in the interpretation by the American courts of certain early 19th century statutes which dealt with inter alia matters of embargo¹¹, revenue¹² and suppression of piracy¹³. These statutes

⁸ Industria Nacional de Papel CA v M/V Albert F 730 F2d 622 (11th Cir 1984).

⁹ Cf D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 426ff.

¹⁰ D R Thomas Maritime Liens (1980) §8.

¹¹ The Little Charles 26 Fed Cas 979 (CCD Virginia 1818).

provided for the forfeiture of the vessel involved as a penalty for a contravention of their provisions¹⁴.

The first case in this regard probably was The Little Charles¹⁵. This case involved the alleged contravention of certain embargo statutes. Addressing the argument that certain incriminating evidence by the master could not affect the owner of the ship, Marshall Cir J said¹⁶:

" ... this is not a proceeding¹⁷ against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves,

¹² See Story J's analogous reference in this regard in The Palmyra 12 Wheat 1 (1827) 14.

¹³ The Palmyra 12 Wheat 1 (1827); The Malek Adhel 2 How 210 (1844) 233f.

¹⁴ Anon 'Personification of Vessels' (1964) 77 Harvard LR 1122, 1124f, pointed out that the personification of vessels in American law first arose in respect of "forfeiture cases" where an explanation was needed where the owner was not liable in personam but nevertheless the ship was required to be held in terms of relevant legislation. The author referred to the courts' assertion that proceeding against the ship was established admiralty practice and that the vessel could be regarded as the guilty party: see text supra. But he says that the notion of the ship as the "guilty party" would seem no more than a metaphoric expression "expressing the initial interpretation of statutory policy". See also D B Toy "Introduction to the Law of Maritime Liens" 1973 Tulane LR 559, 561.

¹⁵ The Little Charles 26 Fed Cas 979 (CCD Virginia 1818).

¹⁶ At 982.

¹⁷ The word "prosecution" was used immediately prior to this statement: supra 982.

violate the law. But this body is animated and put into action by the crew, who are guided by the master. The vessel acts and speaks by the master. It is, therefore, not unreasonable that the vessel should be affected by ... (the incriminating evidence by the master)."

It should be emphasised that the "personification" of the ship in this passage arose from the express wording of the relevant statutes, and not from any principle of maritime law, ancient or modern. Indeed, as Marshall Cir J pointed out¹⁸, if the offence was proved, the supplemental statute:

" ... expressly annexes the penalty of forfeiture to any ship or vessel¹⁹ which shall violate either the original or the supplemental act."

The matter was clearly approached as a criminal case.

This approach was deviated from by Story J in The Palmyra²⁰. This case involved an appeal to the Supreme Court in a matter where the vessel had been seized and forfeited in terms of a statute passed to suppress piracy. It was suggested in argument that a conviction in personam of those involved was a necessary precondition to the libel. Story J disagreed. He distinguished seizures and forfeitures created by statute from common law forfeitures for felonies. In respect of the latter, Story J said

¹⁸ At 981.

¹⁹ Emphasis added. The penalty does not refer to the owner, although it obviously affects him indirectly; it attaches to his ship, irrespective of his innocence or guilt.

²⁰ The Palmyra 12 Wheat 1 (1827)

that the forfeiture "did not, strictly speaking, attach in rem" and the offender was not divested of his right in the forfeited res until conviction. But, he said²¹:

"... this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing here is primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be malum prohibitum or malum in se."

He added:

"The same principle applies to proceedings in rem, on seizures in the admiralty ... the practice has been, and so this court understand the law to be, that proceedings in rem stand independent of, and wholly unaffected by any criminal proceedings in personam."

Consequently, the suggestion supra was dismissed.

Throughout, the proceedings were referred to as "proceedings in rem". Primarily, it seems, because they were ostensibly directed at the vessel²²; but also because of a secondary reason which probably influenced the development of the Personification Theory. In the latter regard, Story J said²³:

"... seizure in the admiralty for forfeitures ... are deemed to be civil proceedings in rem."

Prima facie, this is an extraordinary statement. With respect, this judicial presumption that these plainly criminal matters are

²¹ At 14.

²² See quotation supra: "The thing here is primarily considered as the offender ..."

²³ At 12-3.

"deemed" to be civil proceedings in rem, has no logical foundation. It is also inconsistent with the decision in The Little Charles²⁴ and with Story J's own words where he said:

"In general, it may be said, that it is sufficient in libels in rem for forfeitures, to allege the offence in terms of the statute creating the forfeitures."²⁵

In defence, it may be suggested that, in context, Story J possibly did not intend to transform matters of this nature from criminal to civil proceedings by judicial fiction. The relevant issue was whether the libel adequately described the offence. Possibly Story J merely intended the statement supra to emphasise the distinction between (a) the strict rules of the common law which prescribe accurate wording of libels in criminal cases and (b) the less stringent rules applicable in admiralty criminal forfeiture cases, which were akin to civil proceedings in rem, but were not civil proceedings in rem per se, as the statement implies. But this defence was neutralized by Story J's later statement which, although incorrect²⁶, draws attention to the distinction in his mind between civil and criminal matters relating to this issue and underlines his earlier statement that seizure and forfeiture matters in admiralty are civil proceedings

²⁴ The Little Charles 26 Fed Cas 979 (CCD Virginia 1818).

²⁵ Emphasis added. "An offence" implies criminal and not civil proceedings.

²⁶ In England, the Admiralty Court exercised criminal, as well as civil, jurisdiction: see A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2, 457ff; and The Piracy Act, 1850 (13 & 14 Vic c 26) section II which confers jurisdiction on the Admiralty Court in matters relating to piracy.

in rem. He said²⁷, in emphasising that the proceedings before the court were civil proceedings:

"Both in England and America, the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction."

Apart from distorting the words of the statute, there are logical difficulties of transforming criminal proceedings into civil proceedings by judicial presumption. Furthermore, assuming it could be justified that seizure and forfeiture matters were indeed civil proceedings in rem, conceptual problems would arise. For instance: what is the nature of the right created by the relevant statute? Is it a ius in re, as proceedings in rem imply according to the decision in The Young Mechanic²⁸? In whom does the right vest and when does it arise? These questions were not addressed by Story J.

With respect, it seems that the presumption that these matters are civil proceedings in rem is a distortion that cannot reasonably be sustained.

Nevertheless, Story J had occasion in The Malek Adhel²⁹ to expand on what he had said in The Palmyra. The Malek Adhel also involved the contravention of a statute passed to suppress piracy. However, it is important to note that in this case,

²⁷ At 15.

²⁸ The Young Mechanic 30 Fed Cas (CCD Maine 1855).

²⁹ The Malek Adhel 2 How 210 (1844) 233-5.

Story J appears to have reconsidered his approach in The Palmyra and seems to have treated The Malek Adhel as a criminal matter. His language indicates a clear distinction between criminal and civil matters. The latter were referred to only by way of analogy³⁰. The penalty³¹ for contravention of this statute was the confiscation of the vessel involved³². As far as the owner's guilt or innocence was concerned, Story J said³³:

"... the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."

Up to this point in the opinion, the "personification" of the

³⁰ See infra.

³¹ Story J's word: see eg 237 - "... the act of Congress, pointing out as it does, in this very case, a limitation of the penalty of confiscation to the vessel alone, satisfies our minds that that the public policy of our government in cases of this nature is not intended to embrace the cargo. It is satisfied by attaching the penalty to the offending vessel..." (Emphasis added).

³² The statute provided: "That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use and that of the captors, after due process and trial in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion." Furthermore, "... any person who shall on the high seas commit the crime of piracy as defined by the law of nations, shall, upon conviction thereof, be punished with death": The Malek Adhel supra 231.

³³ At 223.

ship, like in The Little Charles³⁴, was grounded solely on the interpretation of the relevant statute.

But then Story J proceeded to elaborate on what he had said, probably to justify saying that there was nothing:

"... new in a provision of this sort ... (which) does nothing more ... than ... affirm and enforce the general principles of the maritime law and the law of nations."³⁵

In doing so, he introduced obiter, by express analogy, civil matters involving delictual wrongs by the master and crew. He said³⁶:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party ...³⁷...The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as a means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

³⁴ The Little Charles 26 Fed Cas 979 (CCD Virginia 1818).

³⁵ At 233 & 235.

³⁶ At 233-6.

³⁷ He then proceeded to discuss analogous criminal statutes and The Little Charles supra and The Palmyra supra.

It is important to observe that no authority was cited by Story J to substantiate the references in this statement to "the general maritime law" and "the law of nations". This is in marked contrast to his decision in The Nestor³⁸, where he attempted to fully substantiate his exposition of the nature of the maritime lien.

While his approach in the statement quoted supra can possibly be excused on the ground that it was only an obiter it is debatable whether his references to the general maritime law and the law of nations can be substantiated. An attempt was made by Holmes³⁹ to justify its historical validity. But as discussed supra⁴⁰, Holmes' theory is unsatisfactory.

Nevertheless, this statement, substantiated or not, and possibly to a lesser extent the decision in The Palmyra⁴¹, probably influenced subsequent United States civil cases relating to maritime liens which dealt with the res owner's liability in matters relating to collisions. It is possible that Story J's opinions in these cases provided the inspiration for the subsequent development of "the personification theory" in the later cases.

³⁸ The Nestor 18 Fed Cas 9 (CCD Maine 1831).

³⁹ O W Holmes Jr The Common Law (1882) 25-34.

⁴⁰ Chapter 4 supra.

⁴¹ The Palmyra 12 Wheat 1 (1827).

The concept of the "personification" of the vessel was advanced by Swayne J as follows in The China⁴², not by analogy on this occasion, but by direct reference to the issue before the court:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors."

Swayne J isolated the origin of the personification theory to "the commercial usages and jurisprudence of the middle ages". No authority was cited to substantiate this view.

In 1897 Grey J in The John G Stevens⁴³ reviewed the cases discussed supra as authority for this statement:

"The foundation of the rule that collision gives to the party injured a ius in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for damages."

Although The Young Mechanic⁴⁴ was not expressly mentioned, this

⁴² The China 72 US (7 Wall) 53.

⁴³ The John G Stevens 170 US 113 (1898)

⁴⁴ The Young Mechanic 30 Fed Cas (CCD Maine 1855); and see the discussion in Chapter 5 supra concerning the nature of the maritime lienholder's right.

statement endorses the decision in that case that a maritime lien's right is a ius in re. Furthermore, it implies that the maritime lien for damages arising from a collision, has its origin in the personification of a ship.

Bearing in mind the origin of the Personification Theory, and the dubiousness of Holmes' explanation, it is questionable whether Grey J's explanation of the origin of the damage maritime lien was correct.⁴⁵

The examination supra of the cases reveals that the several vague references to "the law of nations", "the general maritime law" and "the commercial usages and jurisprudence of the middle ages", but no satisfactory explanation of the origin in these sources has been proffered.

It is probable that the Personification Theory is no more than a 19th Century legal fiction which reached its zenith in Tucker v Alexandroff⁴⁶ where Brown J said:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron - an ordinary piece of personal property - as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water

⁴⁵ As mentioned in Chapter 5, it is beyond the scope of this dissertation to examine the origin of the maritime lien.

⁴⁶ Tucker v Alexandroff 183 US 424 (1901) 438.

she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents ... She is capable, too, of committing a tort, and is responsible in damages therefore. She may also become a quasi-bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale."

It seems to be currently accepted that the theory is no more than a legal fiction. As Thomas said supra⁴⁷:

"... the contemporary force of the theory may be of diminishing magnitude."

Holmes⁴⁸ was under no illusion that the personification of a ship was a legal fiction when he said it amounted to "metaphysical confusion". But he suggested, unconvincingly⁴⁹, that the fiction which ascribed by personification a legal personality to a ship could be explained and justified on historical grounds. In The Eugene F Moran⁵⁰, Holmes J clearly said that the personification theory was a fiction and that:

"... after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended."

⁴⁷ D R Thomas Maritime Liens (1980) §8.

⁴⁸ O W Holmes Jr The Common Law (1882) 33.

⁴⁹ See Chapter 4.

⁵⁰ The Eugene F Moran 212 US 466 (1912) 474.

And in The Western Maid⁵¹ he ruled that the fiction was inapplicable to public vessels.

In 1960, Learned Hand J in Latus v United States⁵² endorsed what Holmes J said supra in The Eugene F Moran.

American commentators seem to concur that the Personification Theory is a 19th Century legal fiction. Benedict⁵³ said it was:

"... a fiction ... rather in the mode of expression than in the substance of the law."

And Gilmore and Black⁵⁴ remarked:

"... the fiction of a ship's personality has never been much more than a literary theme⁵⁵ ... (W)hen a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is to be welcomed."⁵⁶

⁵¹ The Western Maid 257 US 419 (1921) 433; but see also the dissenting opinion of McKenna J which echoed the full vigour of the Personification Theory: 434.

⁵² Latus v United States 277 F 2d 264 (2d Circuit 1960) 267.

⁵³ G Gilmore and C Black The Law of Admiralty 2 ed (1975).

⁵⁴ G Gilmore & C Black The Law of Admiralty 2ed (1975) 616.

⁵⁵ See Anon 'Personification of Vessels' (1964) 77 Harvard LR 1123, 1125 who says: "... the notion of a "guilty" ship would seem no more than a metaphorical conclusion." See the same conclusion by Scott LJ in The Tolton [1946] P 137, 140; Lord Diplock in The Eshersheim [1976] 2 Lloyd's Rep 1, 8; and R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 369.

⁵⁶ See also G H Longenecker 'Developments in the law of Maritime Liens' (1971) 45 Tulane LR 574, 576; and D M Collins 'Comments on the American Rule of in rem Liability' (1985) 10 The Maritime Lawyer 71, 90.

However, the Supreme Court has not addressed this issue in modern times⁵⁷ and that Court's prior decisions still stand. But if and when it does reconsider the matter, it is probable that the theoretical validity of the Theory will be questioned and it seems doubtful that the Theory will survive.

If the Personification Theory is regarded as an unsatisfactory legal fiction, which it appears to be from the analysis supra, it follows that this theory's concept of the action in rem as a proceeding directed against the res because the res is personified as a juristic person with legal personality is open to question and is accordingly unsatisfactory.⁵⁸

3. THE SUBSTANTIVE THEORY:

As mentioned supra, the United States Supreme Court has not reassessed its traditional position regarding the Personification Theory in modern times, but it is suggested that when it does do so, the Substantive Theory will receive serious consideration.

The Substantive Theory contemplates that:

- (a) the maritime lien is a real or "substantive" right

⁵⁷ R E Burke 'Maritime Liens: an American view' [1978] LMCLQ 269. At the time of writing this dissertation, no reported Supreme Court decision on the issue subsequent to the date of this article could be found.

⁵⁸ Cf D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45, 51: "All the action in rem, as the name implies, is designed to achieve is to cloak a vessel with legal personality ... "

in the res; and

(b) the action in rem is a proceeding brought only to enforce that real or "substantive" right.

Writing at the turn of the 19th Century, Browne⁵⁹ said:

" This remedy in rem against the ship or goods is founded on the practice of the civil law, which gives an actio in rem to recover or obtain the thing itself, the specific possession of it ... the admiralty jurisdiction gives this remedy in rem to a person having only an hypothecatory right, as in the case of seamen's wages."

It is probable that the "remedy in rem" given by "the Admiralty jurisdiction" was, as Roscoe and Ryan pointed out⁶⁰, the civilian solution to the Admiralty Court retaining some measure of jurisdiction in the face of the writs of prohibitions, emanating from the Courts of Common law, which severely curtailed the Court's jurisdiction.

The quotation from Browne's work supra indicates that at the turn of the 19th century, and presumably prior thereto⁶¹, the action in rem was only brought where a claimant had "an hypothecatory right".

⁵⁹ A Browne A Compendious View of the Civil Law and of the Law of the Admiralty Vol 2 (1802) 99.

⁶⁰ See Chapter 4.

⁶¹ See the remarks in Menetone v Gibbons and Another (1789) 3 TR 267, 269f, where proceedings "in rem" are mentioned eo nomine.

But what was the nature of this right as understood by the civilians?

This issue was not addressed in England on the revival of the Admiralty Court during the early 19th century and it appears, from the analysis in Chapter 5, that Dr Lushington in particular, was content with a procedural view of the action in rem based on the early arrest practice of the Admiralty Court.

After Independence, the admiralty and maritime jurisdiction was vested in the United States Courts⁶² and these Courts were not bound by English Admiralty law⁶³. They were thus in a position which was free of the restrictions that had inhibited the English Admiralty Court.

On this basis, the "hypothecary right" as understood by the civilians who practiced in the English Admiralty Court during its period of decline and referred to by Browne supra, was articulated by certain 19th Century American judges in relation to the concept of the maritime lien.

⁶² US Constitution art III, para 2; read with 1 Stat 73 (1789) and the Act of Congress c 20 para 9 (24 Sept 1789).

⁶³ De Lovio v Boit 7 Fed Cas 418 (CCD Mass 1815) 441ff.

The foundation of this analysis was probably laid in 1815 by Story J in De Lovino v Boit⁶⁴, when he sketched the historical aspects of the Admiralty Court's jurisdiction and placed the then current position of the United States Courts in perspective.⁶⁵

In 1831, Story J articulated the concept of the maritime lien in The Nestor⁶⁶. It is clear that this decision⁶⁷ formed the conceptual basis for the definition of the maritime lien given by the Privy Council in The Bold Buccleugh⁶⁸. In delivering the opinion of the Judicial Committee, Sir John Jervis said:

"A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in the courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule in the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal

⁶⁴ De Lovio v Boit 7 Fed Cas 418 (CCD Mass 1815).

⁶⁵ See also Ramsay v Allegre 12 Wheat (6 US) 610 (1827).

⁶⁶ The Nestor 18 Fed Cas 9 (CCD Maine 1831).

⁶⁷ See also the judgement of Ware J in The Rebecca 20 Fed Cas 373 (DCD Maine 1831).

⁶⁸ The Bold Buccleugh (1851) 7 Moo PC 267. See Ryan *op cit* 200.

process; and Mr Justice Story⁶⁹ explains that process to be a proceeding in rem, and adds, that whenever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of a proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it is equally true, that in all cases⁷⁰ where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by proceedings in rem, relates back to the period when it first attached."

Sir John Jervis proceeded to explain the nature of the maritime lienor's right as making him "so to speak, a part owner in interest" in the res.⁷¹ In other words, it was held that a maritime lienor had a proprietary or real interest in the encumbered res which interest was enforced by the action in rem.

In 1855, the concept of a proprietary interest⁷² was elaborated

⁶⁹ The Nestor 18 Fed Cas 9 (CCD Maine 1831); see also The Rebecca 20 Fed Cas 373 (DCD Maine 1831) 374.

⁷⁰ See Chapter 6 supra for criticisms of this suggested concomitance of the action in rem and maritime liens.

⁷¹ The Bold Buccleugh (1851) 7 Moo PC 267, 285.

⁷² Both J Mansfield 'Maritime Lien' 1888 LQR 379, 381; and G Price The Law of Maritime Liens (1940) 5, have objected to the terminology "proprietary interest" because these words may suggest that the concept is synonymous with the rights of ownership, which it is not. In The Halcyon Isle [1980] 3 All ER 197 (PC) 201F-G, Lord Diplock expressed a similar objection in relation to Gorell Barnes J's statement in The Ripon City [1897]

upon by Curtis J in The Young Mechanic⁷³. He concluded that a maritime lienee's right was a ius in re which was enforceable by the action in rem - "a real action to enforce a real right".⁷⁴

P 226, 242, that a maritime lien "...is, so to speak, a subtraction from the absolute property of the owner in the thing." But, it is suggested that in its context, the distinction between a maritime lienee's right and rights of ownership is an abstract one and is obvious. Cf Lords Salmon and Scarman, The Halcyon Isle 214G, who had no difficulty with this terminology.

⁷³ The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855).

⁷⁴ The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855) 876. Cf P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381, 405f, who postulated two theories of the nature of the maritime lienee's right which he called "the hypothecatory theory" and "the proprietary theory". The latter "theory" is substantially set out in the text infra. Herbert said that the former theory is "usually ascribed to Mr Justice Curtis" and adds that this theory "assumes the nature of the lien holder's right is substantially the same as that of a creditor under the Roman law concerning hypothecs." Herbert proceeded to examine the ranking of successive hypothecations in Roman law - the ordinary rule was that liens ranked in order of their accrual unless a subsequent lien had the effect of preserving the res for all the lien holders, in which event that subsequent lien was preferred. Herbert suggested that this Roman law rule could not be applied to "tort liens" or "damage maritime liens", as they are referred to in English Admiralty law, because "no tort benefits a vessel or preserves a fund for lien holders...yet subsequent collision claims were ranked highest in the order of priority". Herbert suggested that because of existence of the damage maritime lien, the proprietary interest theory evolved. But it is suggested that Herbert's analysis is suspect: (1) Curtis J did not deal with the question of ranking; in fact, he said at 876, that it was not necessary for him to express an opinion on this issue. Furthermore, in the light of Curtis J's analysis of the ius in re it is unlikely that he would have adhered to the Roman law principle of ranking under the actio hypothecaria, because as he pointed out, the actio hypothecaria had been modified in the evolution of the modern concept of the maritime lien and hence was no longer applicable in its pure form; (2) Curtis J expressly said that the nature of the ius in re was "a property in a thing" and that the action in rem was "... a real action to enforce a real right" (at 876); and (3) although Herbert said the "hypothecary theory" is "usually" ascribed to Curtis J's remarks in The Young Mechanic, he cites no illustration of the implementation or even discussion of this

At the outset of his judgement, Curtis J said that while the modern concept of the maritime lien has a civil law basis, it is not directly found in the Roman law. He added:

"Not that any texts of the Roman law can be produced which confer upon those who now possess it, what we call a maritime lien, but that the commercial usages of the middle ages modified some of the rules of that law respecting hypothecations, and adapted them to the wants of commerce. The texts of the Roman law on this subject were doubtless used, and with some modifications afforded the rules which obtained in the maritime laws of Europe in the middle ages."⁷⁵

Curtis J approved Pothier's definition of "an hypothecation" as an accurate description of a maritime lien as that concept was understood in the United States - namely:

"The right which a creditor has in the thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in a thing, a ius in re."⁷⁶

He then proceeded to describe the nature of the ius in re in relation to the modern concept of the maritime lien and said:

theory. It seems that this theory is Herbert's alone. In view of what Curtis J actually said in The Young Mechanic, this theory cannot be sustained. In passing, see G Price The Law of Maritime Liens (1940) 4f where these "theories" were condensed without acknowledging Herbert's work.

⁷⁵ The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855) 874. This statement was approved by Gorell Barnes J in The Ripon City [1897] P 226, 239.

⁷⁶ See The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855) 875.

"It is not merely a privilege to resort to a particular form of action to recover a debt ... It is an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an encumbrance thereon, and vesting in the creditor what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser. It is true that a lien gives to the creditor no right to possess the thing; and it can be executed only by a suit in rem."⁷⁷

The action in rem was then discussed.⁷⁸ Curtis J said it included the Roman actio hypothecaria and actio mutui or locatio conducti and concluded that it was:

"... a real action to enforce a real right."⁷⁹

The "real right" was specifically the ius in re, which he had described earlier⁸⁰ as:

"A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by sale, to the payment of his debt; which so inheres in a thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or any other encumbrance created by the debtor, can only be a ius in re, in contradistinction to a ius ad rem; or in contradistinction to a mere personal right or privilege."

Also in The Young Mechanic⁸¹, Ware J said a maritime lienor's right:

⁷⁷ Loc cit.

⁷⁸ At 875f.

⁷⁹ At 876.

⁸⁰ At 876.

⁸¹ At 878.

"... is a ius in re, a proprietary interest in a thing, which may be enforced directly against the thing itself by a libel in rem, in whomsoever the general title may be transferred".

Hohfeld⁸² approved of the use of the generic term 'ius in re'.

He said the term:

"... was freely employed by the modern civilians - especially in opposition to a particular kind of ius in personam called ius ad rem."⁸³

It appears that Thomas' analysis⁸⁴ of the maritime lienee's right was influenced by Lord Stowell's statement in The Tobago⁸⁵ that the bottomry creditor's right was a "ius in rem" and not a "ius in re". But Thomas concluded:

"When the developed law is viewed in its entirety it is hard to resist the conclusion that a maritime lienee enjoys a proprietary interest in the encumbered res."⁸⁶

It seems that Thomas⁸⁷ distinguished the concept of a "proprietary interest" from the American analysis of the right as a ius in re, on the grounds that the latter appeared to have rights of ownership associated with it, according to the terminology employed by Lord Stowell in The Tobago. Lord Stowell is reported

⁸² W N Hohfeld Fundamental Legal Conceptions (1923) 89.

⁸³ At 86.

⁸⁴ D R Thomas Maritime Liens (1980) §27.

⁸⁵ The Tobago (1804) 5 C Rob 218, 222.

⁸⁶ D R Thomas Maritime Liens (1980) §27.

⁸⁷ Cf D R Thomas Maritime Liens (1980) §27, fn 31.

to have said:

"The person advancing money on bonds of this nature, acquires by that act no property in the vessel; he acquires the ius in rem, but not the ius in re, until it has been converted and appropriated by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more."⁸⁸

Later in the judgement⁸⁹ he is reported to have described a "ius in re" as:

"... an interest directly and visibly residing in the substance of the thing itself."

The distinction seems to be grounded on whether the bond holder acquired a right of ownership in the res. But when Curtis J referred to the ius in re giving the lienee a "special right of property in the thing"⁹⁰ he did not mean that the lienee acquired any rights of ownership. It was used in the abstract sense to describe the adherence of the right to the res, notwithstanding the purchase of the res by a bone fide purchaser for value.⁹¹ Thus, the difference seems to be more apparent than real, involving semantic difficulties rather than difficulties of principle. This seems to be indicated by subsequent decis-

⁸⁸ The Tobago (1804) 5 C Rob 218, 222. Emphasis added.

⁸⁹ At 222f.

⁹⁰ The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855) 875.

⁹¹ It is suggested that this was also in this sense in which Gorell Barnes J described the maritime lien in The Ripon City [1897] P 226, 242; but was not fully appreciated by Lord Diplock in The Halcyon Isle [1980] 2 Lloyd's LR 325, 328.

ions, cited by Thomas⁹², namely: Stainbank v Fenning⁹³ and Stainbank v Shepard⁹⁴. Neither case refers to The Tobago; but in the former, Jervis CJ said that the creditor's right was "... a privilege or claim upon [the res]"⁹⁵; and in the latter, Parke B said the right is "enforced against (the res) through the medium of process."⁹⁶

According to the American analysis, the concepts of a ius in re and "a proprietary interest" are convertible terms. It seems that, prior to The Bold Buccleugh⁹⁷, from the discussion supra, this analysis did not conflict in principle with the English law on the issue.

English cases subsequent to the Bold Buccleugh⁹⁸ which dealt with the nature of the maritime lienor's right seem to point in favour of the right being accepted as a real or "substantive" right, notwithstanding the contrary opinion expressed by the majority in The Halycon Isle⁹⁹.

⁹² D R Thomas Maritime Liens (1980) §385.

⁹³ Stainbank v Fenning (1851) 11 CB 51.

⁹⁴ Stainbank v Shepard (1853) 13 CB 418.

⁹⁵ At 585.

⁹⁶ At 618.

⁹⁷ The Bold Buccleugh (1851) 7 Moo PC 267.

⁹⁸ The Bold Buccleugh (1851) 7 Moo PC 267.

⁹⁹ The Halcyon Isle [1980] 2 Lloyd's LR 325.

A review of some of these cases, indicates that the decision of the majority in The Halcyon Isle did not express any settled opinion in this regard.

In The Sara¹⁰⁰ Lord Watson implied that a maritime lien was an "hypothecatory interest in the ship" when he said:

"By the common law of England the master's claims, whether for wages or disbursements, did not carry with them any hypothecary interest in the ship; and inasmuch as they rested upon contract alone, were not cognisable in the Admiralty Courts."¹⁰¹

If this is so, this conception is consonant with the analysis of the ius in re supra and with what Lord Watson said later in his speech, namely:

"A proper right of lien constitutes a nexus upon the ship ..."¹⁰²

In The Ripon City¹⁰³, Gorell Barnes J said that a maritime lien was:

"a right acquired by one over a thing belonging to another - a ius in re aliena. It is so to speak, a subtraction from the absolute property of the owner in the thing."

The second sentence was criticised by Lord Diplock in The Halcyon

¹⁰⁰ The Sara (1889) 14 App Cas 209, 217.

¹⁰¹ Emphasis added.

¹⁰² At 218.

¹⁰³ The Ripon City [1897] P 226, 242

Isle¹⁰⁴; but see supra where, the sense of this phrase employed by Gorell Barnes J was discussed. A ius in re aliena is merely a more elaborate expression of the generic term "ius in re" as discussed supra.¹⁰⁵

In The Veritas¹⁰⁶ Gorell Barnes J said:

"...hypothecations ... create interests in [the res] along with those of her owners".

In The Tervaete¹⁰⁷, Bankes LJ adopted the words of Gorell Barnes J in The Ripon City and said that a maritime lien was a ius in re aliena -

"a subtraction from the absolute property of the [owner]."

But The Tervaete illustrates confusion between the concepts of the maritime lien and the action in rem - between the substantive right (the former) and the remedy (the latter). With respect, it seems that this misconceived confusion prompted the majority in The Halcyon Isle¹⁰⁸ to find that the maritime

¹⁰⁴ The Halcyon Isle [1980] 2 Lloyd's LR 325, 328f.

¹⁰⁵ See W N Hohfeld Fundamental Legal Conceptions (1923) 86; and see H R Hahlo and E Kahn The South African Legal System and its Background (1968) 84 & 87, who describe a ius in re aliena as a right in another's property binding on both onerous and gratuitous successors of the owner of the encumbered res even without notice.

¹⁰⁶ The Veritas [1901] P 304, 314.

¹⁰⁷ The Tervaete [1922] P 259, 267

¹⁰⁸ The Halcyon Isle [1980] 3 All ER 197, 205G-J.

lienee's rights were procedural or remedial only. The minority view, expressed by Lords Salmon and Scarman¹⁰⁹ is probably correct:

"A maritime lien is a right of property given by way of security for a maritime claim ..."

and hence it can only be a substantive right. In The Khalij Sky¹¹⁰, Munnik JP expressly declined to follow the majority decision in The Halcyon Isle and concluded that a maritime lien was a substantive or "real" right.¹¹¹

To revert to the misconception of the nature of the maritime lien in The Trevaete, Bankes LJ, incorrectly construed Lord Watson's words in Currie v M'Knight¹¹² to mean that a maritime lien was "a remedy against the corpus of the offending ship". Lord Watson neither said nor implied this¹¹³. Bankes LJ added:

"Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of

¹⁰⁹ at 214G.

¹¹⁰ The Khalij Sky 1986 (1) SA 485 (C).

¹¹¹ See also H Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350.

¹¹² Currie v M'Knight [1897] AC 97, 106.

¹¹³ He said: "And in my opinion ... when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners ..." He did not say, as Bankes LJ asserted, that a maritime lien is "a remedy against ... "

claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes. To allow such a lien to attach would be, to use Gorell Barnes J's language in The Ripon City, to create a ius in re aliena, a subtraction from the absolute property of the sovereign state."

This quotation shows a dubious appreciation of the nature of the maritime lien. Furthermore, Atkin LJ¹¹⁴ erroneously confused the substantive right with the remedy by saying that a maritime lien was:

"... not a right to take possession or to hold possession of a ship. It is confined to a right to take proceedings in a Court of law to have the ship seized, and, if necessary, sold."

Atkin LJ then proceeded to discuss the action in rem in the light of the procedural theory saying that the owner in such an action is "directly" impleaded¹¹⁵. This confusion is confirmed

¹¹⁴ At 274.

¹¹⁵ At 274. Later, in The Cristina [1938] AC 485, 491 & 504f, both he and Lord Wright were of the opinion that in an action in rem the res owner was "directly impleaded". Although this opinion has not been unanimously endorsed by the English courts, who have held that while the res owner may be "indirectly impleaded" in an action in rem, the action in rem is nevertheless brought against the res in the first instance and there is a substantive difference between the actions in rem and in personam: see eg The Bold Buccleugh (1851) 7 Moo PC 267; The Parlement Belge (1880) 5 PD 197, 219; The City of Mecca (1881) 6 PD 106, 116; The Longford (1889) 14 PD 34; The Burns [1907] P 137, 147 & 150; The Tolton [1946] P 137, 142; and The Rena K [1979] 1 QB 377, 405. But the Procedural Theory has prompted the contrary view on occasions that there is no difference between the two forms of actions: see eg unsuccessful argument of Messrs Carver KC, Scrutton KC and Balloch in The Cargo ex Port Victor [1901] P 243, 251f; the also unsuccessful argument by Messrs Scrutton KC and Bateson in The Burns [1907] P 137, 149; and Scrutton LJ's views in The Jupiter [1924] P 236, 242f, based on the premise that the action in rem was in substance a proceeding against the res owner.

in this extraordinary sentence in Atkin LJ's reported judgment:

"A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied."¹¹⁶

In The Colorado¹¹⁷, Atkin LJ had occasion to express himself again on this issue, but merely said that a maritime lien gives:

"a right against the ship, which continues notwithstanding a change of ownership."

He made no mention of the nature of the right.

In The Tolten¹¹⁸, Scott LJ said that a maritime lien:

"confers a true charge on the ship and freight of a proprietary kind in favour of the 'privileged' creditor."

Thomas¹¹⁹ wrote that Scott LJ's judgment in The Tolten:

"... probably represents the most comprehensive consideration of maritime liens in recent times, appears to have been clearly of the view that a maritime lien represented a substantive right."

From the above analysis it is suggested that the consensus of opinion is that the maritime lien is regarded as a real or "substantive" right. If this is so, then it follows that the action in rem, the process employed to enforce a maritime lien, is a procedural right. This is a primary principle of the Substantive Theory.

¹¹⁶ At 274.

¹¹⁷ The Colorado [1923] P 102, 110.

¹¹⁸ The Tolten [1946] P 135, 151.

¹¹⁹ D R Thomas Maritime Liens (1980) §578.

It was mentioned supra that the passage relating to the concomitance of the action in rem and the maritime lien in The Bold Buccleugh¹²⁰ was accepted by the United States Courts and is still the law in that country today. However, as pointed out in Chapter 5, this statement was not accurate because an action in rem was also available where the claimant had a right of property or other real interest in the res, other than a right which gave rise to what became known as "a maritime lien", in terms of the Admiralty Court's inherent jurisdiction. It was also suggested that this illustrates a defect in this theory. But the defect is not fatal. The principle that an action in rem is brought to enforce a real or "substantive" right in the res remains unscathed. Indeed, the decision in The Young Mechanic¹²¹, which established this principle, was not premised on the concomitance of the action in rem and the maritime lien.

According to this principle, it follows that the res owner's liability in an action in rem cannot exceed the value of the res.

4. CONCLUSION:

Both the Procedural Theory and the traditional Personification Theory, discussed supra, present conceptual difficulties relating

¹²⁰ The Bold Buccleugh (1851) 7 Moo PC 267, 284f.

¹²¹ The Young Mechanic 30 Fed Cas 873 (CCD Maine 1855).

to the action in rem. The Procedural Theory's difficulties begin with probable historical misconceptions concerning the action in rem. Its other shortcomings were discussed in Chapter 6. On the other hand, the Personification Theory has little credibility, based as it is on a legal fiction probably originating in certain 19th century cases, notwithstanding Holmes' attempted, but unconvincing, historical justification of the Theory.

But the principle extracted from the Substantive Theory that the action in rem is an Admiralty procedure to enforce a real or "substantive" right in the res, offers an explanation of the object of the action in rem which appears to have an acceptable historical foundation, is not based on a metaphoric legal fiction, and provides an acceptable solution to the long-standing difference between the United States and English approach regarding the limitation of the res owner's liability in an action in rem.

The concepts of the action in rem and the maritime lien in South African law will be examined in the following chapter.

CHAPTER 8

THE ACTION IN REM AND THE MARITIME LIEN IN SOUTH AFRICAN LAW

1. THE ACTION IN REM:

While there have been an increasing number of maritime cases heard by South African Courts in recent years¹, when the 1983 Act² came into operation³ there were only some 25 officially reported South African cases on Admiralty law.⁴

The action in rem is unique to English Admiralty law and those countries, including South Africa, which inherited that system of law⁵. Consequently, the foreign nature of the concept was likely to cause some difficulty and appear somewhat confusing to South African lawyers. These difficulties have been compounded because the nature of the concept is unsettled, as the previous Chapters in this dissertation have shown.

¹ See D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45, 46f; and H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 4 LMCLQ 462, 464.

² The Admiralty Jurisdiction Regulation Act No 105 of 1983.

³ On 1st November 1983: Proc R162 GG8937 of 21/10/1983 (Reg Gazette 3631).

⁴ See H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 4 LMCLQ 462, 464 fn 17.

⁵ See Chapters 1 and 2.

Prior to the commencement of the 1983 Act, the South African Courts sitting as Admiralty Courts under the provisions of the 1890 Act⁶ applied English Admiralty law as it existed when the 1890 Act was passed.⁷ It is therefore not surprising that these "early" cases reflected the English procedural view of the action in rem.

For instance, in Beaver Marine (Pty) Ltd v Wuest⁸, Trollip JA said:

" ... it is not necessary to discuss proceedings in rem in any detail. It suffices to say this about them. Such proceedings are peculiar to English Admiralty Law⁹. They are directed against the ship itself by having it arrested and kept in custody in order to compel or secure payment of the claim. (The owner or other person liable is, of course also sued on the claim itself.) ... "

The object of the action in rem contemplated by Trollip JA in this passage clearly reflects the procedural view of the concept.

Also, in De Howorth v The SS India¹⁰, Gardiner J followed English

⁶ The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vic c 27).

⁷ See Chapter 2.

⁸ Beaver Marine (Pty) Ltd v Wuest 1978 (4) SA 263 (A) 275A-B.

⁹ This is not strictly correct. The action in rem is as peculiar to those countries who derived their Admiralty law from England, notably the United States.

¹⁰ De Howorth v The SS India 1921 CPD 451, 462.

Admiralty law precedent and held that a res owner was "indirectly" impleaded in an action in rem. In this regard, the following remarks of King AJ in Quick & Louw & Moore & Ano v SS Almoural¹¹ are apposite:

"I am mindful of the fact that, particularly in an action in rem which is so to speak directed at a "thing" rather than a person, it may be said that prior to an entry of appearance there is in reality no party (ie other than the plaintiff). There is, however, necessarily a person interested in the vessel or other thing, be he the owner, charterer, mortgagee or whoever."

Thus, in common with English Admiralty law¹², although the action in rem was seen as fundamentally a proceeding against the res in the first instance¹³, the emphasis in these cases was on the person indirectly affected by the proceedings.

Nevertheless, the central principle of the Procedural Theory concerning the extent of the res owner's liability in the event of his appearance, does not seem to have been in issue in any South African cases. In SS Humber v SS Answald¹⁴, Innes CJ did

¹¹ Quick & Louw & Moore and Ano v SS Almoural 1982 (3) SA 406 (C) 409G-H.

¹² See for instance The Longford (1889) 14 PD 34, 36f & 38; and The Burns [1907] P 137, 149.

¹³ Cf Laurence AJP, in the court a quo in SS Humber v SS Answald 1912 AD 546, reported at 547-9, who said: "the English Admiralty action in rem is brought against the vessel itself ...". See also Peca Enterprises (Pty) Ltd v Registrar of the Supreme Court, Natal NO and Others 1977 (1) SA 76 (N) 77D-E.

¹⁴ SS Humber v SS Answald 1912 AD 546, 556.

say obiter that proceedings in rem were "limited as to the amount available". But it is submitted that this statement did not represent a commitment to any principle in this regard by Innes CJ when read in the context of his judgment. This issue has now been statutorily resolved in South Africa by Rule 6 (3) of the 1986 Rules which provides:

"A person giving notice of intention to defend any action in rem shall not merely by reason thereof incur any liability and shall, in particular, not become liable in personam, save as to costs, merely by reason of having given such notice and having defended the action in rem."

Since the commencement of the 1983 Act, the concept of the action in rem appears to have assumed an emphasis on the res, as a fictional defendant, rather than the res owner, as was previously the case. The 1983 Act and the 1986 Rules do not define the action in rem or the maritime lien. Whereas English Admiralty law is applicable to the latter concept in accordance with the provisions of s 6 of the 1983 Act¹⁵, it was suggested in Chapter 2, that this was not the case in respect of issues concerning the concept of the action in rem. Thus, although the apparent shift of emphasis mentioned supra is not contrary to the provisions of the 1983 Act and 1986 Rules, it is doubtful whether this concept of the action in rem is justified, particularly if the action in rem is correctly conceived, as submitted in this dissertation, as a procedural remedy to enforce a real right in the res.

¹⁵ The Fidias 1986 (1) SA 714 (N) 717I-718B.

In Euromarine International of Mauren v The Ship Berg and Others¹⁶, Milne JP examined the nature of the action in rem and referred briefly to the Personification Theory where "the ship itself is regarded as the defendant" and the Procedural Theory where Milne JP seemed to be under the impression that the action in rem changed its character on the appearance of the res owner¹⁷. It is clear that a full consideration of both approaches was not undertaken by Milne JP. He did not come to an express conclusion about either approach and merely said that it was a common feature of Anglo-American Admiralty law that:

"... the essence of the action in rem is the right to arrest a ship¹⁸, and the right to satisfy any judgment from the proceeds of the sale or bail or security provided in respect thereof."

But in his analysis of the associated ship provisions¹⁹ he indicated that these provisions permitted the introduction of "an action against a different defendant", because "[i]n effect the Legislature has given the maritime claimant an additional, or rather alternative, defendant from which to satisfy his claim

¹⁶ Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 653B ff.

¹⁷ Milne JP relied on Halsbury's Laws of England 4ed, Vol 1, §310, for this observation, overlooking the decision of the Privy Council in The August 8th [1983] 1 Lloyd's Rep 351 which settled this issue, albeit unsatisfactorily: see Chapter 5 supra.

¹⁸ The action in rem is not confined to a ship.

¹⁹ Sections 3 (6) & (7) of the 1983 Act.

which arose from the original guilty defendant".²⁰ The repeated reference to "the defendant" by Milne JP was a clear personification of the res. This emphasis on the personification of the res was repeated on appeal by Miller JA²¹.

An analysis of the associated ship provisions of the 1983 Act is beyond the scope of this dissertation, but it can be mentioned that the emphasis in The Berg, both in the court a quo and on appeal, of the personification of the res as "the defendant" in an action in rem brought in terms of the associated ship provisions, was at best doubtful. As mentioned by Miller JA on appeal²², the associated ship provisions are a development of the notion of "sister ships" which were statutorily introduced into English Admiralty law in 1956²³. These provisions were introduced in England to widen to the scope of the action in rem²⁴ in the light of the International Convention Relating to the Arrest

²⁰ Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 655G f, 659E-F, & 661H-I.

²¹ Euromarine International of Mauren v The Ship Berg 1986 (2) SA 700 (A) 712B-E.

²² Euromarine International of Mauren v The Ship Berg 1986 (2) SA 700 (A) 711I-J.

²³ Section 3 (4) of the Administration of Justice Act, 1956 (4 & 5 Eliz II c 46).

²⁴ Which was previously confined to the res in respect of which the cause of action arose: see The Beldis [1936] P 51.

of Seagoing Ships²⁵. Nevertheless, because of the procedural approach to the action in rem in English Admiralty law, the emphasis in determining the availability of the action in rem in terms of these provisions was²⁶ on the res owner²⁷. Accordingly, if the concept of the associated ship provisions originated in the English "sister ship" provisions, which were designed in the climate of a procedural view of the action in rem it would seem that the procedural view of the action in rem would be more in keeping with these provisions. In addition, sub-section 3 (4) (b) lends support to this view. It provides that an action in rem can be brought where:

" ... the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned."

This sub-section clearly accords with the procedural view of the action in rem.

A curious amalgam of the personification and procedural approaches to the concept of the action in rem was proposed by Judge Friedman in an address at a seminar on maritime law and practice

²⁵ Signed at Brussels on 10th May 1952. For the purpose of the Convention see the remarks of Lord Diplock in The Eshersheim [1976] 2 Lloyd's Rep 1, 5.

²⁶ And still is in terms of the replacement section 21 (4) of the Supreme Court Act, 1981.

²⁷ See D C Jackson Enforcement of Maritime Claims (1985) 212; and H Staniland 'Arrest of Associated Ship Not Retrospective in Operation' [1986] 3 LMCLQ 279, 281. The concept of "sister ships" is unknown in United States Admiralty law: D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424, 426.

at the University of the Witwatersrand on 4th October 1984²⁸, where he said²⁹:

"The action in rem, as an alternative to the action in personam, though it is a distinctive feature of maritime law, likewise should present little difficulty of comprehension to a lawyer trained in Roman-Dutch law. All the action in rem, as the name implies, is designed to achieve is to cloak a vessel with legal personality³⁰, so as to facilitate certain types of proceedings, and to obviate the necessity in such proceedings of finding the owner of the vessel, who or which is, more often than not, unknown to the claimant. The action has the effect of 'impleading the owner of the property³¹ to answer to the judgment of the court to the extent of his interest in the property.'"³²

With respect, this statement illustrates the conceptual confusion of the action in rem in South Africa.

Regrettably, this conceptual confusion is to be found in the 1983 Act where subsection 3 (4) (b) has a procedural bias, as mentioned supra, and Rule 2 (4) has a personification bias. Rule 2 (4) provides:

"In the case of an action in rem the property in

²⁸ Published as: D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45.

²⁹ At 51.

³⁰ This is the personification approach which is based on an outmoded fiction which has no rational explanation: see Chapter 7 supra.

³¹ This is the procedural approach.

³² The Parlement Belge (1880) 5 PD 197, was cited as authority for the proposition in the final sentence. But this is not what this case held. The quotation comes from a question posed by Brett LJ in the course of his judgment where he held that the res owner was "indirectly impleaded": 217.

respect of which a claim lies, as set forth in section 3 (5) of the Act, shall be described as the defendant."

2. MARITIME LIENS:

Part of the statement by Sir John Jervis in The Bold Buccleugh³³ as to the concomitance of the maritime lien and the action in rem was lifted by Searle J in Ex p Government of the USA: in re SS Union Carrier³⁴ from The City of Mecca³⁵, when he said:

"The Admiralty action in rem, the foundation of which is the maritime lien ..."

Whether Searle J intended to convey that the maritime lien and the action in rem were concomitant³⁶, or that the action in rem had its origin in the maritime lien³⁷, is not clear from the judgment. The latter was thought, erroneously³⁸, to be the position by The South African Law Commission³⁹, where it was said:

³³ The Bold Buccleugh (1851) 7 Moo PC 267, 284f.

³⁴ Ex p Government of the USA: in re SS Union Carrier 1950 (1) SA 880 (C) 885

³⁵ The City of Mecca (1881) 6 PD 106, 113.

³⁶ As, it has been suggested in previous chapters supra, was the intention of Sir John Jervis in The Bold Buccleugh (1851) 7 Moo PC 267, and which the United States Courts have recognised: The Rock Island Bridge 73 US (6 Wall) 753 (1867) 754f.

³⁷ As has erroneously been thought by some, for instance: Halsbury's Laws of England 4ed, Vol 1, para 305; and possibly Sheen J in The Father Thames [1979] 2 Lloyd's Rep 364, 368.

³⁸ See Chapter 5.

³⁹ The South African Law Commission Report on the Review of the Law of Admiralty (1982) 8.

"Because of the existence of the maritime lien the Admiralty Court recognised a form of procedure against the ship by way of an action in rem"

Nevertheless, the concept of the maritime lien as a real right was readily acceptable and familiar to the South African Courts. In Crooks & Co v Agricultural Co-Operative Union Ltd⁴⁰, Innes CJ discussed the rights and remedies under Roman Dutch law and those under English Admiralty law and said that they were separate and distinct. Nevertheless he added that these rights and remedies "may" be affected by the same legal principles. He referred to the maritime lien as an illustration of this and said:

"The doctrine of tacit hypothec by which a real right is carved out of the globular dominium and given to the creditor is familiar to our jurisprudence. It has been adopted by the Admiralty Courts as the basis of that action in rem which is so important a feature of their practice."

It will be observed that the word "basis" is used, and not "foundation" as Searle J did in Ex p Government of the USA: in re SS Union Carrier⁴¹. In the context of Innes CJ's analogous description of the maritime lienholder's right as a real right, he probably viewed the action in rem as an action to enforce a real right. His words point in this direction, but this is not entirely clear.

⁴⁰ Crooks & Co v Agricultural Co-Operative Union Ltd 1922 AD 423, 429.

⁴¹ Ex p Government of the USA: in re SS Union Carrier 1950 (1) SA 880 (C) 885

Nevertheless, in cases subsequent to the 1983 Act, the South African Courts have accepted that a maritime lien is a real right. For instance, in Euromarine International of Mauren v The Ship Berg and Others⁴², Milne JP referred to Gilmore and Black's⁴³ definition of the maritime lien which included a statement by the authors that a maritime lienholder's right was:

" ... a right conceived of as a property interest in the tangible thing involved (usually but not always a ship) ..."

Milne JP went on to say that, subject to the concomitance of the maritime lien and the action in rem, Gilmore and Black's definition of a maritime lien appeared "to define accurately what is a maritime lien in English Admiralty law"⁴⁴. Milne JP overlooked the decision of the majority in the The Halcyon Isle⁴⁵. Although this decision is probably incorrect⁴⁶, it does indicate that it is unsettled in English Admiralty law whether or not the maritime lienholder's right is a "substantial" or merely procedural right. Accordingly, Gilmore and Black's definition of the

⁴² Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N) 652 G-I.

⁴³ G Gilmore and H Black The Law of Admiralty 2 ed (1975) 36

⁴⁴ Loc cit.

⁴⁵ The Halcyon Isle [1980] 2 Lloyd's LR 325.

⁴⁶ See the later judgment of Munnik JP in The Khalij Sky 1986 (1) SA 485 (C) where he declined to follow the decision of the majority in The Halcyon Isle; and also the discussion in Chapter 8 supra on the nature of the maritime lienholder's right.

maritime lien should have been qualified by Milne JP in this regard.

However, in a later case, Gulf Oil v Fund of the MV Emerald Transporter⁴⁷, Howard J (with whom Milne JP and Leon ADJP concurred) said:

"Without attempting to define the concept, I think it is trite to say that a maritime lien is a charge in the nature of a ius in re aliena which encumbers the ship against or in respect of which the claim lies."

As mentioned in Chapters 5 and 7, this view is in accordance with the consensus of opinion that a maritime lienholder's right is the nature of a real right, notwithstanding the contrary views expressed by Dr Lushington in The Milford⁴⁸ and the majority in The Halcyon Isle. In The Khalij Sky⁴⁹, Munnik JP expressly declined to accept the views of the majority in The Halcyon Isle and held that the maritime lien was a real or "substantive" right in the the res. And, Nienaber J in Oriental Commercial and Shipping Co Ltd v MV Fidias⁵⁰, although he was bound by the decision in The Emerald Transporter supra, quoted the extract supra from Howard J's judgment without comment and with apparent full approval.

⁴⁷ Gulf Oil v Fund of the MV Emerald Transporter 1985 (4) SA 133 (N) 142B-C.

⁴⁸ The Milford (1858) Swab 362, 366.

⁴⁹ The Khalij Sky 1986 (1) SA 485 (C).

⁵⁰ Oriental Commercial and Shipping Co Ltd v MV Fidias 1986 (1) SA 714 (D) 715H-J.

3. CONCLUSION:

It is suggested that the maritime lien has been correctly construed by the South African Courts as a real or "substantive" right in the res.

The nature of the action in rem, on the other hand, is problematical. There has been no thorough conceptual analysis of the concept by the South African Courts to date. But the current tendency to personify the res, as was done by Milne JP and Miller JA in The Berg and, subsequently, in Rule 2 (4) of the 1986 Rules, presents conceptual difficulties because: (a) it is based on a fiction which the United States experience has shown to be unacceptable; and (b) it is incompatible with the view that the maritime lien is a real right in the res enforceable by the action in rem, because the personification of the res implies that an action in rem is a proceeding against the res personified as the defendant.

The concept of the action in rem should not be based on a doubtful legal fiction; nor should it be based on a misconceived procedural view.

CHAPTER 9

CONCLUSION

The action in rem is at the heart of Anglo-American Admiralty law and those legal systems which derive their Admiralty law from the English Admiralty law source.

The action in rem is a proceeding against the res. This is the fundamental feature of the concept. But the question why such an action is permitted in Admiralty jurisprudence and what its purpose is, involves a proper understanding of its nature.

It has been suggested in this dissertation that the concept has been misconceived in England after the revival of the Admiralty Court in that country. This misconception is still evident in that country in the procedural analysis of the action in rem.

A misconception of the concept was also evident in the traditional approach of the United States Courts where the res was personified as a juristic person.

These misconceptions have led to numerous conceptual difficulties which have been discussed in previous Chapters.

* It has been submitted in this dissertation that the action in rem is no more than a real action brought to enforce a real right in

the res. Such a real right includes what is known as a maritime lien.

It follows from this conclusion that any extension of the action in rem beyond these narrow confines is conceptually unwarranted.

Thus, the concept of statutory rights of actions in rem in English Admiralty law, which involves the action in rem being employed to enforce rights other than real rights, cannot be conceptually justified. Nor would any interpretation of the provisions of sub-section 3 (4) (b) of the 1983 Act that permitted the action in rem to be brought beyond the confines of those causes of action involving the enforcement of a real right in the res itself be justifiable. Preferably, it is suggested that this sub-section should be amended for clarity.

As indicated in Chapter 7, in the United States an action in rem is not brought to enforce claims other than real rights, because the action in rem and the maritime lien are perceived as concomitant in that country. The maritime lien is regarded as a real right and the action in rem is brought to enforce that right. It was suggested in this dissertation that the concept of the concomitance of the action in rem and the maritime lien was probably unjustified and that this points to a flaw in this approach. But it was further suggested that this flaw was not fatal to the principle that the action in rem is a real action

brought to enforce a real right in the res. This flaw would probably justify the confinement of maritime liens in South African law to those maritime liens presently recognised as such in English Admiralty law¹, and would preclude any attempt to suggest that merely because an action in rem can be brought, a maritime lien must exist.²

The provisions of sub-sections 3 (6) and (7) of the 1983 Act relating to the arrest of associated ships would require amendment if their purpose, contemplated by the International Convention Relating to the Arrest of Seagoing Ships, is to be retained. Although the question of associated ships is beyond the scope of this dissertation, it would seem that there was no valid reason that the application of the action in rem should have been statutorily introduced in this regard. It is suggested that "arrest" of the res, not the action in rem, would be more appropriate with regard to associated ships. In passing, it should be noted that the "arrest" contemplated in terms of sub-section 5 (3) of the 1983 Act does not involve an action in

¹ Cf The Fidias 1986 (1) SA 714 (N)

² The feature of a maritime lien that it is inchoate and follows the res even into the hands of a bona fide purchaser for value without notice of the lien, has resulted in it being called "a secret lien" (see for instance R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357, 363) and this feature probably prompted Lord Diplock to remark at the XXVIIth Conference of the Comité Maritime International, New York Sept. 1965, Minutes 101: "The attitude of the United Kingdom towards maritime liens is on the whole a dislike of them. We have a very small number of maritime liens existing in our national law."

rem. It is regrettable that the South African Law Commission slavishly followed the English Law model of "sister ships" in applying the action in rem to the concept of associated ships. The "arrest" of an associated ship would be theoretically acceptable, but the employment of the action in rem in this regard is not.

Furthermore, the notion of the res personified as a defendant in an action in rem in terms of Rule 2 (4) of the 1986 Rules is an unwarranted fiction³. It is suggested that the "defendant" could be described, as in the 1883 Rules, as:

"the owners and all others interested in [the name of the res]".

This Rule, and the Forms set out in the First Schedule, could possibly be amended accordingly.

The 1986 Rules have statutorily overcome one of the major difficulties that has beset Anglo-American Admiralty law, namely, the extent of the res owner's liability in the event of his entry of an appearance to defend an action in rem. Rule 6 (3) states:

"A person giving notice of intention to defend an action in rem shall not merely by reason thereof incur any liability in personam, save as to costs, merely by reason of having given such notice and having defended the action in rem."

In other words, in South African law, the res owner's liability in an action in rem is limited to the value of the res. The

³ See Chapter 7 and 8 for objections to the perpetuation of this fiction.

problem of this being contrary to "the sense of justice", articulated in The Dupleix⁴, is also overcome by the 1986 Rules which sanction the joinder of proceedings in personam with those in rem⁵. This Rule also accords with the nature of the action in rem proposed in this dissertation.

It is finally suggested that an opportunity exists in South Africa to introduce the concept of the action in rem suggested in this dissertation into its Admiralty law. This concept is historically justifiable and jurisprudentially sound. It would also be free of the confusion, misconceptions, and fictions that have plagued conceptions of the action in rem in the past. This would involve a bold initiative; but it is submitted that its introduction would lay a solid foundation for the future development of Admiralty law in South Africa.

⁴ The Dupleix [1912] P 8, 15.

⁵ See Rule 20 (5) read with the content of the Forms prescribed in the First Schedule.

BIBLIOGRAPHY

A

Advocate 'Farewell Victoria! Admiralty Law' (1983) 13 Business-man's Law 84.

Anon 'History of Admiralty Jurisdiction in the Supreme Court of the United States' (1871) 5 Am L Rev 581.

Anon 'Personification of Vessels' (1964) 77 Harvard LR 1122.

Anon 'The Prospects of the Admiralty Court' (1861) 10 L Mag and Rev 262.

J M Ashton 'The Genealogy of Our Maritime Law' (1915) 22 Case and Comment 93.

The Australian Law Reform Commission Reference on Admiralty Jurisdiction Research Paper No 1; An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction (Nov 1984).

B

B R Bamford The Law of Shipping and Carriage in South Africa 3 ed (1983).

J K Beach 'Relative Priority of Maritime Liens' (1923-24) 33 Yale LJ 841.

W Beawes Lex Mercatoria Rediviva (1792).

A Beck 'Admiralty jurisdiction: a new direction' 1984 (47) THRHR 472.

R D Benedict 'The Historical Position of the Rhodian Law' (1909) 18 Yale LJ 223.

The Black Book of the Admiralty ed Sir Travers Twiss (1985 reprint) Vols 1-4.

H Booysen 'Admiraltietshowe in die Suid-Afrikaanse Reg' (1973) 36 THRHR 241.

H Booysen 'South Africa's new Admiralty Act: A maritime disaster' (1984) 6 Mod Bus Law 75.

A Browne A Compendious View of the Civil Law and of the Law of the Admiralty (1802) Vol 2.

R E Burke 'Maritime Liens: an American view' [1978] LMCLQ 269.

C

F Clerke Praxis Supremae Curiae Admiraltatis translator Rowghton (1829 ed).

D M Collins 'Comments on the American Rule of in rem Liability' (1985) 10 The Maritime Lawyer 71.

Minutes of the XXVIIth Conference of the Comité Maritime International, New York (September 1965).

H C Coote The New Practice of the High Court of Admiralty (1860).

D

Clare Dillon and JP van Niekerk South African Maritime Law & Marine Insurance: Selected Topics (1983).

E

E Edwards A Treatise on the Jurisdiction of the High Court of Admiralty in England (1847).

F

D B Friedman 'Maritime Law in Practice and in the Courts' (1985) 102 SALJ 45.

G

G Gilmore and C Black The Law of Admiralty 2 ed (1975).

J Godolphin A View of the Admiral Jurisdiction (1661).

H

H R Hahlo and E Kahn The South African Legal System and its Background (1968).

Halsbury's Laws of England 4ed, Vols 1 and 43.

E R Hardy-Ivamy 'Admiralty Court : Sixth Centenary' (1960) 110 The Law Journal 330.

J F Haynes The Student's Guide (1880).

P M Herbert 'The Origin and Nature of Maritime Liens' 1929 Tulane LR 381.

W N Hohfeld Fundamental Legal Conceptions (1923).

G Hofmeyr 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30.

O W Holmes Jr The Common Law (1882).

Sir William Holdsworth A History of English Law 7 ed (1956) Vol 1.

J

D C Jackson 'Foreign Maritime Liens in English courts - Principle and Policy' [1981] 3 LMCLQ 335.

D C Jackson 'Current English Admiralty Jurisdiction and Practice' 1982 Acta Juridica 5.

D C Jackson Enforcement of Maritime Claims (1985).

K

J M Kriz 'Ships Mortgages, Maritime Liens, and their Enforcement: The Brussels Conventions of 1926 and 1952' 1964 Duke LJ 70.

L

L H Laing 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 Mich LR 163.

G H Longenecker 'Developments in the law of Maritime Liens' (1971) 45 Tulane LR 574.

M

J Marriott Formulare Instrumentorium (1802)

J Mansfield 'Maritime Lien' 1888 LQR 379.

R G Marsden 'Admiralty Droits and Salvage - The Gas Float Whitton No 2' (1899) 60 LQR 353.

R G Marsden 'The Case of The Zeta' (1894) 10 LQR 113.

R G Marsden 'Six Centuries of the Admiralty Court' (1896) 67 The Nautical Magazine 85ff & 169ff.

R G Marsden 'Two Points of Admiralty Law' (1886) 2 LQR 357.

Joanne Mathiasen 'Some Problems of Admiralty Jurisdiction in the 17th Century' (1958) 2 Amer J Leg Hist 215.

E C Mayers Admiralty Law and Practice in Canada (1916).

E C Mayers 'Maritime Liens' (1928) 6 Canadian Bar Review 516.

D McLachlan The Treatise on the Law of Merchant Shipping 3 ed.

T L Mears 'The History of the Admiralty Jurisdiction' Select Essays in Anglo-American Legal History Vol II (1908) 312.

O

C W O'Hare 'Admiralty Jurisdiction' (1979) 6 Monash Univ LR 91ff & 195ff.

D R Owen 'US maritime liens and the new arrest and attachment rules' [1985] 4 LMCLQ 424.

P

G Price The Law of Maritime Liens (1940).

G Price 'Maritime Liens' 1941 LQR 409.

G Price 'The Priority of Maritime Liens' 1942 J of Comp Leg (3rd series) 38.

G Price 'Statutory Rights in rem in English Admiralty Law' (1945) J of Comp Leg (3rd Series) 21.

W Prynne Brief Animadversions on the Fourth Part of the Institutes of the Laws of England (1669).

R

T Ridley A View of the Civile and Ecclesiastical Law 3 ed (1662).

E S Roscoe Admiralty Jurisdiction and Practice 3 ed (1903).

E S Roscoe Studies in the History of the Admiralty and Prize Courts (1932).

E R Ryan 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 Western Ont L Rev 173.

A Rycroft 'Changes in South African admiralty jurisdiction' (1984) 3 LMCLQ 417.

S

F R Sanborn Origins of the Early English Maritime and Commercial Law (1930).

A Saunders Maritime Law (1920).

T E Scrutton The Influence of the Roman Law on the Law of England (1885).

The Selden Society Select Pleas in the Court of Admiralty Vols 1 and 2 (Ed R G Marsden) (1894) .

W Senior 'Admiralty Matters of the 15th Century' (1919) 35 LQR 290.

W Senior Doctors' Commons and the Old Court of Admiralty (1922).

W Senior 'Early Writers on Maritime Law' (1921) 37 LQR 323.

W Senior 'The First Admiralty Judges' (1919) 35 LQR 73.

W Senior 'The History of Maritime law' (1952) 38 Mariners' Mirror 260.

H Spelman Discourse of the Admiral's Jurisdiction (1723).

The South African Law Commission Report on the review of the law of Admiralty Jurisdiction (1982).

H Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350.

H Staniland 'Arrest of Associated Ship Not Retrospective in Operation' [1986] 3 LMCLQ 279.

H Staniland 'The implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 4 LMCLQ 462.

H Staniland and J S McLennan 'The Arrest of an Associated Ship' (1985) 102 SALJ 148.

H Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' 1984 Acta Juridica 271.

G F Steckley 'Merchants and the Admiralty Court During the English Revolution' (1978) 22 Amer J Leg Hist 136.

L C Steyn Die Uitleg van Wette 3 ed (1963).

T

D R Thomas Maritime Liens (1980).

W Tetley 'Attachment, the Mareva injunction and saisie conserva-toire' [1985] 1 LMCLQ 58.

D B Toy 'Introduction to the Law of Maritime Liens' 1973 Tulane LR 559.

W

D M Walker The Oxford Companion to the Law (1980).

A Merriam-Webster Webster's Biographical Dictionary (1966).

Williams and Bruce Admiralty Practice 3 ed (1902).

F L Wiswall The Development of Admiralty Jurisdiction and Practice Since 1800 (1970).

F L Wiswall 'Admiralty: Procedural Unification in Retrospect and Prospect' (1968) 35 Brooklyn LR 36.

W Wynne The Life of Sir Leoline Jenkins (1724).

Z

R Zouch The Jurisdiction of the Admiralty in England (1663).