CHAPTER 4

THE GREAT TRANSITION

UPON Dr Lushington's retirement as Admiralty Judge in 1867, the volume of the Court's instance business had almost exactly trebled since his first years on the bench;[1] the direct cause of this increase was of course the expansion of Admiralty jurisdiction by statute—principally the Acts of 1840 and 1861. Much of the new business was also due, however, to Lushington's own dynamism in the discharge of his office, effecting, in the words of one of his admirers, 'a fresh creation of law'.[2] And while opinion might be reserved for the moment as to the wisdom of some of his ideas for Court reform, it is plain that Lushington handed to his successor a Court of far greater strength and vitality than he had himself inherited twenty-nine years previously.

Dr Lushington's successor, Sir Robert Phillimore, was a man whose background and training ensured his fitness for the office. Born in 1810, he was the son of Dr Joseph Phillimore, Regius Professor of Civil Law at Oxford and the Admiralty Advocate; he attended Westminster School and Christ Church, Oxford, graduating D.C.L. in 1838, and was elected a Fellow of Doctors' Commons in the following year. He was called to the bar by the Middle Temple in 1841, and, like his predecessors, was a Member of Parliament, serving from 1852-7. He followed in his father's footsteps by becoming Admiralty Advocate in 1855, and became Queen's Advocate in 1862 and Judge Advocate General 1871-2, holding the latter post while Admiralty Judge and Dean of Arches, as both of which he succeeded Dr Lushington in 1867; he had earlier served as Judge of the Admiralty Court of the Cinque Ports, a position to which he was appointed in 1855—an experience which particularly suited him to the Admiralty Judgeship. A scholar of international law, he was the author of a great treatise in the field; upon Lushington's death in 1873 he became Master of the Faculties, but resigned that office and the Deanship of the Arches in 1875; he survived the creation of the Admiralty Division

[1] See Return to H.C. by Rothery, Adm. Reg'r., 28 May 1867, p. 1.
[2] Coote, 1st ed., preface, p. vi.

to remain as Admiralty Judge until his retirement in 1883, and died in 1885.[1]

There were no major extensions of the Admiralty jurisdiction during the first half of Phillimore's judgeship, but several miscellaneous statutes are worthy of note, as are a few interpretative decisions. Statutorily, the Court acquired jurisdiction over seamen's claims in the nature of wages for expenses of food and treatment ['maintenance and cure'] during illness under conditions defined by statute,[2] exclusive jurisdiction in certain cases to pronounce condemnation and forfeiture of British vessels enlisted in the services of foreign belligerents during hostilities to which Britain remained neutral,[3] concurrent jurisdiction to pronounce forfeiture of cargoes of statutorily defined 'dangerous goods' (chiefly explosives),[4] and concurrent jurisdiction over any questions arising under the Slave Trade Acts, as well as exclusive jurisdiction over claims for bounty under the Slave Trade Act of 1873[5] (theoretically, slaves may even today be sued as a *res* under the 1873 Act and condemned *in rem* as forfeit to the Crown, by whom they are then released to freedom[6]).

In addition to the jurisdiction conferred by these new statutes, Phillimore's interpretation of some older enactments enabled the Court to assume a jurisdiction which was not contemplated in the statutes themselves, such as questions of damage to submarine cables.[7] And decisions of other courts, such as that of the Court for Crown Cases Reserved, which held that foreign subjects serving aboard British ships were British seamen under the law regardless of the ship's location,[8] provided a basis for interpretation of earlier enactments such as the Merchant Shipping Act, 1854, §268, to which applied the Admiralty jurisdiction over 'British seamen'.

It was early in Phillimore's judgeship that—despite considerable opposition[9]—a limited instance jurisdiction in Admiralty was conferred upon the County Courts in England and Wales. Under this statute, appellate jurisdiction was given to the High

[1] Holdsworth, *H.E.L.*, vol. 16, pp. 146–50; *D.N.B.*
[2] Merchant Shipping Act, 1867, §7. [3] Foreign Enlistment Act, 1870, §19.
[4] Merchant Shipping Act, 1873, §§27, 23.
[5] Slave Trade (Consolidation) Act, 1873, §§5, 19.
[6] See McGuffie, *Practice*, p. 33, ¶69.
[7] *The Clara Killam*, (1870) L.R. 3 A. & E. 161.
[8] *R. v. Anderson*, (1868) L.R. 1 C.C.R. 161. [9] See, *e.g.*, Wendt, p. 624.

Court of Admiralty in all cases, together with the power to transfer proceedings to the High Court of Admiralty from the County Courts at the discretion of the Admiralty Judge, upon motion or appeal.[1] It ought here to be noted that, besides the County Courts, the Admiralty Court of the Cinque Ports, the Mayor's Court of the City of London, and the Court of Passage of the Borough of Liverpool each possessed some form of instance jurisdiction at that time. These courts are still functioning, though it seems that only the Liverpool Court of Passage ever entertained actions *in rem* with any frequency;[2] appeal now lies from the Court of Passage to the Court of Appeal rather than to the Admiralty Court,[3] though appeal was to the High Court of Admiralty in Sir Robert Phillimore's day.[4]

An interesting question arose following the grant in 1869 of jurisdiction to the County Courts to entertain actions *in rem* for breach of charterparty[5]—a jurisdiction not possessed at that time by the Admiralty Court itself; upon a motion for transfer of such an action from a County Court to the Admiralty Court, the question arose whether the latter could take cognizance by transfer of a matter not within its original jurisdiction. Phillimore's decision that the Admiralty Court could accept such an action by transfer[6] has been upheld in the present century;[7] and the result is not really surprising in view of the similar problems which arose in the eighteenth century with regard to appeals from Colonial Vice-Admiralty Courts which exercised a wider instance jurisdiction than the High Court of Admiralty,[8] which were nonetheless heard by the latter until the Judicial Committee of the Privy Council came into existence.[9]

While the procedure for bringing cases on appeal to the Admiralty Court from inferior courts is properly a subject which is linked to the procedure of those courts and hence without the scope of this work, there existed a notable anomaly in appeals from one particular body, the Salvage Commissioners of the

[1] County Courts Admiralty Jurisdiction Act, 1868, §§6, 32.
[2] See Williams and Bruce, 2nd ed., p. 271.
[3] Liverpool Corporation Act, 1921, §260.
[4] See, *e.g.*, *The Alexandria*, (1872) L.R. 3 A. & E. 574.
[5] County Cts. Adm. Jurisdiction Amendment Act, 1869, §§1–3.
[6] *The Swan*, (1870) L.R. 3 A & E. 314.
[7] *The Montrosa*, [1917] P. 1.
[8] See *The Royal Arch*, (1857) Swab. 269, 277.
[9] Judicial Committee Act, 1833, §2.

Cinque Ports. The oddity was that, procedurally, causes coming up from the Commissioners were introduced into the Admiralty Court as if instance rather than appellate matters, and appeals in such cases were actually commenced by issuance of a *citation in personam* in original form,[1] though the Court's jurisdiction was clearly appellate.[2]

A few minor changes in instance procedure were made in 1871, but aside from a confirmation of the Marshal's authority within the Port of London and an extension of his authority elsewhere throughout England and Wales to serve warrants *in rem* either personally, or, in the latter venue, as well by the Collector of Customs nearest the *res* acting as his substitute, there were no actual additions to procedure. The 1859 Rules regarding default were amended, however, permitting filing of the summary petition in the absence of appearance within twelve days of service of the warrant or citation, setting of the cause for hearing after a further twelve days of non-appearance, decree for the plaintiff upon the hearing without any reference and report, order for appraisement and sale without previous notice, and order for direct payment of the proceeds of sale without payment first into Court.[3] It is probable that these changes were prompted not only by a desire to render the Court's procedure more summary, but also to bring procedure more into line with that of the common law for the benefit of practitioners whose lack of civilian training must have made the old procedure difficult to understand.

A more fundamental change in the Court's post-hearing procedure for the enforcement of money judgments came in 1874. The English-speaking world—influenced to some degree, no doubt, by the writings of Charles Dickens—had begun in the early days of the latter half of the nineteenth century to recognize both the cruelty and futility of the practice of imprisoning judgment-proof debtors. The practice was abandoned at an early date in the Federal jurisdiction of the United States, and the Admiralty Rules of the Supreme Court were amended in 1850, 1851, and 1854 to effect the abolition of imprisonment for debt in Admiralty causes.[4] In England, a bill of general application was passed in

[1] Williams and Bruce, 3rd ed., pp. 512–14.
[2] Cinque Ports Act, 1821, §4.
[3] Additional Rules for the H.C.A., 1871 (O.-in-C. of 24 March), rr. 2 & 3, 4 & 5.
[4] See Parsons, pp. 747 *et seq.*

1869 providing that, with a few specific exceptions for defaults in payment, no person should thereafter be arrested or imprisoned for failure to discharge a debt, and that in none of the excepted cases might imprisonment exceed one year.[1] The effect upon the Admiralty Court's procedure was of course considerable, as the sole method used to obtain satisfaction of money judgments in Admiralty was attachment and/or committal of the person of the defendant; under the terms of the Debtors Act, this procedure at once became almost wholly obsolete, and after 1869 it was necessary in each instance of an application for an order for attachment to establish in some informal way whether the Act would permit the order to issue—even provisionally—under the particular circumstances of the case. After five years of such informal inquiries, new rules were adopted to ensure compliance with the Act by requiring prior notice of any motion for an order for attachment to be given to the Judge and served, where practicable, upon the debtor, and requiring also an affidavit on behalf of the plaintiff, attesting and offering proof of the debtor's ability to pay.[2]

The most important event of Sir Robert Phillimore's judgeship was of course the passage of the Judicature Acts, which consolidated the central superior courts of the realm into a unified system. In this process Phillimore had at least some direct involvement, as he was appointed a member of a Royal Commission to inquire into the court structure and to make recommendations for its improvement. The First Report of the Judicature Commission appeared in 1869, and contained recommendations specifically pertinent to the Admiralty Court. The Report opened with a number of noteworthy observations, one of which was that the Admiralty jurisdiction as expanded by the Acts of 1840 and 1861—and enjoying exclusively the advantage of the proceeding *in rem*—would probably continue to extend its cognizance into areas where the jurisdiction of common law was concurrent but its procedure less convenient, analogous in some ways to the manner in which the jurisdiction of Chancery had already extended to cover 'a large class of cases properly cognizable in Courts of Common Law . . .'.[3] Surprisingly, in light of the events of the previous decade, the Commission identified as the root cause of

[1] Debtors Act, 1869, §4.
[2] Additional Rules for the H.C.A., 1874 (O.-in-C. of 12 May), rr. 1–3.
[3] Parl. Paper [1869] (1) xxv (R.C. 25 March), p. 7.

the extension of Admiralty jurisdiction 'the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere'.[1] But the inability of the Admiralty Court to afford a complete remedy in every case was also recognized, and the Report cited the common but distressing situation in which a claim might be instituted against a foreign shipowner in Admiralty for damage to cargo, while the shipowner, having a cross-claim for freight, was obliged to proceed against the cargo-owner at common law; one of the major advantages of a unified court system would therefore be the elimination of jurisdictional conflicts, with the added benefit that 'no suitor could be defeated because he commenced his suit in the wrong Court. . .'.[2]

Happily—and perhaps due to the presence of Phillimore—the Commission, in recommending a system which would unite the principal courts of the realm in one structure, also recognized the advantages to be gained by encompassing together the courts of civil law, and the Report stated that 'as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.'[3]

The wisdom of the Commission's Report was, in general, quite unquestionable; with the obvious need for widespread court reform which existed at that time, there was surely no plausible reason why advantage should not have been taken of the opportunity to make a great collective improvement rather than a host of individual ones. Some specific recommendations, however, were never acted upon, while others were considerably mutilated by the machinery of legislation; but there were, in retrospect, a few recommendations which would if enacted have proven most unwise, such as the abolition of the Admiralty Court's Prize and other special jurisdiction. The credit for preventing the confusion which might have very well proven disastrous in subsequent times of both war and peace must go directly to Sir Robert Phillimore, who, in the course of signing the Report and commending most of its suggestions, nonetheless made specific reservations concerning the abolition of any of the Admiralty jurisdiction as recommended by the Commission.[4]

Four years after the Report of the Royal Commission, most of

[1] Parl. Paper [1869] (1) xxv (R.C. 25 March), p. 7.
[2] *Id.*, pp. 8, 9.
[3] *Id.*, p. 9.
[4] *Id.*, p. 25.

its recommendations were enacted by Parliament in the first of the Judicature Acts. By this Act of 1873, the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy were consolidated as the 'Supreme Court of Judicature'.[1] Because of the confusion which would have resulted if appeals from the courts of civil law continued to go to the Judicial Committee of the Privy Council while appeals from the common law courts went to the Exchequer Chamber and on to the House of Lords, the Judicature Commission recommended the substitution of a 'Common Court of Appeal',[2] and so in the Act of 1873 the Supreme Court of Judicature was further divided into two hemispheres—one, comprising the courts of original jurisdiction, to be known as 'Her Majesty's High Court of Justice', and the other, created to exercise all appellate jurisdiction, was to be called 'Her Majesty's Court of Appeal'.[3] The 1873 Act also denied any appeals from the Supreme Court of Judicature to either the Privy Council or the House of Lords, and made provision for the transfer of the jurisdiction of the Judicial Committee of the Privy Council to the Court of Appeal.[4]

Within the new High Court of Justice, five Divisions were created: Queen's Bench, Common Pleas, Exchequer, Chancery, and Probate, Divorce and Admiralty (hereinafter referred to as 'P.D.A.'[5] or Admiralty Division), and to these Divisions was assigned the respective jurisdiction of the previously existing courts.[6] Rules of law in force in Admiralty, such as half-damages under the both-to-blame rule in collision causes,[7] were specifically preserved by the 1873 Act[8]—in response to the anticipation of problems of conflict between the Admiralty rule and the rule of contributory negligence at common law, as raised in the 1869 Report[9]—and the Admiralty Division thereby became bound to

[1] Supreme Court of Judicature Act, 1873, §3.
[2] Parl. Paper, [1869] (1) xxv (R.C. 25 March), p. 8.
[3] Supreme Court of Judicature Act, 1873, §§4, 18, 19.
[4] Supreme Court of Judicature Act, 1873, §§20, 21 [never effective; see Appellate Jurisdiction Act, 1876, §24].
[5] Humorously called 'wills, wives & wrecks'.
[6] §§31, 31(5), 16.
[7] See *The Milan*, (1861) Lush. 388.
[8] §25(9).
[9] Parl. Paper [1869] (1) xxv, pp. 7–8.

apply them.[1] Miscellaneous provisions included the necessary merger of law and equity, 'Divisional Courts' of a number of judges to hear certain matters within a given Division (including Admiralty), power to transfer causes between Divisions, and a rule-making power for the Supreme Court.[2] Though it was specifically provided that the rules of procedure prevailing in the High Court of Admiralty should govern Admiralty proceedings in the P.D.A. Division,[3] the rulemaking power was utilized to create several rules of basic application to the High Court of Justice, including the Admiralty Division, and actions in Admiralty were thereafter commenced by writ of summons[4] rather than by praecipe to institute. It might be noted here that although the 1873 Act introduced the common law terminology of 'action' to cover all forms of proceedings in the High Court,[5] custom has preserved the jurisprudential term for a proceeding in Admiralty as 'suit', in the same manner as it is customary to speak of a 'suit in equity' as opposed to an 'action at law'.

The 1873 Act was scheduled to come into operation late in 1874,[6] but in mid-1874 it was recognized that there were many flaws of omission and effect that would have to be corrected prior to putting the judicial reformation into operation; an Act was therefore passed which had as its sole object the delay of operation of the 1873 Act until 1875,[7] by which time the necessary amendments would have been decided upon. These amendments appeared in an Act of 1875. While the basic structure set up in the 1873 Act remained unchanged, the 1875 Act served to fill in some neglected details; thus specific provisions were made for the salary, pension and precedence of the Admiralty Judge and Admiralty Registrar,[8] provision was made for appeals to Divisions of the High Court from inferior courts,[9] and the Rules of the High Court of Admiralty were again declared to remain in force in the Admiralty Division,[10] save as altered under new rulemaking powers.[11] The greatest amendment of the 1873 Act, however, was

[1] *The Drumlanrig*, [1911] A.C. 16.
[2] Supreme Court of Judicature Act, 1873, §§24, 37–41, 44, 36, 23.
[3] Supreme Court of Judicature Act, 1873, §70.
[4] R.S.C. [Rules of the Supreme Court], 1873, r. 2.
[5] R.S.C., 1873, r. 1.
[6] Supreme Court of Judicature Act, 1873, §2.
[7] Supreme Court of Judicature (Commencement) Act, 1874.
[8] Supreme Court of Judicature (Amendment) Act, 1875, §8.
[9] §15. [10] §18. [11] §24; see also §§16, 17, 25.

in the Schedule of Rules; the 1875 Act completely re-ordered and re-constituted the 1873 Rules, with many elaborations and additions. With specific reference to Admiralty, there was introduced a special form of writ of summons *in rem*,[1] the affidavit to lead was preserved, but was used to lead the writ rather than the warrant, and the statement of claim was required to be indorsed upon the writ before issue,[2] the default procedure *in rem* was preserved with no substantial alteration,[3] the demurrer and the writ of delivery were for the first time introduced into Admiralty practice,[4] and enforcement of judgments by *fieri facias* or *elegit*, though probably technically possible since 1861,[5] was first specifically permitted by the 1875 Act;[6] the writ of *audita querela*, long obsolete, was finally abolished.[7]

The new uniform mode of pleading introduced by the Judicature Acts—by statements of claim and defence[8]—did not depart in structure from the existing plea by petition and answer,[9] which had been substituted for the ancient modes of Admiralty pleading in 1859[10] and was itself modelled upon common law procedure; the proceeding by libel then also became obsolete, though it had earlier fallen into disuse. In balance, the convenience of joinder of multiple parties, which had been for so long of peculiar advantage to Admiralty suitors, was made applicable in all Divisions of the High Court.[11]

While there was no direct expansion of Admiralty jurisdiction contained in the Judicature Acts, one immediate effect was to make the Admiralty jurisdiction exclusive in claims for limitation of liability.[12] Earlier, even after the 1861 Admiralty Court Act, the jurisdiction had primarily been Chancery's, with Admiralty having jurisdiction only ancillary to other actions *in rem*;[13] under the provisions of the 1873 Act providing for the assignment of business between the Admiralty and Chancery Divisions,[14] and later rules governing transfer of causes between Divisions, all

[1] R.S.C., 1875, form A., I, 4.
[2] R.S.C., 1875, O. 5, r. 11; O. 3, r. 1; see p. 117, *infra*.
[3] R.S.C., 1875, O. 13, r. 10 (a)–(h).
[4] R.S.C., 1875, OO. 23, 49.
[5] See Admiralty Court Act, 1861, §§15, 22.
[6] R.S.C., 1875, O. 42, r. 15.
[7] R.S.C., 1875, O. 42, r. 22.
[8] R.S.C., 1875, O. 19, esp. rr. 2, 3, 30; O. 21, r. 3.
[9] See Williams and Bruce, 3rd ed., p. 341.
[10] 1859 Rules, r. 55.
[11] R.S.C., 1875, O. 17.
[12] See Roscoe, *Practice*, p. 242.
[13] See, *e.g.*, *The Northumbria*, (1869) L.R. 3 A. & E. 24.
[14] Supreme Court of Judicature Act, 1873, §42.

limitation cases were simply directed or transferred to the Admiralty Division.

Interestingly, the grant to the new High Court of the collective jurisdiction of the previous individual courts[1] meant that each of the High Court Judges possessed the same jurisdiction (though exercising it according to the business before his Division); this not only permitted transfers of cases between Divisions, but it also prevented any Judge from issuing a prohibition to any of his brethren. And thus the courts of common law at last lost the power to prohibit the exercise of jurisdiction by the Admiralty Court—a power which, despite the vanquishment of Doctors' Commons, the triumph of the common lawyers and the impending unification of the court system, continued to be exercised virtually on the eve of the Judicature Acts.[2]

One provision of the Judicature Acts which immediately aroused great controversy was that which abolished the appellate jurisdiction of the House of Lords.[3] Perhaps foreseeing that the Judicature Commission's recommendation for a 'Common Court of Appeal'[4] would, if implemented, mean at least a dilution of its jurisdiction, the House of Lords appointed a Select Committee of its own to examine the question of its appellate jurisdiction. This Committee, reporting in 1872, proposed establishment of 'The Queen's Great Council of Appeal', to consist of the Lord Chancellor and five salaried judges, which would hear all appeals formerly directed to either the Lords or the Privy Council.[5] The recommendation was never implemented, and in the 1873 Act, as previously noted, the appellate jurisdiction of the House of Lords was abolished in common law cases, and that of the Privy Council severely restricted in civil law cases; but in 1876 a bill was introduced to restore the Lords' appellate jurisdiction. Though technically establishing a new jurisdiction to hear causes coming up from the new Court of Appeal,[6] the clear intent of the Act was the restoration of the jurisdiction formerly enjoyed; the wholly new jurisdiction conferred by the Act in appeals from Chancery and the courts of civil law appears to have been a

[1] Supreme Court of Judicature Act, 1873, §16.
[2] See, *e.g.*, *Smith v. Brown*, (1871) L.R. 6 Q.B. 729.
[3] Supreme Court of Judicature Act, 1873, §20.
[4] Parl. Paper [1869] (1) xxv (R.C. 25 March), p. 8.
[5] Parl. Paper [1872] (1) 149 (H.L. 9 July).
[6] Appellate Jurisdiction Act, 1876, §§3–9, 24.

'fringe benefit'. As soon as the bill had been published, an enormous clamour arose from the mercantile interests, and a great many letters were written by insurers, steamship brokers, chambers of commerce, etc., to the Board of Trade and to the Lord Chancellor, protesting the addition of another appellate rung in Admiralty procedure and objecting to the innovation as unnecessary, wasteful, and time-consuming.[1] Despite this powerful opposition the bill became law,[2] but at least the safeguard of nautical assessors was adopted on Admiralty appeals to the Lords,[3] and the addition of a third appellate stage does not appear to have proven a particular drawback to the proper functioning and exercise of jurisdiction by the Admiralty Court, nor does it seem to have been prejudicial to maritime interests, as had been feared.[4]

Altogether, the effect of the Judicature Acts themselves upon the Admiralty Court was not great; jurisdiction remained largely unaltered in scope, and the Acts did not change the exercise of the jurisdiction with regard, for example, to suits between foreign parties.[5] Within the prior scope of Admiralty jurisdiction, however, the Court did gain a more complete cognizance of matters such as ship mortgages.[6] Procedurally, the situation was similar; previous practices such as appearances under protest could still be utilized[7] under the clause saving prior procedure,[8] but confusion was generated by conflicting wording of statutes in some minor matters such as appeal from the Admiralty Division to the Court of Appeal of causes which came to the Admiralty Division on appeal from the Salvage Commissioners of the Cinque Ports, because it was not clear whether the Salvage Commissioners were an 'inferior court' within the provisions of the Judicature Acts.[9]

The best illustration that the pattern of business in the Admiralty Court was undisturbed by the Judicature Acts is provided by the figures for the issuance of process: 395 citations in 1874, 416 writs of summons in 1876;[10] there was a drop in business during 1875 to 285 citations/writs, which might be ascribed to confusion as to the effect of the Acts on the Court's jurisdiction

[1] Parl. Paper [1877] (1) 69 (H.C. 14 June).
[2] Appellate Jurisdiction Act, 1876.
[3] See *The Nautilus*, [1927] A.C. 145.
[4] See, *e.g.*, Wendt, p. 681.
[5] *The Evangelistria*, (1876) 2 P.D. 241.
[6] See Boyd, p. 76, n.
[7] See *The Vivar*, (1876) 2 P.D. 29.
[8] Supreme Court of Judicature (Amendment) Act, 1875, §18.
[9] See Williams and Bruce, 3rd ed., pp. 515–16.
[10] Figures supplied by Admiralty Registry, 1966.

in rem, inasmuch as the drop was in actions *in rem* rather than in actions *in personam*, but in the following year business regained the previous level, which it maintained over the next five years, with 410 writs issuing in 1881.[1]

If the Court's operation remained smooth throughout its transition from an independent to a consolidated body, its organization was chaotic. Despite his seniority and his civilian training, Sir Robert Phillimore never became head of the Admiralty Division—yet he remained sole Admiralty Judge, and acted quite independently. The first President of the Division administering the civil law was in fact a common lawyer, Sir James Hannen. Hannen was born in 1821, attended St Paul's School and Heidelberg University, was called to the bar by the Middle Temple in 1848, became a Justice of the Queen's Bench and was made Serjeant in 1868, and was appointed Judge of the Probate and Divorce Courts in 1872, from which position, by operation of the Judicature Acts, he became President of the Probate, Divorce and Admiralty Division of the High Court in 1875. He served as president of the Parnell Inquiry Commission in 1888, and was, appropriately, given an Hon. D.C.L. (Oxon.) in the same year; he became a Lord of Appeal in Ordinary in 1891, served as an arbitrator in the Bering Sea Dispute in 1892, and died in 1894.[2]

It was undoubtedly because of the greater volume of probate and divorce business as compared to the number of causes tried annually in Admiralty that Sir James Hannen became President of the new Division. Sir Robert Phillimore, however, was senior to Hannen not only in tenure as Admiralty Judge, but as a member of the Judicial Committee of the Privy Council, to which Phillimore had been appointed in 1867, and to which Hannen was not appointed until more than five years thereafter.[3] This seniority, and Phillimore's civilian character, manifested themselves in the Admiralty Division, for while all other Judges of the High Court of Justice were addressed as they are today, Phillimore continued to be known both in public and in the reports of Admiralty cases as 'Sir Robert', and was never addressed as 'The Rt Hon. Mr Justice Phillimore'; moreover, though §84 of the Judicature Act of 1875 specifically provided that officers of the Division should be appointed by the President, Phillimore

[1] Figures supplied by Admiralty Registry, 1966.
[2] Holdsworth, *H.E.L.*, vol. 16, pp. 156–8; *D.N.B.*
[3] *D.N.B.*

in fact appointed both a new Admiralty Registrar and Assistant Registrar in 1878, with Hannen only adding a note of confirmation to the appointments signed by Phillimore—and, quite remarkably, the appointments were then submitted by Phillimore to the Lords Commissioners for their assent, though the Court had in 1875 become completely dissociated from and independent of the Admiralty.[1]

If Phillimore's status as Admiralty Judge seems unusual, so too was his (best-remembered) status as an Ecclesiastical Judge, though in quite a different way. It will be recalled that, although Phillimore succeeded Dr Lushington not only as Admiralty Judge but as Dean of Arches in 1867, Lushington retained the Mastership of the Faculties; this was because the Mastership carried with it all of the emoluments which made the Deanship tenable, so that Lushington was thereby permitted to continue to collect the emoluments without performing most of the services which they had been designed to compensate, while Phillimore's salary as Dean did not alone suffice to meet even the expenses of the Office. This situation prevailed until Lushington's death in 1873, whereupon Phillimore succeeded to the Mastership; but because the framers of the Judicature Acts felt that no Judge of the new High Court ought to hold any judicial office outside the Supreme Court for fear of conflicts of duty and interest, it was provided in the Acts that no salary should attach to the Office of Admiralty Judge for so long as he should continue to hold the Office of Dean of the Arches[2]—and so Phillimore had no sooner secured a just remuneration for his services as Dean than he was coerced to resign the Office,[3] in which, however, he remained active until the Judicature Acts became effective.[4]

With the fall of Doctors' Commons, the Admiralty Court had been moved to Westminster. Here the scene was far removed from the splendour of the doctors' Common Hall, for the new courtroom was a mean and dingy little garret known as 'The Cockloft', situated high up under the eaves of the Law Courts which had themselves 'grown up as excrescences on Westminster Hall'.[5] How this move must have affected Dr Lushington can

[1] Thompson, p. 20.
[2] Supreme Court of Judicature (Amendment) Act, 1875, §8.
[3] See Holdsworth, *H.E.L.*, vol. 16, pp. 146–50.
[4] See, *e.g.*, *Durst v. Masters*, (1876) 1 P.D. 373 [P.C. App.].
[5] Roscoe, *Studies*, p. 7.

only be imagined, for though he endured the new surroundings for seven years, he seems to have done so in silent suffering; it is possible that Sir Robert Phillimore may have taken an affectionate view of The Cockloft, for it was his courtroom during the whole of his tenure as Admiralty Judge.

Thanks to the reminiscences of E. S. Roscoe, one may get an intriguing picture of the Admiralty Court during Phillimore's judgeship; it is plain that no-one 'danced . . . like a semi-despondent fury'[1] in The Cockloft, but that its seclusion, which freed it from spectators, and its business, which freed it from any large professional attendance, gave it 'the atmosphere of a select social club.'[2] Sir Robert is described as 'a courteous elderly gentleman, with a rosy complexion and a quiet voice'—a great contrast to the 'flamboyant' William Baliol Brett (later Lord Esher, M.R.), a common lawyer who succeeded Sir Travers Twiss as the Court's leading counsel when Twiss began to retire from active practice. Twiss, who was Professor of Civil Law at Oxford, 1855-70, was the last Queen's Advocate[3]—a post which, together with Queen's Proctor and Procurator-General, is now combined with that of Treasury Solicitor.[4] A new bar of common lawyers, such as Charles Butt, Gainsford Bruce, and, despite civilian training, Sir Robert's son Dr Walter (later Lord) Phillimore, became predominant over survivors of Doctors' Commons such as Twiss and Dr Deane, Q.C., who sat in the front row with a 'smiling countenance' and black mittens upon his hands, and old proctors—even such as Mr Jemmett:

> [who,] with unkempt beard, generally untidy and cross-eyed, was steeped in Admiralty lore, and the main object of his life appeared to be to preserve the old Admiralty practice against the attacks of the Common Law. For this purpose he had always some precedent or point which he pressed on counsel, hoping to keep the court in its ancient ways.[5]

Through the Judicature Acts, the Court preserved its identity, with the same Judge and practitioners applying the same law in the same manner, and with the same officers. The officers of the High Court of Admiralty were in fact transferred to the Admiralty

[1] Gilbert, *Trial by Jury*, 'When I, good friends . . .'.
[2] Roscoe, *Studies*, p. 11.
[3] *Id.*, pp. 8–9.
[4] Holdsworth, *H.E.L.*, vol. 16, p. 139.
[5] Roscoe, *Studies*, pp. 9–10; *H.C.A.*, pp. 12–13.

Division by the Judicature Acts, and their powers and duties remained the same except for the Registrar,[1] who, though he could no longer sit as surrogate for the Admiralty Judge, retained the power—as did his Assistant—to entertain and dispose, while sitting for the Judge, of all applications which could have been dealt with by the Judge in chambers.[2] The last judicial decision by a Registrar as surrogate was given in 1874.[3]

At this juncture, it might be mentioned that H. C. Rothery retired as Registrar in 1878 to become Wreck Commissioner of the United Kingdom, and that he was succeeded by H. A. Bathurst, who had been appointed Assistant Registrar in 1858, and who was in turn succeeded as Assistant Registrar in 1878 by one J. G. Smith.[4] Rothery closed his career as Registrar in giving, quite typically, testimony as to needed reform in the Registry organization to the Judicature Acts (Legal Offices) Committee, which recommended that the Registry staff be centralized, in order to ease the conditions of overwork described by Rothery, who favoured centralization, and further recommended that the Admiralty Registrar become a Master of the Supreme Court not specifically attached to the Admiralty Division.[5] These proposals were fortunately shelved, and the value of a separate Registry and Registrar has since been both proven and recognized.[6]

The period of Sir Robert Phillimore's tenure which followed the Judicature Acts did not see any major developments in Admiralty Law or procedure, though a few miscellaneous points deserve mention. The Court acquired in 1875 a jurisdiction concurrent with Vice-Admiralty Courts abroad to condemn, forfeit or restore vessels or goods seized under the Pacific Islanders Protection Acts, and to award damages for unlawful seizure.[7] The bounds of the territorial waters of the United Kingdom were declared by statute in 1878, and jurisdiction over offences within territorial waters was given to 'the admiral', *i.e.*, to the nearest court with applicable Admiralty jurisdiction;[8] and, significantly, the first of the statutes of Richard II, the Admiralty Jurisdiction

[1] R.S.C., 1875, O. 60, r. 1; O. 54. [2] Williams and Bruce, 2nd ed., p. 511.
[3] *The Vladimir*, (March, 1874) [unrep.] see Williams and Bruce, 2nd ed., p. 511, n. (y). [4] Thompson, p. 20.
[5] Parl. Paper [1878] (5) 25 (H.C. March).
[6] See (1934) 177 *L.T.* 54, 55.
[7] Pacific Islanders' Protection Act, 1875, §§4, 5.
[8] Territorial Waters Jurisdiction Act, 1878, §§2, 7.

Act, [x]1389, was wholly repealed in 1879.[1] Somewhat curiously, the power of the Admiralty to issue appointments of Vice-Admiralty Judges, Registrars and Marshals was confirmed by statute in 1876, and the power to issue patents for those offices was not passed from the High Court of Admiralty to the Admiralty Division.[2]

The most important procedural development resulted from a series of enactments which provided for the investigation of shipping accidents; one of these gave power to the Lord Chancellor to make rules for the appeals from findings of courts of inquiry into shipping mishaps;[3] this power was reaffirmed and broadened by a statute of 1879, which also conferred appellate jurisdiction upon the Admiralty Court in cases wherein the Board of Trade refused to order a rehearing following the cancellation of the licence ['ticket'] of any Officer of the Merchant Navy.[4] The Rules governing such appeals were promulgated in the following year, and were made applicable to appeals to the Admiralty Division from any investigations into shipping casualties, whether by the Board of Trade, the Wreck Commissioner, or other authorities;[5] the procedure on such appeals was to be, generally, the same as that in any cause normally brought before the Admiralty Court, save that without special permission of the Judge there should be no formal pleadings;[6] the Admiralty Judge might add parties to the appeal at his discretion, subject to objection, and might receive new evidence in any form and make any order as to costs.[7] It was also made a specific requirement that the Judge hear the appeal with two assessors, and that he send a 'report of the case' to the Board of Trade at the conclusion of the proceedings.[8] To make the Admiralty Court's jurisdiction in such cases truly comprehensive, any appeals from refusals to order rehearings by colonial courts or tribunals convened under an Act of 1882 were also directed to the Admiralty Division.[9]

The post-Judicature Acts procedure of the Court was, as

[1] Civil Procedure Acts Repeal Act, 1879.
[2] Appellate Jurisdiction Act, 1876, §23. [3] Merchant Shipping Act, 1876, §30.
[4] Shipping Casualties Investigations Act, 1879, §§3(1), 2(2).
[5] Shipping Casualties (Appeal & Rehearing) Rules [S.C.R.], 1880 (by order of the Ld. Chancellor, 17 April), r. 3.
[6] S.C.R., 1880, r. 6(j). [7] S.C.R., 1880, rr. 6(e)–(i).
[8] S.C.R., 1880, rr. 6(d), 6(k).
[9] Merchant Shipping (Colonial Inquiries) Act, 1882, §6.

earlier indicated, largely unaltered during the balance of Sir Robert Phillimore's judgeship; the 'preservation clause' of the Acts saved not only the formal but the customary procedure of the High Court of Admiralty, so that practices such as the requirement of proof of or agreement upon the value of a salved vessel prior to its release from arrest continued in force in the Admiralty Division.[1] In the continuing effort to render proceedings more summary, one new provision permitted the Judge upon motion to accelerate the trial at any stage[2] (akin to a motion for summary judgment), but it is not known how frequently this procedure was employed.

In January of 1883 the construction of the new Royal Courts of Justice in the Strand was completed and all of the civil courts were transferred there, Admiralty and common law from Westminster, and Chancery from Lincoln's Inn.[3] This must have seemed to Phillimore, then aged seventy-two, the proper time to retire—which he did in March 1883, two years before his death.

As a scholar, Sir Robert Phillimore was better known as an international lawyer, and as a Judge better recognized as a canonist, than he was in either of these capacities as an Admiralty jurist;[4] and yet he was admirably suited to the Admiralty Judgeship, and discharged his Office with a wisdom and diligence which by no means suffers in comparison with the erratic brilliance of his predecessor. If in the ordering of greatness in the list of Judges of the High Court of Admiralty he must be placed below Lushington, it is because his term of office was too brief and the Court's business too mundane to have afforded him the necessary opportunity.

Some idea of Phillimore's quality as Admiralty Judge may nonetheless be gleaned from a few of his decisions. He used his knowledge of the international law to the best advantage in a difficult case of collision involving a vessel of the Khedive of Egypt; the Khedive sought to invoke the principle of sovereign immunity to protect his ship—which flew the flag of the Royal Ottoman Navy—from arrest in an English action *in rem*; Phillimore, noting that the vessel was actually engaged in commerce, decided

[1] Haynes, ¶161, p. 49.
[2] R.S.C., 1875, O. 62, r. 7; see Haynes, ¶175, p. 54.
[3] See Roscoe, *Studies*, p. 4.
[4] Holdsworth, *H.E.L.*, vol. 16, pp. 146–50; *D.N.B.*

that, as the true sovereign of the Ottoman Empire was its ruler the Sultan of Constantinople, the Khedive—a mere Prince without the powers of a sovereign—was not entitled to confer the protection of sovereign immunity upon his ship.[1] The qualities of rationality, lucidity, diplomacy and legal expertise which abound in this decision make it illustrative of Phillimore's contribution to the jurisprudence of Admiralty. He was conscious as well of the equitable powers of the Court, especially as reinforced by the Judicature Acts' consolidation of jurisdiction, and he used them in a notable case to set aside an unconscionable contract for life salvage.[2] He was as well versed in the customary Law of Admiralty (as for example the evidentiary problem of a sufficiently contemporaneous log entry[3]) as he was in the legal powers conferred upon the Court by statute, and he established the implied power of the Court to compel a master judicially removed to deliver up to the Court the ship's papers and certificate of registry.[4]

Phillimore did upon occasion show a reluctance to exercise jurisdiction; this was sometimes understandable, as in declaring the Court a *forum non conveniens* following a protest to jurisdiction by a foreign consul,[5] and sometimes unfathomable, as in his application of a statutory immunity from suits for negligence in navigation by Trinity House Pilots to a Liverpool Pilot, who clearly did not enter the purview of the enactment.[6] But in general Phillimore possessed great judicial acumen, and he was both inventive and independent; to expedite more summary procedure, he abandoned as soon as he came to the bench the practice of summing up the evidence in open Court for the nautical assessors and instead retired from the courtroom with them to consider the evidence[7]—a practice followed ever since.[8] Such was his wisdom and fairness that, like Lord Stowell before him,[9] he was several times called upon to serve as arbitrator of collision and salvage claims against the vessels of foreign sovereigns immune to suits in Admiralty.[10]

[1] *The Charkieh*, (1873) L.R. 4 A. & E. 59.
[2] *The Medina*, (1876) 2 P.D. 5 [App.].
[3] *The Henry Coxon*, (1878) 3 P.D. 156.
[4] *The St. Olaf*, (1877) 2 P.D. 113.
[5] *The Leon XIII*, (1883) 8 P.D. 121; *cf. supra*, p. 68, n. 4.
[6] *The Alexandria*, (1872) L.R. 3 A. & E. 574.
[7] *The Hannibal*, (1867) L.R. 2 A. & E. 53, 56 (n.).
[8] See Roscoe, *Practice*, p. 4.
[9] *E.g.*, *The Prins Frederick*, (1820) 2 Dod. 451, 481.
[10] See *The Constitution*, (1879) 4 P.D. 39, 45.

Sir Robert Phillimore was the last civilian Judge of the Admiralty Court. His feelings upon resigning the Judgeship must have been intense, for he had served the Court as counsel, Admiralty and Queen's Advocates, and finally Judge, for over forty-four years—and he knew that there was no civilian to succeed him. He had been appointed in 1867 as the Deputy of the Queen in her Office of Admiralty, and not simply by the Queen upon the advice of the Lord Chancellor, as with the common law judges.[1] And at the instant that his 1867 appointment ceased effect in 1875 it was replaced by another—vesting him with new powers, but no longer unique in form and constituting him no more as the Admiral's Deputy but as one of Her Majesty's Judges.

Yet the business of the Admiralty Court remained quite constant throughout the hurricane winds of change that altered its form, if not its substance. The Court continued to sit for not more than four days each week,[2] though the trained eye would surely have detected the slow transition from the learning and scholarship of the civilians to the businesslike attitude of the less formally educated but more commercially aware common lawyers. The change, so rude for most other courts and fatal to the ancient Exchequer and Common Pleas, was almost imperceptible in Admiralty—but by 1883 it had been wrought. If the Judicature Acts produced a hurricane, then The Cockloft was surely the hurricane's 'eye', and Phillimore, having weathered the fury, must have known with the instinct of a wise old mariner that the time had come to hand the wheel to a new watch.

With sentiment and misgivings, many beheld the change as disastrous:

> . . . I viewed with alarm the merging of the High Court of Admiralty by the Judicature Acts into a branch of one of the Divisions of the Supreme Court of Judicature . . . ; I did not expect that the old and venerable Admiralty Court would be changed.
> I felt at once that many and great difficulties would arise.[3]

There were indeed difficulties, and perhaps they were in fair measure the legacy of the civilians to their common law successors.

[1] Marsden, 'Six Centuries', p. 86; *cf.* A. Browne, vol. 2, p. 28.
[2] Roscoe, *Studies*, p. 10.
[3] Wendt, p. 624.

But to examine some of those difficulties and their solutions it is necessary to open a new chapter in the history of English Admiralty, for the retirement of Sir Robert Phillimore marked the great turning point for the Court, from which it has emerged out of the past and into the present.

CHAPTER 5

THE COURT UNDER COMMON LAWYERS

BARELY six months after Sir Robert Phillimore's retirement as Admiralty Judge, a sweeping reform of procedure was put into effect. It is doubtful that it was anything more than mere coincidence that the reform should have awaited the departure of the last civilian Judge, for it was applicable to the entire High Court and not limited in effect to the Admiralty Division, but many changes of detail, though few of substance, nonetheless altered procedures in the Admiralty Court.

Of chief importance were the changes regarding the appearance of defendants: while they might yet appear at any time prior to the actual giving of judgment, they did not—if they appeared after the date specified in the writ for appearance—continue to enjoy the benefit of an unrestricted defence, but were denied, save by order of the Judge in exceptional cases, any extensions of time.[1] It is also of interest to note a specific requirement that notices of appearances entered in Admiralty actions should thenceforward be given by the Central Office to the Admiralty Registry,[2] indicating perhaps that this had not always been done in the past, to the possible detriment of proceedings in the Admiralty Court. In specifically preserving the earlier summary procedure in collision causes by which the Judge might open the Preliminary Acts and hear evidence without the filing of any pleadings, it was required that any party intending to offer the defence of compulsory pilotage thereafter give notice to that effect at least two days prior to the opening of the Acts.[3] Other new provisions gave an absolute right of removal of actions *in rem*, in certain circumstances, from County Courts to the Admiralty Division,[4] and abolished the use in Admiralty of the demurrer,[5] which had been introduced only eight years previously.[6]

Of greater significance than any of these changes, it would seem, was the emphasis which the 1883 Rules placed upon the preservation of pre-Judicature Acts procedure in Admiralty. Aside from new rules which re-enacted earlier procedures without identifying them as such, as in restoration of the affidavit to lead the *warrant in rem*,[1] and payment into Court in lieu of bail to secure release of a previously arrested *res*,[2] there were rules which incorporated procedures in use in the High Court of Admiralty by specific reference to them as such, as with intervention of third parties in actions *in rem*.[3] In addition to these particular provisions, a 'preservation clause' similar to those contained in the 1873 and 1875 Rules was included in the 1883 Rules to retain pre-existing practices and procedures where no replacement or alteration had been specified.[4] There was an oddity to this, however, in that the 1859 and 1871 Rules, which had been declared by the Judicature Acts to 'remain in force' save where they conflicted with the Rules in the 1873 and 1875 schedules, were annulled by the 1883 Rules;[5] thereafter, such pre-Judicature Acts procedures as the appearance under protest could be utilized only by performance of the 'judicial miracle' of resurrecting the pertinent sections of the completely defunct pre-Judicature Acts Rules, as, in the case of the appearance under protest, 1859 Rules 30 and 70–7.[6]

Some of the old procedures sought to be saved by the 1883 Rules died nonetheless, as, for example, the *monition*. It was provided in 1883 that money judgments in Admiralty might be recovered by any method which would have been available to the Admiralty Court prior to the Judicature Act of 1875,[7] and it may be recalled that the usual mode of obtaining satisfaction of personal judgments in both contested[8] and uncontested[9] cases was by decree of a monition for attachment and/or committal of the person, despite the availability of execution as at common law after 1861.[10] Following the passage of the Debtors Act in 1869, and prior to the Judicature Acts, it was considered necessary to separate the monition to pay from the decree of attachment, and to serve the monition immediately after judgment, allowing an

[1] R.S.C., 1883, O. 12, r. 22.
[2] R.S.C., 1883, O. 12, r. 3.
[3] R.S.C., 1883, O. 19, r. 28.
[4] R.S.C., 1883, O. 35.
[5] R.S.C., 1883, O. 25, r. 1.
[6] R.S.C., 1875, O. 23.

[1] R.S.C., 1883, O. 5, rr. 16, 17; *cf.* R.S.C., 1875, O. 5, r. 11.
[2] R.S.C., 1883, O. 29, r. 3.
[3] R.S.C., 1883, O. 12, r. 24.
[4] R.S.C., 1883, O. 72, r. 2 (1044).
[5] See Williams and Bruce, 2nd ed., intro., p. vii; 3rd ed., p. 276.
[6] See, *e.g.*, *The Vera Cruz* (*No. 1*), (1884) 9 P.D. 88.
[7] R.S.C., 1883, O. 42, r. 3.
[8] See Williams and Bruce, 3rd ed., p. 336.
[9] 1859 Rules, rr. 33, 34.
[10] Admiralty Court Act, 1861, §§15, 22; see *supra*, pp. 64–5.

interval for compliance before attachment;[1] the 1883 Rules, while not specifically annulling that practice, nonetheless did specify that no prior demand for the payment of a judgment should be necessary,[2] so that the monition to pay became obsolete. Attachment and/or committal might still have been resorted to,[3] but it was quickly found more convenient to employ the common law methods of execution, and after 1883 money judgments in Admiralty were enforced by *fieri facias* or *elegit*,[4] though the latter fell into disuse in the very early years of the present century.[5] The monition, in use as a process in Admiralty since the ancient days of the Court, fell into complete disuse once deprived of its most usual employment, and was replaced by injunction[6] and mandamus, either of which the Admiralty Judge had power to issue by order or judgment.[7] Attachment itself survived, however, as the Court's mode of punishing contempt for (1) arrest-breaking *in rem* (discussed in detail later), (2) attempted levying upon an arrested *res*, (3) defiance by a master or part-owner of a decree of possession, (4) wilful disobedience by any person of an order of the Court,[8] and (5) noncompliance by a solicitor with his undertaking to appear and answer in lieu of arrest *in rem* (discussed in detail later).[9]

Post-1883 arrest in actions *in rem* was effected separately for each cause where a number of claims were brought against the same vessel,[10] in contrast with the procedure earlier outlined[11] in which pre-Judicature Acts *citations in rem* were served upon the Registrar in such instances; after 1883, however, consolidation came to be utilized to prevent a multiplicity of suits—hence, multiple *arrests* are rare.[12] 'Arrest' of a vessel by telegram from the Marshal to his substitute began to be employed in particularly urgent cases,[13] though in form this 'arrest' is really a detention upon pain of contempt until regular service of the warrant effects the actual arrest. In actions during which the *res* remained under arrest, and in which an order issued commissioning the Marshal

[1] See R. G. M. Browne, p. 252.
[2] R.S.C., 1883, O. 42, r. 1.
[3] R.S.C., 1883, O. 42, r. 3(581); see Williams and Bruce, 2nd ed., p. 495.
[4] Williams and Bruce, 2nd ed., p. 486.
[5] *Id.*, 3rd ed., p. 338.
[6] *Id.*, 2nd ed., p. 486; R.S.C., 1883, O. 42, rr. 7, 24 (585, 602).
[7] Williams and Bruce, 2nd ed., p. 491.
[8] See R. G. M. Browne, p. 250.
[9] See *infra*, pp. 186–8, 192.
[10] R. G. M. Browne, pp. 34–5.
[11] See *supra*, p. 56.
[12] See Williams and Bruce, 3rd ed., p. 392.
[13] R. G. M. Browne, p. 102.

to appraise and sell, the advertisement of sale required by the 1883 Rules was carried by *The Times*, the *Shipping and Mercantile Gazette*, and some newspaper local to the interested parties specified in the order;[1] the auction of the vessel then took place in Lloyd's Captains' Room at the Royal Exchange.[2]

The 1883 Rules also permitted the parties to a dispute to stipulate agreement as to facts and then to bring the matter before the Admiralty Judge as a 'special case' for his opinion solely on the questions of law involved (*i.e.*, a declaratory judgment not having the force and effect of a judgment rendered in an ordinary case).[3] This was not a new procedure, however, having been informally utilized by the Admiralty Court for some years.[4] And though the Court had historically entertained the suits of indigent mariners,[5] the 1883 Rules made the first provision for suits in *forma pauperis* as at common law.[6] Hearings proceeded as before, with Trinity Masters appearing as nautical assessors at the request of either party—in answer to a praecipe in collision and salvage causes, otherwise by summons[7]—and their task remained simply to give advice to the Admiralty Judge based on the admissible evidence alone.[8] The Registrar, assisted by two Merchants appointed with the approval of the President of the P.D.A. Division, continued to preside at references, though in cases of default he had come to be assisted by only one mercantile assessor,[9] and in causes of salvage the Court was said to become reluctant (for no discernible reason) to direct inquiries to the Registrar and Merchants.[10]

Interpretation of the 1883 Rules, somewhat surprisingly, frequently had the effect of preserving rather than abolishing the old procedure. By the procedural 'preservation clause'—despite the clear requirement that all matters should be commenced in the Court by 'action'—the old method of institution by *praecipe* was retained for special matters involving (1) pirate goods and bounty money, (2) removal and appointment of masters, (3) sale of the ship or share of an unqualified (non-British) owner, (4)

[1] R. G. M. Browne, p. 157; see also Williams and Bruce, 2nd ed., p. 379.
[2] *Ibid.*
[3] Williams and Bruce, 2nd ed., p. 360; 3rd ed., p. 361.
[4] *E.g.*, *The Zeta*, (1875) L.R. 4 A. & E. 460.
[5] See *supra*, p. 16.
[6] R.S.C., 1883, O. 16, r. 22.
[7] Williams and Bruce, 3rd ed., p. 443.
[8] Pritchard and Hannen, p. 1467.
[9] Williams and Bruce, 2nd ed., p. 450.
[10] *Id.*, 3rd ed., p. 454.

questions of security for salvage, title to wreck, or enforcement of salvage bonds, and (5) decisions respecting certificates for repayment of excess wages paid to substitutes of seamen leaving merchant ships and entering the Royal Navy (arising under §§214-220, M.S.A., 1854).[1] And in spite of the clear wording of the 1833 Rules that an order for sale could only be made upon the hearing of the cause,[2] the Judge continued with some frequency to make orders for sale prior to the hearing where in his opinion it was desirable so to do,[3] which retained the effect, if not the form, of the procedure in Dr Browne's day.[4]

The forms appended to the 1883 Rules soon proved most troublesome. Designed to bring the pleadings and practice in the Admiralty Court into closer conformity with the system prevailing in the common law courts, the 1883 forms tended to demand too much information from the parties, as with the requirement of a statement of particulars of loss and damages in the claim in collision causes[5]—the question of loss and damages of course being for the Registrar and Merchants only after a finding of liability by the Court, which ordinarily does not consider the issue of damages and therefore has no need of such information—or else to demand too little information, as with the 1883 form of claim in causes of salvage, which proved insufficient to permit the Court to reach a decision in a case arising in that year.[6] The inadequacy of the 1883 forms posed a ticklish problem, for they could not be relied upon and yet could not very well be completely rewritten so soon after promulgation; the solution came with a judicial declaration by Sir James Hannen that the forms were 'not to be slavishly adhered to',[7] whereupon practitioners began to employ forms very similar indeed to those in use before 1883, and as this move met no official resistance or objection, there was soon, for all practical purposes, a complete reversion to the pre-1883 Admiralty forms.[8]

Another problem arising after the 1883 Rules involved the service of Admiralty process *in rem*; it will be recalled that the pre-Judicature Acts warrant of arrest *in rem* contained a citation to the interested parties to appear and defend the *res*,[9] and that the

[1] R. G. M. Browne, p. 219.
[2] R.S.C., 1883, O. 13, r. 13 (113).
[3] Williams and Bruce, 2nd ed., p. 275.
[4] A. Browne, vol. 2, pp. 403–4.
[5] Williams and Bruce, 2nd ed., pp. 343–4.
[6] *The Isis*, (1883) 8 P.D. 227.
[7] (1883) 8 P.D. 227, 228.
[8] See Williams and Bruce, 2nd ed., pp. 342–3.
[9] See 1859 Rules, form 5.

Admiralty Marshal or his substitute alone had the right to board the offending vessel and serve the warrant, affixing a copy to the mainmast.[1] The Judicature Acts, however, removed the citation from the warrant of arrest and placed it in a new writ of summons *in rem* which was a separate instrument;[2] while the Marshal continued exclusively to serve the warrant of arrest, considerations of economy and convenience gave rise to the practice of service of the writ of summons *in rem* by the clerks of plaintiffs' solicitors,[3] who had in any case been accustomed since before the Judicature Acts to serving Admiralty process *in personam*.[4] Inevitably, one of these lay servers of a writ *in rem* was forcibly resisted in his attempt to board and serve a vessel, and the question arose as to the right of such individuals to serve such process; it was ruled that only the Admiralty Marshal had the *right* to board a ship and nail a writ to the mast,[5] which doubtless explains the customary modern practice whereby the Marshal serves both warrant and writ simultaneously,[6] though lay service of writs is occasional.

After 1883, the impact of the common lawyers' domination of the Court began to manifest itself in Admiralty practice as well as procedure. The informal motion practice before the Judge in Chambers which had prevailed under the civilians gave way to the more conventional practice of the common law whereby motions were generally made only in open Court,[7] and the wording of the 1883 Rules with respect to written evidence illustrates the totality of the change in emphasis from written to oral testimony,[8] a change which, though it had begun more than half a century previously, was undertaken in open imitation of the procedure at common law. Moreover, the beginnings of the great confusion of the common lawyers by the specialized jurisprudence of Admiralty were also manifested in the 1883 Rules, which, in oblivious repetition of a misconception introduced in the Judicature Acts,[9] classed an action for *distribution* of a recovery for salvage previously awarded as an action *in rem*;[10] since the object of a suit for distribution of salvage was and is the recovery of money paid as an

[1] 1859 Rules, r. 14.
[2] R.S.C., 1875, form A., I, 4.
[3] See *The Solis*, (1885) 10 P.D. 62.
[4] See 1859 Rules, r. 32.
[5] *The Solis*, (1885) 10 P.D. 62.
[6] See R. G. M. Browne, p. 70.
[7] See Williams and Bruce, 3rd ed., p. 500.
[8] R.S.C., 1883, O. 38, r. 2.
[9] R.S.C., 1875, O. 5, r. 11(d.).
[10] R.S.C., 1883, O. 5, r. 16(38)(d.).

award to a salvor, which money, upon payment, loses its identification with the salved *res*, and since that salvor—and not in any way the salved *res*—becomes the defendant in an action for distribution of salvage, the action is properly *in personam* (against the salvor) and not *in rem* (against the *res*). The pre-Judicature Acts suit for distribution of salvage was clearly *in personam*, and it seems plain that the post-Judicature Acts misconception of its nature was the result of confusion by the common lawyers concerning the jurisprudential distinction which must be drawn in Admiralty between actions *in rem* and actions *in personam*.[1]

Sir Robert Phillimore's successor as Admiralty Judge was Sir Charles Butt, who had been called to the bar by Lincoln's Inn in 1854, after which he was for some years the correspondent of *The Times* in Constantinople, where he also carried on a sizeable maritime law practice in the Consular Court; upon his return to London he entered into practice in the Admiralty Court, and though said to have been 'by no means a consummate lawyer', he was acknowledged to be a skilful advocate at the bar, and took silk in 1868.[2] Butt was described during his years at the Admiralty bar as 'bearded and worn-looking from hard work and the climate of Constantinople'[3] (his caricature by 'Ape' from *Vanity Fair* is wondrous), and while it is true that he lacked the academic training and 'ecclesiastical erudition' of the advocates of Doctors' Commons,[4] his knowledge of Admiralty Law and its practice, together with his purposive nature, undoubtedly made him the worthiest of the candidates for the Admiralty Judgeship.

Unfortunately, though Butt was appointed specifically because of his ability to discharge the Office left vacant by Sir Robert Phillimore's retirement, it became the policy of the President, Sir James Hannen, to sit alternately with Butt in Admiralty matters. Resentment grew against this on the part of the bar and of the maritime interests which had a natural concern over the Court's viability, and the eventual result was a published criticism of Hannen for keeping Butt away on circuit and substituting himself, the reason given being that the Court ought to have a full-time Judge in the tradition of the civilians.[5] A more compelling—but unstated—reason for discontent may have been that

[1] See Williams and Bruce, 2nd ed., p. 246, n. (*u*).
[2] *D.N.B.*
[3] Roscoe, *Studies*, p. 9.
[4] *Id.*, p. 5; *H.C.A.*, pp. 6–7.
[5] (1884) 76 *L.T.* 286.

Hannen, though his name appeared as co-author of a large digest of Admiralty practice and procedure, was in truth not an Admiralty Lawyer and had no 'experience of shipping law',[1] and the fear may have been not so much of Butt's absence as of Hannen's presence. In any event, Butt seems after 1884 to have sat more consistently in Admiralty matters, while Sir James concentrated on probate and divorce.

If the urgent problem had been solved, Hannen's action in sitting as an alternate had nonetheless broken the ancient succession of single Judges in the Admiralty Court, and never since has the Admiralty Judge had the opportunity enjoyed by his civilian predecessors both to personify the Court of Admiralty and to exert almost a sole influence upon its development; indeed, the formal title of Admiralty Judge lapsed with Sir Robert Phillimore's retirement, and the dignity of the ancient Office has become vested in the President of the P.D.A. Division, in whose Court the gilt anchor hangs and before whom, upon the formal hearing of causes in Admiralty, is displayed the great silver oar mace of the High Court of Admiralty. Sir Charles Butt, then, as the first 'Admiralty Judge' from the ranks of the common lawyers, is also the first to whom that title is applied solely as a description of his function, and the term 'Admiralty Judge' as applied to Butt and to his successors down to the present is used hereafter purely to designate those Judges of the Admiralty Division who sat predominantly in Admiralty matters, and who have either made a significant contribution to Admiralty Law or jurisprudence, or have played a significant part in the Court's later development.

As Admiralty Judge, Sir Charles Butt left no great impression upon the Law of Admiralty, though his decision in *The Vera Cruz (No. 1)*[2] indicating the possibility of finding negligence *per se* ['statutory fault'] on the basis of *non*-contributory violation of a safety regulation,[3] may, if recent American experience is any guide,[4] become significant in the future of Admiralty tort litigation in England. There was no notable judicial extension of the Admiralty jurisdiction ascribable directly to Butt; his reluctance to order a stay of action at common law *pendente lite* despite what

[1] Roscoe, *H.C.A.*, pp. 6–7; *Studies*, p. 5.
[2] (1884) 9 P.D. 88.
[3] *Contra, The Fanny M. Carvill*, (1875) L.R. 4 A. & E. 417, 422, 430.
[4] See *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958).

appears to have been a clear statutory power so to do[1] seems to typify his rather unadventuresome judicial outlook. However, if Butt's contribution to Admiralty jurisprudence was not scintillantly affirmative, there were those in other judicial positions whose overall contributions may have been almost negative—two of these in particular being Sir Gainsford Bruce and William Brett, Lord Esher. Born in 1815, Esher attended Westminster School and Gonville and Caius College, Cambridge, taking his M.A. in 1845; he was called to the bar by Lincoln's Inn in 1846, took silk in 1861, and became a leading practitioner at the Admiralty bar; he was made a Justice of the Common Pleas in 1868, Lord Justice of Appeal in 1876, Master of the Rolls in 1883, and died in 1899.[2] He delivered a judgment in the celebrated Crown Case Reserved of *R. v. Keyn*,[3] which established criminal jurisdiction over ships passing through territorial waters, and his judgment in *The Gas Float Whitton (No. 2)*,[4] which settled the non-vessel status of waterborne aids to navigation, thus exempting them from salvage claims, is also notable for its discussion of the historical development of Admiralty jurisdiction in salvage.

Despite these admirable achievements, Lord Esher was notorious for a lack of judicial discretion,[5] and it was said that 'his judgments . . . , even within his own special domain of mercantile and marine law, [were] by no means unimpeachable.'[6] That this was a reasonable statement is illustrated in two cases on appeal from the Admiralty Division concerning recovery for wrongful death under Lord Campbell's Act, which will be discussed later, and particularly in the case of *R. v. Judge of City of London Court*,[7] which was an appeal from refusal of a Divisional Court of the Queen's Bench Division to issue a mandamus compelling the Judge of the City of London Court to exercise that Court's Admiralty jurisdiction *in personam* under the County Courts Admiralty Jurisdiction Act to entertain a suit against the negligent pilot of a Thames barge. The argument recited and relied upon, in part, Mr Justice Story's opinion in *DeLovio v. Boit*,[8] which had earlier been accepted and approved by the Privy Council;[9]

[1] *The Nereid*, (1889) 14 P.D. 78.
[2] *D.N.B.*
[3] (1876) 2 Ex. D. 63 [C.C.R.].
[4] [1896] P. 42, 47–53 [App.].
[5] See *D.N.B.*
[6] 22 *D.N.B.* 265.
[7] [1892] 1 Q.B. 273.
[8] 7 Fed. Cas. 418 (No. 3776) (C. C. Mass., 1815).
[9] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 284 [*via The Nestor*; see *infra*, p. 157].

Esher, ignoring the principle that a decision of the Privy Council when the final court of appeal in Admiralty is as 'formally and technically' binding upon the Court of Appeal as is a post-Judicature Acts Admiralty decision of the House of Lords,[1] proceeded to discount completely the effectiveness in England of Mr Justice Story's reasoning,[2] and, making it plain that he viewed the proceeding below as an ill-clothed attempt to procure an extension of Admiralty jurisdiction, said: 'I for one will not reopen the floodgates of Admiralty Jurisdiction upon the people of this country.'[3] This statement should demonstrate that the Judicature Acts did not smother the ancient feud between the common law and Admiralty, a fact which retains importance in the present day. Esher was not alone in scorning *DeLovio*, for Kay, L.J., remarked that Story, if literally read, would include even slander within the Admiralty jurisdiction;[4] slander, of course, was within the ancient jurisdiction of Admiralty when committed at sea, as was any tort,[5] and damages for oral defamation were once regularly awarded by the Court[6] without interference by the courts of common law.[7] The unduly restrictive decision in *R. v. Judge of City of London Court* is worthy of a more expert criticism than may be offered here,[8] but it is plain that by this time the common lawyers' ignorance of precedents established by the civilians had become a very material factor in Admiralty decisions both in and out of the Admiralty Court.

As opposed to the real damage done by Lord Esher out of incomplete knowledge and fundamental hostility, the smudges left upon the Admiralty Law by Sir Gainsford Bruce might well be termed 'friendly blunders'. An active Admiralty barrister and author of the leading text for many years on Admiralty jurisdiction and practice, Bruce was described as 'a sensible and pleasant north countryman, with a somewhat horse-face', which gave rise to the cruel pun that, when a nautical chart was placed before him for examination, it was a case of 'putting the chart before the horse.'[9] In spite of his agreeable attributes, Bruce was never

[1] *English & Empire Digest*, vol. 1, p. 117; *The Cayo Bonito*, [1903] P. 203, 215, 220.
[2] [1892] 1 Q.B. 273, 293–4.
[3] [1892] 1 Q.B. 273, 299.
[4] [1892] 1 Q.B. 273, 310.
[5] See *The Plymouth*, 3 Wall. (70 U.S.) 20, 36 (1866).
[6] See, *e.g.*, *Raynes c. Osborne*, (1579) 2 *Sel. Pl. Adm.* 156.
[7] Marsden, 10 *L.Q. R.* 113 (1894).
[8] *Ibid.*
[9] Roscoe, *Studies*, p. 10.

considered to possess a legal intellect of the highest order, and his appointment in 1892 as a High Court Judge in the Queen's Bench Division has been called 'dubious', and 'it was not welcomed by the Press at the time';[1] more significantly, it was not welcomed by Lord Chief Justice Coleridge, who took exception to it in a letter to the Lord Chancellor (Halsbury),[2] and the 'justification' which it 'would seem to require'[3] has never been supplied. Bruce retired in 1904 and died in 1912, but prior to his retirement he occasionally sat as an alternate in the Admiralty Division, exercising that jurisdiction as a result of the vesting in each Judge of the entire jurisdiction of the High Court by the Judicature Acts. In that capacity he rendered no decisions contributing significantly to the development of Admiralty jurisdiction, though in one case, *The Theta*,[4] he surely had a great opportunity of doing so; the issue in that case revolved around the meaning of the word 'damage' in §7 of the 1861 Court Act, and the specific question was whether 'damage' included negligent personal injury suffered aboard a ship in dock. A previous case had established that the meaning of 'damage' was not restricted to collision,[5] and Bruce very reasonably accepted that 'damage' might include personal injury, but despite the firm holding that the 'damage done by any ship' clause gave jurisdiction within the body of a county,[6] he refused to extend §7 to cover injuries suffered in dock. Bruce did, however, render one decision which has had a fundamental impact upon Admiralty procedure and jurisprudence in the present century: *The Nautik*,[7] which will be discussed in detail in the following chapter—and which alone provides sufficient justification for the many reservations over Bruce's appointment to the bench.

At the outset of the common lawyers' dominion over the Admiralty Court, the Admiralty jurisdiction remained essentially that of the twilight of the civilian age, and the 1883 Rules even established this more firmly by providing that any cases which would have come before the Court prior to the Judicature Acts should be assigned automatically to the Admiralty Division.[8] Powers

[1] Heuston, pp. 46–8.
[2] *Ibid.*
[3] *Id.*, pp. 40–1.
[4] [1894] P. 280.
[5] *The Guldfaxe*, (1868) L.R. 2 A. & E. 325; *The Zeta*, [1893] A.C. 468.
[6] *The Malvina*, (1862) 6 L.T.R. 369.
[7] [1895] P. 121.
[8] R.S.C., 1883, O. 5, r. 5.

possessed by the Court under the civilians, such as that to stay Admiralty actions in inferior courts, remained basically unaltered,[1] though there seems for a time to have been some question whether the Judicature Acts[2] restricted the hearing on appeal from inferior courts of causes which could not have been brought before the Court at instance;[3] that jurisdiction was judicially affirmed, however, early in the present century.[4] Appellate jurisdiction in salvage causes comprehended cases originally brought before Justices of the Peace or their Umpires, Stipendiary Magistrates, or County Court Judges, where the sum in dispute exceeded fifty pounds.[5]

The ancient and inherent jurisdiction of the High Court of Admiralty remained vested in the Admiralty Division, including that of matters of international comity as a court of civil law.[6] But by the same token the ancient restrictions placed upon the Court by the common law and not removed by statute were also passed on, so that 'mixed' [land-sea] contracts, such as charterparties, were actionable only in the Queen's Bench Division[7] unless Admiralty had ancillary jurisdiction in a particular case. The Court's ancillary jurisdiction was in fact broadened by the acquisition under the Judicature Acts of common law jurisdiction, which, like the Admiralty jurisdiction, was thereafter technically shared by all Divisions of the High Court; the result was that causes *in rem* and *in personam* arising out of a single incident, such as a suit for collision brought against an offending vessel in Admiralty and an action for negligence brought against her pilot at common law, which previously had to be tried in separate courts, could after the Judicature Acts and the 1883 Rules be tried together in the Admiralty Division.[8]

During these first years under the common lawyers, a few miscellaneous pieces of jurisdiction were conferred upon the Court by statute. An Act of 1883 regulating fishing vessels placed legal proceedings thereunder upon the same basis as those under the M.S.A., 1854, thus giving the relevant jurisdiction to the

[1] See Roscoe, *Practice*, p. 245.
[2] Supreme Court of Judicature (Amendment) Act, 1875, §15(3).
[3] See R. G. M. Browne, p. 20.
[4] *The Montrosa*, [1917] P. 1.
[5] See Williams and Bruce, 2nd ed., p. 515.
[6] Pritchard and Hannen, p. 639.
[7] Smith, p. 9.
[8] *E.g.*, *The Altyre*, (1885) (Feb. 27) S.G.S. 150; see Williams and Bruce, 3rd ed., p. 107, n. (*f*).

Admiralty Division when read with the Judicature Acts and 1883 Rules, and in any suits for wages under the Act jurisdiction was specifically given to consider its forfeiture provisions.[1] Concurrent jurisdiction to try offences involving submarine telegraph cables was given in 1885,[2] and an Act of 1891 affected the Court's jurisdiction in that it forbade detention or arrest of vessels of any nationality defined as 'exempted mail ships' by international convention.[3]

A few aspects of the Court's procedure were likewise affected by statute in this period. Under an Act of 1883, power was given to the Lord Chancellor to transfer jurisdiction under the 1869 Debtors Act to the Queen's Bench Division, and this was done early in 1884;[4] thereafter, satisfaction of any Admiralty Court judgment or order for the payment of money by attachment and/or committal could be effected only upon application to a Judge of the Queen's Bench Division. The Admiralty Judge was given power in 1885 to name persons to conduct examinations or take depositions beyond the Court's geographical jurisdiction.[5] Appeal upon motion to the Admiralty Division from County Courts was facilitated in 1888,[6] and the appellate jurisdiction of the Privy Council in cases coming from Vice-Admiralty Courts[7] survived the replacement in 1890 of the Vice-Admiralty Court system by Colonial Admiralty Courts, which were vested with a jurisdiction and power modelled upon that of the Admiralty Division.[8]

It is of extreme interest to observe that the Admiralty jurisdiction was as readily extended by judicial fiat under the common lawyers as it had been when in the hands of the civilians. This was most frequently accomplished by transfer of actions into the Admiralty Division from the Queen's Bench Division, as upon applications stating as grounds that the matters, *e.g.*, salvage,[9] were not triable at common law, or by retaining suits in Admiralty on matters such as mixed contracts, which ought technically to

[1] Merchant Shipping (Fishing Boats) Act, 1883, §§51, 29.
[2] Submarine Telegraph Act, 1885, §6(5).
[3] Mail Ships Act, 1891, §5.
[4] See Bankruptcy Act, 1883, §103.
[5] Evidence by Commission Act, 1885, §2.
[6] County Courts Act, 1888, §120.
[7] See, *e.g.*, *The Thomas Allen*, (1886) 12 App. Cas. 118 [P.C.].
[8] Colonial Courts of Admiralty Act, 1890.
[9] See, *e.g.*, *Game Cock Towing Co. v. Grey*, (1887) (Hilary Term) Q.B.D. [unrep.]; Williams and Bruce, 3rd ed., p. 396.

have been transferred to the Queen's Bench Division, and which, upon application, were done so only with the greatest reluctance;[1] indeed, it was in this latter manner that the Admiralty Court during the last quarter of the nineteenth century acquired cognizance of suits upon policies of marine insurance.[2]

But the most significant jurisdictional struggle of these first years of the Court under the common lawyers was one which in fact had its genesis in the first half of the nineteenth century, for it involved the application in Admiralty of one of the most significant pieces of legislation in English history, the Fatal Accidents Act, 1846—better known by the name of its author as Lord Campbell's Act. By permitting actions for infliction of death to be maintained by the survivors of the deceased, this statute in effect created the modern tort of wrongful death; but because the Act made no mention of or specific provision for suits in Admiralty, there was no immediate attempt to apply it in the Admiralty Court. In 1868, however, Sir Robert Phillimore came to grips with the really crucial issue—the ability to sue a *vessel* in Admiralty under Lord Campbell's Act—and held that since a suit could be maintained *in rem* for 'damage done by any ship',[3] and that since 'damage' must reasonably include personal injury or death, there was no jurisdictional bar to a recovery upon suit *in rem* under Lord Campbell's Act.[4] This view was subsequently adopted by the Judicial Committee of the Privy Council in affirming another judgment of Phillimore's on the same grounds.[5] Remarkably, despite the clear position of the Privy Council, the Queen's Bench in 1871 issued a prohibition against an Admiralty suit *in rem* seeking recovery for wrongful death, making it plain in the process that the common lawyers' real objection to such a recovery was that it would, in Admiralty, be awarded without a jury trial.[6] The two views came into head-on collision in a post-Judicature Acts appeal from another recovery *in rem* awarded under Lord Campbell's Act by Sir Robert Phillimore; the Court of Appeal upheld Phillimore in a split decision, Baggallay and James, L.JJ., relying upon the Privy Council's decision in *The Beta*, and Brett [Esher]

[1] See, *e.g.*, *Price v. Sea Insurance Co.*, (1889) (12 January) P.D. [unrep.]; Williams and Bruce, 3rd ed., p. 397, n. (*n*).
[2] *Ibid.*
[3] Admiralty Court Act, 1861, §7.
[4] The *Guldfaxe*, (1868) L.R. 2 A. & E. 325.
[5] *The Beta*, (1869) L.R. 2 P.C. 447.
[6] *Smith v. Brown*, (1871) L.R. 6 Q.B. 729.

and Bramwell, L.JJ., ignoring *The Beta* completely in favour of the Queen's Bench in *Smith v. Brown*. After this decision, *The Franconia*,[1] Sir Robert Phillimore completed his years as Admiralty Judge confirmed in the reasoning which he had given in the first year of his tenure. In the year following Phillimore's retirement, Sir Charles Butt awarded a recovery *in rem* for wrongful death under Lord Campbell's Act,[2] and an appeal was taken from that decision to the Court of Appeal; Brett, newly appointed Master of the Rolls, at last prevailed, and the decision below was reversed.[3] Brett's judgment in *The Vera Cruz (No. 2)* is worthy of some dissection; he based his decision upon the narrow equation of the word 'damage' in the 1861 Admiralty Court Act with 'collision', excluding such interpretations as that made by Sir Robert Phillimore in *The Guldfaxe*. Brett was not alone in this reading of 'damage', for the same position had been taken by Dr Lushington in interpreting the same clause;[4] but since Lord Stowell had earlier defined 'damage', used in the same sense, as inclusive of personal injury,[5] the validity of Lushington and Brett's position is very doubtful. More significantly, Brett and his associates' holding against Admiralty jurisdiction *in rem* under Lord Campbell's Act in *The Vera Cruz (No. 2)* again ignored the Privy Council's holding in *The Beta*, and did so despite the citation of that case in argument, and despite the reliance upon it in the decision in *The Franconia*, which Brett took pains to distinguish from the case at bar. On all points, there is clearly very little justification for the refusal of Brett and his colleagues to acknowledge *The Beta*, and its status as a decision of the highest appellate court in Admiralty ought to have produced a different result in *The Vera Cruz (No. 2)*.[6] Though the wrongful death jurisdiction was not judicially restored to Admiralty, at least the restrictive interpretation of 'damage' was soon overruled by Lord Herschell, L.C., in *The Zeta (Mersey Docks and Harbour Board v. Turner)*,[7] and Lord Stowell's view was thereafter restored to favour.[8]

[1] (1877) 2 P.D. 163 [App.].
[2] *The Vera Cruz (No. 1)*, (1884) 9 P.D. 88.
[3] *The Vera Cruz (No. 2)*, (1884) 9 P.D. 96 [App.].
[4] *The Robert Pow*, (1863) Br. & Lush. 99.
[5] *The Ruckers*, (1801) 4 C. Rob. 73.
[6] See *supra*, p. 125; *cf. The Cayo Bonito*, [1903] P. 203, 215, 220.
[7] [1892] P. 285; [1893] A.C. 468, 483–7 [H.L.].
[8] See, *e.g.*, *The Theta*, [1894] P. 280.

When Sir James Hannen retired as President of the Admiralty Division in 1891, he was succeeded by Sir Charles Butt; Butt, however, was in poor health at the time, and was President only a few months until his own retirement, which was followed shortly by his death.[1] The new President of the Division was Sir Francis Henry Jeune, who had been appointed Judge of the Division only a few months previously (for the purpose, if seems, of taking over the bulk of the probate and divorce work from Hannen). Jeune was born in 1843, attended Harrow School and Balliol College, Oxford, was called to the bar by the Inner Temple in 1868, took silk in 1888, and became Judge of the P.D.A. Division in 1891. After his appointment in 1892, Jeune served as President for thirteen years, and in addition served without compensation as Judge-Advocate-General from 1892 until 1904.[2] Owing to the previous uncertainty of the status and precedence of the Presidency, legislation was enacted to settle the matter,[3] and in consequence Jeune was the first President to enjoy precedence equal to that of a Lord Justice of Appeal. He retired in 1905 and was given an hereditary peerage as Baron St Helier, and his career upon the bench has been described as 'successful', though personally considered as 'not in the very first rank of English Judges.'[4]

The illness and untimely death of Sir Charles Butt thrust Admiralty matters upon Jeune very soon after he came to the bench. This was unfortunate, for 'of admiralty he had little or no special knowledge at the time of his appointment as a judge . . .',[5] and Jeune's lack of expertise in this admittedly esoteric field did not restrain him, even in the first months of his judgeship, from rendering decisions based upon his personal concepts of the historical development of Admiralty jurisdiction and procedure.

In following the reasoning and precedents of the civilians he was generally on firm ground, as with his exposition of the action *in rem* as the ancient foundation of the suit for salvage, given soon after coming to the bench,[6] which found him in agreement with Dr Lushington.[7] But Jeune is best remembered as a pioneer of new doctrines in Admiralty, and in a decision given just after his appointment as President, *The Dictator*, he departed from the

[1] *D.N.B.*
[2] *Ibid.*
[3] Supreme Court of Judicature Act, 1891, §2.
[4] Heuston, p. 46.
[5] 1901–11 *D.N.B. Supplement*, p. 374.
[6] *The Elton*, [1891] P. 265.
[7] See *The Fusilier*, (1865) Br. & Lush. 341, 344.

precedent and reasoning of the civilian Admiralty Judges of the nineteenth century to establish the concept of personal liability in actions *in rem*;[1] and near the end of his judicial career he expanded this view to hold charterers for the first time personally liable to pay salvage claims.[2] *The Dictator* is perhaps, jurisprudentially, the most important single case within the period covered by this work, and that decision, together with the issues raised by it, is discussed at length in the succeeding chapter. For better or for worse, it is fair to say that Sir Francis Henry Jeune had a greater influence upon the development of the Law of Admiralty than any single common lawyer since Coke.

One procedural development of importance during Jeune's Presidency was the introduction by statute of a right of appeal from interlocutory orders in the Admiralty Division which had the effect of a determination of liability, without permission of the judge making the order;[3] this constituted the first fundamental departure from the doctrine, which had prevailed in Admiralty since the days of Dr Browne and before, that interlocutory decrees were not generally appealable.[4]

A jurisdictional development of more curiosity than importance came with the enactment of legislation giving to local authorities the right to recover, 'in the same manner as salvage', expenses incurred by the disposal of animals washed ashore from wrecks.[5] Though recently repealed, this provision at one time involved the Admiralty Court in determinations such as the applicability of the statute to the disposal of frozen mutton washed ashore from a wrecked refrigerator ship.[6]

By far the most significant enactment of this era, however, was the Merchant Shipping Act, 1894, a consolidation and rewriting of all of the earlier Merchant Shipping Acts, including one which only five years previously had statutorily confirmed the jurisdiction of the Admiralty Court over claims or questions concerning masters' disbursements.[7] It repealed, wholly or in part, several sections of the 1861 Admiralty Court Act and all previous Merchant

[1] [1892] P. 64, 304.
[2] *The Cargo ex Port Victor*, (1901) 84 L.T.R. 363.
[3] Supreme Court of Judicature (Procedure) Act, 1894, §1.
[4] See A. Browne, vol. 2, pp. 435–6.
[5] Diseases of Animals Act, 1894, §46.
[6] *The Suevic*, [1908] P. 292 [App. to Adm. Div.].
[7] Merchant Shipping Act, 1889, §1.

Shipping and Shipping Casualties Investigations Acts,[1] and reissued all of the pertinent provisions in a single vast body of legislation.

The 1894 M.S.A., while too large to examine here in great detail, covered the registry and established the priority of ship mortgages,[2] dealt with seamen's rights of wage recovery, discharge compensation, and liens for wages (immune to forfeiture) and salvage (may be forfeited),[3] defined the power of the Admiralty Court to rescind maritime contracts[4] and to remove and appoint shipmasters,[5] dealt with legal proceedings for forfeiture and/or fine under other provisions of the Act,[6] set forth the procedures and powers of tribunals investigating shipping casualties[7] (including the power of the Minister of Transport to order a rehearing by the Admiralty Division[8]), gave a statutory lien for freight enforceable in Admiralty,[9] established the liabilities of registered and beneficial shipowners,[10] gave to the Admiralty Court the power to consolidate, upon application, claims against foreign and domestic shipowners,[11] established a concurrent jurisdiction for the Admiralty Court over claims relating to recovery or apportionment in salvage and wreck,[12] and defined the geographic limits of jurisdiction under the Act, giving a right of detention of foreign ships within British territorial waters pending compensation of damage done by them to British ships or property elsewhere.[13]

As to practice, the business of the Court during the first years under the common lawyers remained at about the same level which it had reached just prior to Sir Robert Phillimore's retirement. For a random sample, there were 395 writs issued in 1887, 411 in 1891, and 404 in 1896, with the percentage of writs *in rem* remaining at about three-quarters of the total; there was a sharp rise in the number of writs *in rem* in 1903–4, but the total in the year of Jeune's retirement was again just under 400.[14]

Jeune retired as President in 1905, and died in the same year. The civilian influence, which had been maintained to some degree

[1] M.S.A., 1894, §745 and Schedule 22.
[2] §§31–46, esp. §33.
[3] §§155–63, esp. §§162, 156.
[4] §168.
[5] §472.
[6] §§356–8.
[7] §§464–8, 469–71, 475–9, esp. §§475(3), 478.
[8] See, *e.g.*, *The Seistan*, [1959] 2 Ll.Rep. 607.
[9] M.S.A., 1894, §494.
[10] §§502–9, 58.
[11] §504.
[12] §§510–71, esp. §§547, 556, 565.
[13] §§684–93, esp. §688.
[14] Figures supplied by Admiralty Registry, 1966.

by Sir Charles Butt, owing to his early practice in the Court under the civilians, dwindled and died during Sir Francis Jeune's tenure—not only in England, but also in Ireland, where, with the death of the last civilian Judge, Dr J. F. Townshend,[1] the High Court of Admiralty in Ireland was united and consolidated in 1893 with the Supreme Court of Judicature in Ireland.[2]

Coincidentally, a great era in United States Admiralty would soon end also. It was the intention of the framers of the Judiciary Acts of the late eighteenth century that the principal function of the District Courts should be the exercise of the Admiralty and maritime jurisdiction mandated by the Constitution; and so it was, until the early twentieth century.[3] The District Courts of the Atlantic coast were of course those which, in terms of business, flourished best; thus Maine, Massachusetts, and Southern New York were the early great Districts. But the Southern District of New York has always been the foremost Admiralty Court of the United States. This one Court—being the oldest Federal Court in the Nation—with a District comprising only Manhattan and a few surrounding counties of New York State, heard 245 Admiralty causes in 1860, 255 in 1870, 525 in 1880, 408 in 1890, 423 in 1900, 384 in 1910, and 1,904 in 1920.[4] Though essentially the Admiralty Court for the Port of New York, a host of proceedings involving foreign-flag vessels and causes arising outside territorial waters have been brought there; the names of a few—*Titanic*, *Andrea Doria/Stockholm*, *Torrey Canyon*—are fairly illustrative.

In the opinion of a leading American treatise upon the Rules of Nautical Road, 'Notwithstanding the fact that in this country we do not have special admiralty courts, but any federal judge may be required to hear a collision case, it will be found that the decisions have been, as a whole, sound in seamanship as well as in law.'[5] While that statement may be a generally accurate evaluation, it is undeniable that the lack of an Admiralty Judge or Judges in the English sense has historically been the greatest impediment to the development of Admiralty Law in the United States; whether or not a Judge comes to the bench of a great Admiralty District equipped to serve its maritime needs has always been largely a matter of fate, and fate has been kinder, by

[1] Yale, pp. 159–61.
[2] Williams and Bruce, 3rd ed., p. 325, n. (*u*).
[3] Hough, pp. 6–7.
[4] *Id.*, p. 34.
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and large, than the system deserves.[1] That is why the eminent Admiralty Judges of American history (though little attention has ever been paid them) are so easily distinguishable—they are merely the ones whose decisions may be read and clearly understood. Of these there are perhaps ten who could be called great—Betts, Bee, Benedict, Hough, and H. B. Brown, in addition to those previously named.[2] Many, having Admiralty cases thrust upon them despite a total lack of qualification in the field, have been almost nightmarishly incompetent, with concomitant results for the Law. Indeed, only three can be said to have equalled the English civilians in stature; Story and Ware have already been spoken of, but the third, Addison Brown, was on the bench while the direct influence of the civilians in England waned and was extinguished.

Brown was born in West Newbury, Massachusetts, in 1830. He entered Amherst College in 1848, but transferred to Harvard in the following year, where he took his B.A. in 1852, LL.B. in 1854, and was awarded an LL.D. *honoris causa* in 1902. After law school he entered Admiralty practice in New York City, but he was better known as a gifted amateur botanist, on which subject he was the co-author of a noted three-volume treatise. He was appointed to the bench of the Southern District of New York in 1881, served as the last sole Judge of that Court (there are well over a score at present) retired in 1901, and died in 1913.[3] Upon his retirement he published a digest of his decisions, still a treasured possession for any American proctor, and which best shows the extent of his great capabilities in Admiralty.

But Addison Brown was unique in developing a special judicial expertise within Admiralty itself—he was probably the world's foremost judge of marine collision causes. His ability in this was fantastic, as only a reading of his decisions can serve to illustrate,[4] and the peculiar volume of collision cases in his Court gave him continual opportunity to perfect that area of the law, of which he is the modern father in America. In general, Brown took an expansive view of the Admiralty jurisdiction; its growth in the United States during his tenure owed chiefly to him,[5] and his retirement closed a chapter in its evolution.

[1] Wiswall, 'Procedural Unification,' pp. 44–5.
[2] *Supra*, p. 28.
[3] *D.A.B.*, *W.W.W.*
[4] See, *e.g.*, *The Aurania* and *The Republic*, 29 F. 98 (S.D. N.Y. 1886); also Brown, pp. 46–81.
[5] See Hough, p. 29.

by Sir Charles Butt, owing to his early practice in the Court under the civilians, dwindled and died during Sir Francis Jeune's tenure—not only in England, but also in Ireland, where, with the death of the last civilian Judge, Dr J. F. Townshend,[1] the High Court of Admiralty in Ireland was united and consolidated in 1893 with the Supreme Court of Judicature in Ireland.[2]

Coincidentally, a great era in United States Admiralty would soon end also. It was the intention of the framers of the Judiciary Acts of the late eighteenth century that the principal function of the District Courts should be the exercise of the Admiralty and maritime jurisdiction mandated by the Constitution; and so it was, until the early twentieth century.[3] The District Courts of the Atlantic coast were of course those which, in terms of business, flourished best; thus Maine, Massachusetts, and Southern New York were the early great Districts. But the Southern District of New York has always been the foremost Admiralty Court of the United States. This one Court—being the oldest Federal Court in the Nation—with a District comprising only Manhattan and a few surrounding counties of New York State, heard 245 Admiralty causes in 1860, 255 in 1870, 525 in 1880, 408 in 1890, 423 in 1900, 384 in 1910, and 1,904 in 1920.[4] Though essentially the Admiralty Court for the Port of New York, a host of proceedings involving foreign-flag vessels and causes arising outside territorial waters have been brought there; the names of a few—*Titanic*, *Andrea Doria/Stockholm*, *Torrey Canyon*—are fairly illustrative.

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In England, Jeune, P., was succeeded by Sir Gorell Barnes, first Judge of the 'new breed' of Admiralty specialists trained solely in the common law. Born in 1848, he took his degree at Peterhouse, Cambridge, was called to the bar by the Inner Temple in 1876, took silk in 1888, was appointed Admiralty Judge upon Butt's death in 1892, became President of the Division in 1905, was elevated to the peerage as Baron Gorell upon his retirement in 1909, and died in 1913.[1] Barnes was, as a former Admiralty barrister, a competent and dependable Admiralty Judge; and if not remembered today for any spectacular or very innovatory decisions, it is perhaps because he was better qualified to adjudicate Admiralty causes than was the President under whom he served.

Barnes' Presidency did see one notable procedural innovation, however, in the introduction of the Admiralty Short Cause Rules in 1908. These Rules represented the latest in the series of efforts begun in the early nineteenth century to streamline Admiralty procedure in hopes of achieving the truly summary proceeding which was the ideal of the civil law. The Short Cause Rules have never been a part of the Rules of the Supreme Court, but were instead established by order of the President of the Admiralty Division as directions to facilitate the dispatch of business.[2] As they enjoyed the technical status of directions rather than rules, the Short Cause Rules could not be imposed upon parties, but were applied in individual cases by request of the parties.[3] Except for claims and counterclaims, there were no pleadings in a short cause save by order of the Judge; after a mutual inspection of documents, the parties each made a simple statement of their case, including the values involved (which, in a normal proceeding, would be determined by reference), and the Judge might then call for and act upon any evidence desired. In all other respects, the Judge might apply at his discretion the normal rules of procedure, and his discretion was also complete as to the assignment of costs; the Judge could arbitrate any issues necessary, but there was no appeal from his determination of a short cause save by his leave, and then only upon questions of law.[4]

Sir Gorell Barnes' successor as President, appointed in 1910, was Sir Samuel Evans. Evans was born in 1859, and was admitted

[1] *D.N.B.*
[2] See Roscoe, *Practice*, p. 394.
[3] *S.C.R.*, 1908, r. 1.
[4] *S.C.R.*, 1908, rr. 2–10.

as a solicitor in 1883 before being called to the bar by the Middle Temple in 1891; he took silk in 1901, and became Solicitor-General in 1908.[1] By the greatest stroke of fortune, Evans had made the study of Prize Law something of a hobby, and with the outbreak of World War I, he was naturally called upon to handle a multitude of Prize causes. While he relied heavily upon the Prize precedents of Stowell, he yet established his individuality in that field, and is regarded second only to Lord Stowell as a Prize Judge.[2]

The Judge to whom fell the task of handling the Admiralty (instance) causes generated by the First World War was very fortunately a specialist and former member of the Admiralty bar, Sir Maurice Hill. Born in 1862, Hill was educated at Haileybury School and Balliol College, Oxford; he was called to the bar by the Inner Temple in 1888, made K.C. in 1910, and became Admiralty Judge in 1917; he retired from the bench in 1930, and died in 1934.[3] The volume of Admiralty business generated by World War I was considerable, reaching a peak of well over 900 writs issued in 1920, more than 800 being *in rem*; by comparison, the highest total of writs issued during the Second World War was just over 400, in 1940.[4]

Over a quarter-century after the removal of Admiralty jurisdiction to entertain suits *in rem* for wrongful death by the decision in *The Vera Cruz (No. 2)*,[5] the United Kingdom became a party to certain international maritime conventions; these were given effect by a statute of 1911 which also confirmed and restored to the Admiralty Division jurisdiction in all causes of maritime personal injury or wrongful death.[6] The same Act introduced into Admiralty a two-year statute of limitations applicable to suits for salvage, personal injury or wrongful death, and a one-year statute of limitations applicable to actions for contribution of joint tortfeasors in such causes;[7] in addition, under the Brussels Collision Convention of 1910, the Act substituted the present rule of proportional fault damages in collision causes for the earlier practice

[1] *D.N.B.*
[2] See Roscoe, *Studies*, pp. 36, 40–3.
[3] *D.N.B.*
[4] Figures supplied by Admiralty Registry, 1966.
[5] (1884) 9 P.D. 96 [App.].
[6] Maritime Conventions Act, 1911, §5.
[7] Maritime Conventions Act, 1911, §8.

of awarding half-damages[1] under the both-to-blame rule[2] (which still—unfortunately—applies in American Admiralty[3]).

An Act earlier in 1911 designed to facilitate the compensation claims of stevedores and coal trimmers gave the Admiralty Court a concurrent jurisdiction over such claims, and created a right of recovery in the manner of claims for necessaries, with a statutory lien enforceable in Admiralty by suit *in rem*.[4] And nothing could have been more significant of the changes in environment since the time of the Court under the civilians than the grant to the Court in 1920 of a concurrent jurisdiction with the County Courts, by incorporation of the Merchant Shipping Acts, over salvage claims *by aircraft* in any case where a vessel rendering the service might have been able to claim salvage;[5] by the same Act all jurisdiction over air collisions might be delegated to Admiralty by an Order in Council,[6] but this was evidently a dead letter, for in the succeeding fifteen years no actions at all had been brought in Admiralty for air salvage or collision.[7] In another statute of the same year, however, jurisdiction over any claims involving charterparties, carriage of goods, or torts in respect of goods carried was given to Admiralty in suits *in rem* or *in personam* unless the ship- or share-owner defendants were English or Welsh domiciliaries at the institution of suit,[8] in which case the sole remedy lay at common law.

Acts of 1922[9] and 1925 gave Admiralty jurisdiction in cases arising under the conventions and treaties which they carried into effect, and the latter gave to seamen a specific right of wage recovery during the two months next after the termination of employment or shipwreck, provided that this period was within the time of his contract.[10]

[1] Roscoe, *Practice*, pp. 77–8.
[2] See, *e.g.*, *The Drumlanrig*, [1911] A.C. 16 [H.L.]; but *cf. The British Aviator*, [1965] 1 Ll. Rep. 271.
[3] See Gilmore and Black, §7–4, p. 402.
[4] Merchant Shipping (Stevedores & Trimmers) Act, 1911, §§1–3.
[5] Air Navigation Act, 1920, §11; of course seaplanes may be the *subjects* of salvage—see, *e.g.*, *Lambros Seaplane Base v. The Batory*, 215 F. 2d 228 (2 Cir. 1954).
[6] Air Navigation Act, 1920, §14 (2).
[7] See Merriman, P., *Address to the Canadian Bar Association*.
[8] Administration of Justice Act, 1920, §5(1), (2).
[9] Treaties of Washington Act, 1922, §2(3).
[10] Merchant Shipping (International Labour Conventions) Act, 1925, §1(1); see also §1(2).

This period just after the First World War saw also an emphasis upon the equitable nature of the Admiralty jurisdiction as strengthened by the acquisition of true equitable powers under the Judicature Acts. The doctrine of laches was applied by Sir Maurice Hill in connection with the two-year statute of limitations introduced in 1911 for salvage suits, where the salved vessel was immune from arrest as a Crown ship,[1] and injunctions were issued by the Court to prevent transactions affecting the ownership of a vessel[2] and to restrain interference with North Sea salvage operations.[3]

The procedure of the Court in instance causes continued to be governed by the 1883 Rules, but a series of Rules developed the procedure employed by the Court upon appeals from or rehearings of shipping casualties investigations. Rules were promulgated in 1894 which assigned to the Admiralty Division virtually all jurisdiction conferred upon the High Court by the 1894 M.S.A., and which detailed the procedure for making certain applications under the 1894 M.S.A. to the Admiralty Registrar.[4] An Act of 1906 made it possible to appeal to a Divisional Court of the Admiralty Division from decisions by Board of Trade rehearing tribunals, and from Naval Courts on questions of wages, fines or forfeitures;[5] and further Rules in 1908 permitted the consolidation of such causes on appeal to the Admiralty Division, and made it clear that the Divisional Court might enjoy the assistance of nautical assessors, receive new evidence, and make any necessary orders.[6] Such proceedings therefore came to be governed by a jumble of rules and statutes—a situation which prevailed until 1923, when a new set of Shipping Casualties and Appeals and Rehearings Rules consolidated and superseded the previous provisions. These 1923 Shipping Rules set down the procedure to be followed at original hearings as well as upon appeal. Appeal could be taken from any Board of Trade hearing to a Divisional Court of the Admiralty Division within twenty-eight days of the hearing decision,[7] and the use of nautical assessors upon appeal

[1] *H.M.S. Archer*, [1919] P. 1.
[2] *Beadell v. Manners* (*The Victoria*), Ll.L. 14 July 1919.
[3] *The Tubantia*, [1924] P. 78.
[4] R.S.C. (Merchant Shipping), 1894 (S.R.O. Rev. [1904], vol. 12, p. 680), rr. 1–3.
[5] Merchant Shipping Act, 1906, §§66, 68.
[6] M.S.R., 1908 (S.R.O., 1908, No. 446).
[7] S.C.R., 1923 (S.R.O., 1923, No. 752), rr. 19, 20(a), (b).

seems to be mandatory;[1] in all other pertinent respects, the procedure established by these Rules was either that previously obtaining under the older shipping casualties and merchant shipping rules, or that normally in use in the Admiralty Court.[2]

Sir Samuel Evans died in 1918, and his successor as President of the Admiralty Division was Sir Henry Duke, Lord Merrivale. Duke was born in 1855, was called to the bar by Gray's Inn in 1885, took silk in 1899, and may have had some Admiralty experience while at the bar. He served as Irish Secretary following the Easter Rebellion, from 1916 to 1918; he became a Lord Justice of Appeal in 1918, and in the year following his appointment in 1919 as President of the P.D.A. Division, the precedence of that Office was advanced by statute[3] to its present position next after that of the Master of the Rolls; he was elevated to the peerage as Baron Merrivale in 1925.[4]

The Admiralty Registrarship changed hands only twice in the fifty years following Sir Robert Phillimore's retirement as Judge; J. G. Smith succeeded H. A. Bathurst upon the latter's retirement in 1890, and Edward Stanley Roscoe, who had been appointed Assistant Registrar in 1890, succeeded Smith in 1904.[5] Roscoe was a prolific writer, leaving some thirty-eight published titles to his credit, and his works upon Admiralty Court jurisdiction, practice and history are valuable contributions to the body of knowledge in this field.

Early in the postwar period, it became obvious that the statutory structure of judicial administration, with a great host of enactments altering, modifying, and adding to the basic design of the Judicature Acts, had evolved into a grotesque and maze-like edifice. The entire structure was therefore razed and rebuilt in 1925 by a single consolidating enactment. Outwardly, the Consolidation Act changed very little of what had existed before; the High Court of Justice retained its three Divisions, though the President of the P.D.A. Division became an additional Judge of the Court of Appeal. To the Admiralty Division was assigned all of the Admiralty and Prize business, including all causes previously assigned and all which would have been within the exclusive jurisdiction of the High Court of Admiralty.[6]

[1] S.C.R., 1923, r. 20(e).
[2] S.C.R., 1923, r. 20(j).
[3] Administration of Justice Act, 1920, §7.
[4] *D.N.B.*
[5] Thompson, p. 22.
[6] Supreme Court of Judicature (Consolidation) Act, 1925, §§4, 6, 56(3)(a)–(c).

The greatest effect of the Judicature Consolidation Act upon the Admiralty Court was jurisdictional. The inclusive grant of Admiralty jurisdiction by the Judicature Acts remained the basis of jurisdiction,[1] but additions included claims for necessaries supplied to any foreign ship *anywhere* save in her home port and questions of title arising in necessaries suits,[2] claims for damage done *to* any ship,[3] and claims for salvage, life salvage, and services in the nature of towage and salvage regardless of where rendered.[4] The total Admiralty jurisdiction granted was therefore all that possessed formerly by the High Court of Admiralty, all that possessed by the High Court of Justice immediately prior to the Consolidation Act, and all that unrepealed and added by the Act itself.[5]

It is interesting to note, in addition, the definition by the Act of 'damage' as inclusive of personal injury and wrongful death,[6] and the definition of 'ship' as 'any description of vessel used in navigation, not propelled by oars.'[7] There were a few miscellaneous provisions governing the assignment of costs;[8] however, the discretion of the Judge still generally prevailed. Where a specific grant of pre-existing jurisdiction was made, portions of earlier statutes such as the Court Acts of 1840 and 1861 were correspondingly repealed;[9] but in no case does the Act appear to have affected the previous jurisdiction exerciseable *in rem*.[10]

One aspect of the Judicature Consolidation Act offers a point for speculation, because it differs in construction from the Judicature Acts. By the Judicature Acts of 1873 and 1875, the High Court of Admiralty was consolidated, together with other courts, into the Supreme Court of Judicature, and its jurisdiction transferred to the High Court of Justice,[11] though exercised primarily by the Admiralty Division.[12] But the Supreme Court of Judicature was reconstituted by the Judicature Consolidation Act, which vested in it the jurisdiction possessed before 1875 by a number of the old courts; the jurisdiction formerly possessed by the High Court of Admiralty was not specifically so vested, however,[13] and

[1] S.C.J. (Cons.) Act, 1925, §18.
[2] §22(1)(a)(vii), (i)
[3] §22(1)(a)(iii).
[4] §22(1)(a)(v), (vi).
[5] §22(2).
[6] §22(1)(b), (c).
[7] §22(3).
[8] §33(1)(a)–(c).
[9] See Schedule of Repeals.
[10] Price, *L.M.L.*, p. 95.
[11] Supreme Court of Judicature Act, 1873, §§3, 16.
[12] R.S.C., 1883, O. 5, r. 5; *cf.* S.C.J. Act, 1873, §34.
[13] S.C.J. (Cons.) Act, 1925, §18; *cf.* S.C.J. Act, 1873, §16.

the Admiralty jurisdiction of the High Court of Justice was separately provided for.[1] When the Acts of 1873 and 1925 are compared in this respect, the construction of the 1925 Act appears most peculiar; it may be that in specifying the Admiralty jurisdiction by particulars, it was hoped thereby to avoid confusion with the High Court's common law jurisdiction. Indeed, all of the High Court's civil law jurisdiction as exercised by the P.D.A. Division was set apart, and this may have prompted, in 1926, the decision (discussed p. 143) in the case of *The Sheaf Brook*.

The business of the Admiralty Court remained at a high (though declining) pitch in the years immediately after World War I, but after falling to roughly the prewar average of 400 writs issued in 1926–7, there began a decline which reached the low ebb of just over 200 writs issued in 1935.[2]

The nature of instance causes, in some respects, was reflective of scientific and technical progress; thus bottomry, after establishment of the rule that the master must make every reasonable effort to contact the shipowners and obtain money upon their personal credit before resorting to hypothecation,[3] was slowly made archaic by the establishment of world-wide telegraph links[4] in the same way that the great number of seventeenth and eighteenth century suits for holing by settling upon unbuoyed anchors had been eliminated in the nineteenth century by the advent of floating docks and non-grounding hulls.[5] Among the few twentieth-century bottomry cases, however, is one in which Lord Merrivale partially upheld bottomry bonds upon a yacht, finding necessity proven despite the vessel's non-commercial employment.[6] Other cases, such as one in which Hill, J., was required to rule whether the white ensign of a member vessel of the Royal Yacht Squadron gave her the status of a Crown ship, illustrate the somewhat trivial nature of many questions coming before the Court in that period.[7]

It is noteworthy that under the common lawyers, the Court has secured upon occasion a legislative enlargement of its jurisdiction

[1] S.C.J. (Cons.) Act, 1925, §22; see also §33(2).
[2] Figures supplied by Admiralty Registry, 1966.
[3] *The Oriental*, (1851) 7 Moo. P.C. 398, 411.
[4] Abbott, p. 207.
[5] See Marsden, 'Jurisdiction', 10 *L.Q.R.* 113 (1894).
[6] *The St. George*, [1926] P. 217.
[7] *H.M.S. Glatton*, [1923] P. 215.

following a restrictive decision; thus a twentieth-century decision by the Court of Appeal which held that the Admiralty Division could have no cognizance of claims *in personam* under the 1925 Consolidation Act by cargo owners against English shipowners, and that the President had no discretion to retain such a case but should transfer it to the King's Bench Division,[1] is said[8] to have resulted in the 1928 legislation which specifically declared the jurisdiction of the High Court of Justice to belong to all divisions alike,[3] thus enabling the Admiralty Division to entertain any claim *in personam* which could have been brought before any other Division. Similarly, the Court's own holding in 1886 that it had no jurisdiction to entertain an appeal from a refusal by the Board of Trade to order the rehearing of a shipping casualty investigation[4] resulted in legislation of 1894 giving a specific right of appeal to the Admiralty Division from such a refusal;[5] and the right of appeal from decisions of Board of Trade hearings was expanded by the Court in the post-World War I period to permit a censured but still licensed master to appeal as an 'interested party',[6] and the Court has power to revoke such censure when warranted.[7]

The twentieth century has also seen fundamental changes of theoretical Admiralty jurisprudence which evolved so gradually as to be almost unnoticeable. Thus the master of a vessel, once regarded as bailee for the owners, could therefore transfer possession—but the modern view sees the owner in possession of his ship at all times, and the master merely as a servant-custodian.[8] And the 'ship', a limited concept, has increasingly been replaced in the present century by the 'vessel',[9] a concept elastic enough to comprehend such undreamed-of innovations as the hovercraft. Concepts of the proper exercise of the Court's jurisdiction have also changed, so that Lord Stowell's restrictive view of the Admiralty jurisdiction over foreigners has been distinguished[10] until, at present, 'it is no longer necessary that the parties should consent, or that a foreign government should signify its assent.[11]

[1] *The Sheaf Brook*, [1926] P. 61 [App.].
[3] Administration of Justice Act, 1928, §6.
[4] *The Ida*, (1886) 11 P.D. 37.
[5] Merchant Shipping Act, 1894, §475(3).
[6] *The Royal Star*, [1928] P. 48.
See S.C.R., 1923, r. 19.
[7] *E.g.*, *The Seistan*, [1959] 2 Ll.Rep. 607.
[8] Roscoe, *Practice*, p. 123.
[8] See Roscoe, *Practice*, p. 40.
[9] *Id.*, p. 133.
[10] See, *e.g.*, *The Jupiter (No. 2)*, [1925] P. 69, 74.
[11] Roscoe, *Practice*, p. 42.

Discretion is of course still exercised to refuse jurisdiction in the manner of *forum non conveniens* 'where foreigners have merely taken advantage of a vessel being temporarily in [England] . . . to obtain a decision on questions which depend upon the municipal law of a foreign state',[1] though where such questions arise in the normal course of a suit, the Judge may decide upon them.[2]

E. S. Roscoe, the last Admiralty Registrar to hold a life appointment to that post, died in 1932 at the age of 89; his Assistant Registrar, Henry Stokes, who similarly held his post under a life appointment, retired in 1939 at the age of 91. Subsequent appointees to these posts—the next being L. F. C. Darby as Registrar in 1933 and G. H. M. Thompson as Assistant Registrar in 1939—were required by statute to retire at age 75.[3] The 'dignified and urbane' Lord Merrivale retired as President in 1933 and died in 1939.[4] The new President, Sir Frank Boyd Merriman [Lord Merriman], sometime Solicitor-General,[5] was appointed in 1934 during another storm of controversy over the Admiralty Court.

The Second Interim Report of the Business of the Courts [Hanworth] Committee, published in December, 1933, contained a recommendation that the P.D.A. Division be abolished and its jurisdiction be assumed by the two other Divisions of the High Court; in particular, it proposed the transfer of Admiralty business to the King's Bench Division, with the appointment in that Division of a 'Judge in Admiralty' who alone should exercise the jurisdiction of the High Court in Admiralty, Prize, and 'Commercial Business'. The advantages of this scheme were supposedly the continued centralization of the specialty in London with the added assurance of a Judge skilled in Admiralty Law, though the 'Judge in Admiralty' would be assisted by other judges in the dispatch of 'commercial cases.'[6] In the ensuing furore, a counter-proposal was offered by 'a Member of the Admiralty Bar' for the establishment of a new Admiralty and Commercial Division of the High Court,[7] and this plan, which would have resulted in four Divisions rather than the two proposed by the Hanworth Committee, was endorsed by the London Chamber of Commerce in

[1] Roscoe, *Practice*, p. 42.
[2] S.C.J. (Consolidation) Act, 1925, §102.
[3] Thompson, pp. 22–3.
[4] *D.N.B.* [5] See Heuston, p. 587.
[6] Parl. Paper, Cmd. No. 8809, ¶18, pp. 13–14; ¶11, p. 8 (1933).
[7] 177 *L.T.* 54 (1934).

a resolution sent to Lord Chancellor Sankey.[1] There was considerable—and justifiable—criticism of the Hanworth Committee, whose membership did not include any Admiralty lawyers or judges, for making such recommendations as the abolition of the Admiralty Court and Registry without having solicited sufficient testimony from the commercial and maritime interests and from the branch of the profession most concerned.[2] At length the furore died and the Hanworth Committee's proposals were shelved, but not forgotten.

It was observed in 1886 that the Rules of 1883 contained provisions not by their nature applicable to Admiralty practice and yet so worded as to appear to govern all practice in the High Court, the result being a confusion as to the extent to which the old Admiralty procedure remained in force.[3] The situation complained of three years after the promulgation of the 1883 Rules has not altered very materially in the succeeding eighty years, and the 1883 Rules are still the basis of Admiralty procedure,[4] though frequently amended during that period.[5] The undesirability of this situation has now been recognized for several years, and the first corrective steps began in 1962, pursuant to the recommendations of the [Evershed] Committee on Supreme Court Practice and Procedure in 1951.

It is most interesting that in some of the Evershed Committee's proposals, the pendulum has seemed to swing back past the 1859 Rules, pointing out as advantageous some of the procedures employed in the era of Lord Stowell. Thus the excess of reformative zeal which led to the printing rules of 1855 and 1859 is, after nearly a century, balanced by the Evershed Committee's observation that the printing of pleadings and apostles is a 'needless extravagance' which should be eliminated,[6] and the shift in emphasis from written to oral testimony which is particularly evident in the 1859 Rules contrasts with the 1951 recommendation encouraging the trial of salvage suits by documentary evidence alone[7]—much in the fashion, one would suppose, described by Dr Browne. Further parallels might be found in the recommendation that the Registrar be given jurisdiction to dispose of certain

[1] 77 *L.J.* 53 (1934). [2] See 177 *L.T.* 54 (1934).
[3] Williams and Bruce, 2nd ed., preface, p. vii.
[4] See *Annual Practice, 1966*, vol. 2, intro., p. v. [5] *Id.*, vol. 1, p. 1.
[6] Parl. Paper, Cmd. No. 8176, ¶¶30, 31, pp. 13–14 (1951).
[7] *Id.*, ¶23, p. 11.

cases in which there is no 'substantial' dispute[1] (a power resembling that of the Registrar as surrogate between 1861 and 1875), and that such proceedings be instituted upon *originating summons*[2] (a device similar to the old *monition* to appear and answer).

A few of the Evershed Committee's proposals have been adopted, most notably the use of the *originating motion* and *originating summons*[3] to institute certain proceedings. But the most significant development has surely been the consolidation of the Admiralty procedure begun in 1962 as part of a complete revision of the 1883 Rules; after patient 'weeding', the Admiralty rules have been separated from the body of Rules of the Supreme Court and consolidated in a single new Order 75, which took effect in 1964,[4] and subsequent steps have been taken to ensure that procedure in the Admiralty Court will follow that Order and not the procedure of the common law courts.[5] Ironically, an exactly opposite move was being made at the same time in the United States, where the old Supreme Court [General] Admiralty Rules have been abolished and, aside from special supplemental rules for actions *in rem* and a few other proceedings peculiar to Admiralty,[6] causes in Admiralty are now tried according to the rules and forms established for civil actions at common law and contained in the (1 July 1966) Federal Rules of Civil Procedure,[7] governing proceedings in all United States District Courts. In view of the previous experiences in both countries, it will be interesting to compare future procedural developments in England and America.[8]

It must be stressed that the consolidation of English Admiralty procedure has not been accompanied by a revision, and that the procedure currently in effect is still based upon the 1883 Rules. There have, however, been a few procedural developments which are deserving of comment with regard to the present Admiralty procedure. Thus the mechanism for pre-trial discovery has been improved by the application for orders for discovery of documents and the acceptance of written interrogatories as a method of discovery,[9] though the latter are not much used in practice.[10]

[1] Parl. Paper, Cmd. No. 8176, ¶36, p. 15 (1951).
[2] *Ibid.*
[3] See *id.*, ¶¶11, 12, p. 7; also McGuffie, *Practice*, §427, p. 190
[4] R.S.C. (Revision) 1962 [S.I. 1962, p. 2624].
[5] See *Annual Practice*, 1966, vol. 1, intro., p. xi.
[6] F.R.C.P. [1 July 1966], Adm. Rules A–F.
[7] F.R.C.P. [1 July 1966], Rule 1.
[8] See Wiswall, 'Procedural Unification,' pp. 46–8.
[9] Roscoe, *Practice*, pp. 316–20.
[10] McGuffie, *Practice*, §922, p. 402.

There is virtually complete discovery today, as 'the existence of all relevant documents must be disclosed even if it is intended to refuse production unless the court orders it to be given',[1] and the penalty for refusal to make discovery may be dismissal (plaintiff) or entry of judgment (defendant).[2] Several procedures, though still technically applicable, have fallen into practical disuse; it is doubted whether appearance under protest would be permitted now—though not abolished by the Judicature Acts—and a new 'conditional' form of appearance has been substituted, differing only in that it becomes unconditional within two weeks unless the Court's jurisdiction is successfully contested.[3] *Fieri facias* and other forms of execution are rarely employed, because even in the unusual instance of inadequate bail, the defendant normally makes voluntary satisfaction of the judgment.[4] And the Short Cause Rules of 1908, though amended in 1930–31, were observed by the Evershed Committee in 1951 to have been little used because of the difficulty of obtaining the consent by the parties to the implied waiver of the right of appeal;[5] this situation persisted until, in 1966, the President directed that the Short Cause Rules should cease to have effect, and they were at the same time replaced by a new Rule 31 in Order 75 of the Rules of the Supreme Court,[6] enabling the trial of any action in Admiralty as a Short Cause upon application.

While it appears that the majority of Admiralty actions *in personam* could be tried at common law in the Queen's Bench Division,[7] the procedural advantages of a suit in Admiralty—perhaps including the total absence of a civil jury—have evidently been sufficient to maintain a yearly average of about fifty *in personam* writs in Admiralty since 1935,[8] not counting over 200 writs *in personam* issued in the single cause of the disastrous wartime collision between the *Queen Mary* and the escort cruiser *H.M.S. Curacoa*.[9] There has been a recent increase in the issue of writs *in rem*, so that the total of writs issued has risen from a

[1] McGuffie, *Practice*, §841, p. 369.
[2] *Id.*, §901, p. 398.
[3] *Id.*, §300, p. 130; *The Vivar*, (1876) 2 P.D. 29 [App.].
[4] McGuffie, *Practice*, §§324, 325, p. 142.
[5] Parl. Paper, Cmd. No. 8176, ¶28, p. 13 (1951).
[6] R.S.C. (Amendment No. 2) 1966 [S.I. 1966, No. 1055].
[7] McGuffie, *Practice*, §42, p. 23, n. 47.
[8] Figures supplied by Admiralty Registry, 1966.
[9] *Ibid.*; *The Queen Mary*, (1947) 80 Ll.L.R. 178.

twentieth-century low of just over 100 in 1945–6 to over 350 in 1964–5.[1]

The evolution of case law in Admiralty has continued to have both procedural and substantive effect; thus the giving of bail, which was once held to be such 'a decisive step in the action' as to nullify the effect of an appearance 'under protest',[2] may now be tendered in certain cases under a special wording of the bond which will prevent conversion thereby of a conditional to an unconditional appearance.[3]

A much more extended and controversial case line deals with liability *in rem* in the absence of liability *in personam*. The line begins, characteristically enough, with a 'judicial pirouette' by Dr Lushington, who first held pursuant to a strained application of the law of agency that there could be no proceeding against the *res* where there could be no proceeding against the owners,[4] and who then held that there could be maintained an action *in rem* where there was no possibility of an action *in personam* upon the same cause if the owners had surrendered control to a sovereign charterer,[5] or if the owner was deceased.[6] Brett [Esher], L.J., reached the opposite conclusion in *The Parlement Belge*,[7] which like *The Ticonderoga*[8] involved a question of sovereign immunity, and held that there could be no action *in rem* without liability *in personam*. Sir Gorell Barnes made the next 180° turn in *The Ripon City*,[9] permitting the *res* to be sued in the absence of any personal liability by the owner. Sir Maurice Hill, however, in a case bearing a strong fact-situation resemblance to *The Ticonderoga*, disagreed with the position of Lushington and Barnes, and held that the vessel could not be sued *in rem* where the owner could not be sued *in personam*,[10] a view subsequently upheld by the Court of Appeal;[11] but a treatise on Admiralty practice published thereafter declared that suit *in rem* could in some instances be maintained without the availability of a remedy *in personam*.[12] Then, thirty-odd years later, in a case involving consideration of statutory rights *in rem*, Sir Bushby Hewson held against suit *in rem*

[1] Figures supplied by Admiralty Registry, 1966.
[2] *The Rosina*, (1921) 6 Ll.L.R. 346, 347.
[3] *The Bulgaria*, [1964] 2 Ll. Rep. 524.
[4] *The Druid*, (1842) 1 W. Rob. 391.
[5] *The Ticonderoga*, (1857) Swab. 215.
[6] *The Ruby Queen*, (1861) Lush. 266.
[7] (1880) 5 P.D. 197, 220 [App.].
[8] (1857) Swab. 215.
[9] [1897] P. 226, 242.
[10] *The Crimdon*, (1918) 35 T.L.R. 81
[11] *The Tervaete*, [1922] P. 259, 275 [App.]
[12] Roscoe, *Practice*, p. 104.

where a suit *in personam* was not possible.[1] Now, only a few years since, Sir Henry Brandon has made an exhaustive review of the authorities and perhaps settled the dispute, holding actions *in rem* maintainable without the possibility of suit *in personam*.[2]

Two pieces of legislation in the later 1940s affected Admiralty jurisdiction. In the first, a long concern over the application of the principle of limitation of liability to British vessels in foreign courts[3] was suddenly mirrored—in the wake of the *Queen Mary/Curacoa* disaster—by concern over inapplicability of the same principle to claims involving Crown vessels in the Admiralty Courts of Britain, and limitation of liability together with immunity from suit *in rem* was made available to Crown vessels and aircraft.[4] The second statute reflected a weakness of the 1925 Judicature Consolidation Act, and enabled the Court to entertain claims by aircraft for salvage or life salvage of/from *other aircraft* as well as vessels.[5]

But in the entire panoply of legislation which has conferred jurisdiction upon the Admiralty Court, no other enactment has possessed the potential for judicial expansion of jurisdiction which is inherent in the most recent grant of jurisdiction to Admiralty, contained in Part I of the Administration of Justice Act, 1956. This Act confirms to the Court any jurisdiction possessed by the High Court of Admiralty prior to the Judicature Acts or subsequently vested in the High Court of Justice,[6] as well as a particular enumeration of questions or claims cognizable under the Act itself.[7] There are, however, a number of new or newly-phrased provisions enabling cognizance of claims: (1) for personal injury or wrongful death due to unseaworthiness or negligence of operations 'in or from the ship';[8] (2) by and against aircraft in the nature of salvage, towage and pilotage;[9] (3) for necessaries supplied for operation or maintenance;[10] (4) for construction, repair or equipment of a vessel, or for dock charges or [port] dues;[11] and (5) for general average.[12]

[1] *The St. Merriel*, [1963] 1 Ll. Rep. 63.
[2] *The Monica S.*, [1967] 2 Ll. Rep. 113, 132.
[3] See Parl. Paper [1874] (69) lx (H.C. 18 May).
[4] Crown Proceedings Act, 1947, §§5, 29.
[5] Civil Aviation Act, 1949, §51.
[6] Administration of Justice Act, 1956, §1(1)(*e*).
[7] §1(1)(*a*)–(*e*).
[8] §1(1)(*f*).
[9] §1(1)(*j*)–(*l*).
[10] §1(1)(*m*).
[11] §1(1)(*n*).
[12] §1(1)(*q*).

Even more important is the range of applicability of all cognizance, old and new, for it now extends to cover: (1) *all* vessels or aircraft, British or not, registered or not, whatever the domicile of their owners;[1] (2) all claims *wherever* arising (including cargo or wreck salved ashore);[2] (3) *all* mortgages or 'charges' (including maritime and statutory liens), registered or not, legal or equitable, foreign or domestic[3]—provided only that these provisions not be interpreted to extend recovery under the various Merchant Shipping Acts. Moreover, the jurisdiction of the Admiralty Court may now be invoked: (1) in *all* cases *in personam*,[4] save that in claims for damage (including that done to ship or cargo), personal injury, wrongful death or negligent operation (*arising out of or resulting in* **collision**) suit may be brought *in personam*—but only if: (A) the defendant resides or has a place of business 'in England and Wales' ('and' being employed to unify, and not to separate),[5] *or* (B) the cause arose within a port or territorial waters of England and Wales,[6] *or* (C) if the Court has ancillary jurisdiction over the person in a matter generated by the same cause;[7] (2) *in rem* in any suit for possession (including title, petition or restraint) of ship or share thereof, any suit upon a mortgage of ship or share thereof, any suit for condemnation, forfeiture or restoration of ship or goods, any suit for droits of Admiralty, or in any suit upon a maritime or statutory lien or other 'charge'.[8] And of the utmost significance is the introduction by the 1956 Act, in any case in which the owner is a resident of England and Wales and liable to suit *in personam*, of (1) the ability to invoke the Admiralty jurisdiction *in rem* against aircraft for claims in the nature of towage or pilotage,[9] and (2) (where the resident was, at the time the cause arose, owner, charterer, or otherwise 'in control'), the ability to invoke the Admiralty jurisdiction *in rem* against *sister ships* [any vessels also *wholly* owned by the possible defendant *in personam*] as well as against the offending vessel for any claims under the Act save those of possession, mortgage, forfeiture, condemnation, restoration, droits, or any other under §1(1)(*s*), or where the basis of the suit is a 'charge'

[1] Administration of Justice Act, 1956, §1(4)(*a*).
[2] §1(4)(*b*).
[3] §1(4)(*c*); *cf.* Dicey, comment p. 218.
[4] §3(1).
[5] §4(7), (1)(*a*).
[6] §4(7), (1)(*b*).
[7] §4(7), (1)(*c*).
[8] §3(2), (3); see comment in Dicey, at p. 218.
[9] §3(5).

incurred by a specific vessel and not within the scope of §1(1)(*d*)–(*r*).[1]

The 1956 Act also repealed the £50 minimum claim limit for jurisdiction over mariners' wage claims in the Admiralty Division, and gave the Court a specific authority to declare *forum non conveniens* in wages suits by personnel of foreign vessels,[2] though it seems clear that the question of *forum non conveniens* may be considered in a suit upon any claim involving foreign parties.[3] It should also be noted that the Act defines 'ship' as 'any description of vessel used in navigation',[4] dropping the 'not propelled by oars' qualification of the 1925 Consolidation Act[5] in deference to the gradual extinction of the oar as a propulsive mechanism.

Many provisions of many prior enactments were repealed by the 1956 Act, including the power given by §688 of the 1894 M.S.A. to detain in Britain foreign ships which had injured British-owned property anywhere in the world.[6]

For the total compass of current Admiralty jurisdiction, including that contained in the 1956 Act, reference should be made to *Halsbury's Laws of England*[7] and similar sources.

At the turn of the twentieth century, it was noted concerning the former jurisdiction of the Admiralty Court over suits by materialmen for necessaries—which was twice struck down by higher courts[8]—that: 'any jurisdiction the Admiralty possessed in respect of necessaries supplied on the high seas would be a portion of the jurisdiction, *ex contractu*, in matters on the high seas of which the Common Law Courts only obtained a share by the fiction of a false venue . . .'[9] Fifty-four years later, whether in recognition of the truth of that statement or not, the Admiralty jurisdiction over materialmen's suits was restored by the 1956 Act. But if the Act took pains to preserve such obsolete jurisdiction as that over suits for restraint,[10] and to re-enact the useful

[1] Administration of Justice Act, 1956, §3(4)(*a*), (*b*); see 1952 Brussels Convention on Arrest of Sea-Going Ships, Art. 3.
[2] §5(1), (2); see also Temperley, ¶306.
[3] See McGuffie, *Practice*, §493, p. 223.
[4] Administration of Justice Act, 1956, §8(1).
[5] S.C.J. (Consolidation) Act, 1925, §22(3).
[6] Administration of Justice Act, 1956, §7(1).
[7] Vol. 1, p. 50 *et seq.*; see also Dicey, pp. 213–20.
[8] *The Neptune*, (1834) 3 Kn. P.C. 94.
The Heinrich Björn, (1885) 10 P.D. 44 [App.].
[9] Williams and Bruce, 3rd ed., p. 197, n. (*l*).
[10] §1(1)(*b*); McGuffie, *Practice*, §642, p. 285.

jurisdiction over charter-party claims first given by the 1925 Act,[1] and to restore the lost jurisdiction over materialmen's claims and general average,[2] why did it not grant to the Court a jurisdiction equal to that of the common law over the remainder of mixed contracts, and specifically place within the cognizance of the Court such matters as questions of particular average and claims upon policies of marine insurance? Perhaps because the Act is elastic enough to permit such cognizance without great interpretive strain[3]—but it seems a missed opportunity that a flat jurisdiction over mixed contracts was not stated. At the heart of the matter lies the discretion, or lack of it, to transfer causes between Divisions of the High Court, and until cognizance of mixed contracts in general is statutorily placed within the Admiralty jurisdiction there will continue to be grounds for demands for transfer of such causes out of the Admiralty Division and equal grounds for the refusal of transfer of such causes into the Admiralty Division.

The 1956 Act does, however, make such great restoration of jurisdiction to Admiralty that it may properly be termed 'a Coke's nightmare'. The territorial extension of jurisdiction alone is enough to cast doubt upon the definitive decisions in that area of the law,[4] and the new availability of proceedings *in rem* against aircraft has already involved the Court in an examination of the pertinent sections of the Act, and led to a suggestion that this jurisdiction ought to be extended to cover charges and mortgages upon aircraft as well.[5] In the case of the limitation of sister-ship arrest to claims upon which the owner may be liable on suit *in personam* as a domestic resident,[6] it is clear that the restriction was intended to answer the objections of a Parliamentary Committee on Arrestment which some years ago considered and rejected the device of sister-ship arrest in fear that it would create a new method of *obtaining* jurisdiction;[7] but it is not difficult to imagine that this provision, coupled with that which now enables suits upon claims for ship construction[8] (which American Admiralty has

[1] Administration of Justice Act, 1956, §1(1)(*h*).
[2] §1(1)(*m*), (*q*).
[3] *E.g.*, §1(1)(*d*), (*g*).
[4] *E.g.*, *The Fagernes*, [1927] P. 311 [App.]; *cf. Notarian v. Trans-World Airlines*, 244 F. Supp. 874 (W.D. Pa. 1965).
[5] *The Glider Standard Austria S.H. 1964*, [1965] P. 463.
[6] Administration of Justice Act, 1956, §3(4), (8); see *The St. Elefterio*, [1957] P. 179.
[7] Parl. Paper, Cmd. No. 3108, ¶7, pp. 4–5 (1928).
[8] Administration of Justice Act, 1956, §1(1)(*n*).

avoided since the earliest days of the Republic by holding such claims non-maritime[1]), may someday result in the arrest by the Marshal of a ship under construction—even if nothing of her yet exists save the architect's plans and models—in a suit upon a claim for construction of another ship of the same owner.

Since the early 1930s, the increase of divorce business in the P.D.A. Division has necessitated the appointment of several more judges under a timely provision of the 1925 Judicature Consolidation Act, which had already established the addition of one judge,[2] but there has been no increase in Admiralty business sufficient to warrant the appointment of an additional Admiralty Judge. One Admiralty Judge who served from 1945 until 1958, Sir Henry Gordon Willmer, thereafter had occasion to exercise his expertise in the subject as a Lord Justice of Appeal; his successor, Sir Joseph Bushby Hewson, was not only a member of the Admiralty bar but was educated and served as an Officer of the Royal Navy and in addition was the author of a valuable treatise upon navigation, and it is to be regretted that after only eight years of distinguished service as Admiralty Judge he was forced to retire owing to ill-health; the present Admiralty Judge, Sir Henry Brandon, is, in the tradition of his immediate predecessors, also an Admiralty specialist, and he brings to the bench a keen interest in that history.[3] Upon the death of Lord Merriman in 1962, Sir Jocelyn Simon, also sometime Solicitor-General, was appointed President of the Admiralty Division and continues in that Office at the present time, also hearing Admiralty matters upon occasion.[4] G. H. M. Thompson became Admiralty Registrar in 1948 upon the retirement of L. F. C. Darby, and the post of Assistant Registrar thereafter became obsolete; upon Thompson's retirement in 1957, the present incumbent, Kenneth C. McGuffie, assumed the Registrarship.[5] With the abolition of the Admiralty itself in 1964,[6] the Admiralty Registrar and Marshal now remain the only links with the High Court of Admiralty and its civilian history.

Though it was doubtful only ten years ago that the 1933 Report of the Hanworth Committee would ever be acted upon,[7]

[1] *Clinton v. The Brig Hannah*, 5 Fed. Cas. 1056 (No. 2898) (Adm. Ct. Pa., 1781).
[2] S.C.J. (Consolidation) Act, 1925, §§4, 5.
[3] See, *e.g.*, *The Monica S.*, [1968] P. 741.
[4] *W.W.*, *1966*.
[5] Thompson, p. 24.
[6] Defence (Transfer of Functions) Act 1964.
[7] See Ivamy, 110 *L.J.* 330 (1960); see *supra*, pp. 144–5.

a proposal by the recent Government is strongly reminiscent. In its present form, this plan calls for the transfer of all Admiralty jurisdiction, the Admiralty Registry and staff (and the Silver Oar) to a new Admiralty Court within the Queen's Bench Division where the Admiralty Judge would hear maritime commercial cases in addition to the traditional Admiralty matters; probate would be transferred to the Chancery Division, which would in turn give up guardianship, wardship and adoption cases to a reconstituted Family Division—abolishing the Probate, Divorce and Admiralty Division altogether.[1] It is difficult to argue against the logic of any proposal which would give each of the respective divisions of the High Court complete cognizance of related matters; yet one must feel some twinge of apprehension at the dissemination of the jurisdiction of the last united courts of civil law, and the thought of a final and complete acquisition of the Admiralty jurisdiction by Queen's Bench evokes ancient spectres as well. Much debate must follow, and if a new organization of the High Court does emerge it may differ from that just described. Time alone can tell whether chaos in the substance and procedure of Admiralty will result, or whether the Court will again survive—as basically unaltered in its appearance and administration of the maritime law as it has been for centuries—though perhaps in a new environment.[2]

There can be no doubt whatever that the future of the Admiralty Court will continue to be strongly influenced by social and technological change; a hint of problems to come with the increase in pleasure-boating has already been seen in the present, in the Marshal's arrest—in the time-honoured manner—of a small sloop floating in an artificial indoor pool at a London boat show.[2] What the availability of such devices as hovercraft and helicopters to the general public will mean to the venerable Admiralty Court under its broad new jurisdiction is a subject for amusing speculation.[3]

In facing these and other new problems, the Court will apply a Law which, however ancient, has demonstrated its flexibility and adaptability to change; though, as will now be seen, changes in the Law of Admiralty itself may be as much the result of accident as of design.

[1] I am indebted to Lord Gardiner, L.C., for these details. And *cf.* Administration of Justice Act 1969, §23.

[2] See *The Times*, 13 January 1966, p. 10, col. 5.

[3] See, *e.g.*, the jurisdiction conferred under the Hovercraft Act 1968, §2.

CHAPTER 6

THE EVOLUTION OF THE ACTION *in rem*

[An example of the effect of the historical development of the Court upon the substantive Law of Admiralty]

I will commence with the action *in rem*, being that which is most resorted to, and which constitutes the peculiarity of the Court of Admiralty, and gives to it an advantage over other Courts having concurrent jurisdiction.[1]

For centuries, the ability to proceed in the Admiralty Court directly against a ship has been the distinguishing feature of the Admiralty jurisdiction. The action ***in rem*** seems to have been employed in Admiralty before the Elizabethan era,[2] but only by the nineteenth century had it become the dominant Admiralty procedure;[3] and it was in the mid-nineteenth century—as a result of the dominance of the action ***in rem***—that the modern theory of maritime liens [rights against the ship] began to evolve. The beginning of consideration of the action ***in rem*** itself must lie in the emergence of the theory of maritime liens, for the two have since become inextricably intertwined.

It has been truly said that 'the beginning of wisdom in the law of maritime liens is that maritime liens and land liens have little in common';[4] for that reason, it is necessary to discard all preconceptions and to consult one of the few works which deal with the jurisprudence of maritime liens.[5] (The discussion of lien jurisprudence in this work will be strictly limited to the nexus between maritime liens and the action ***in rem***.)

The principal English case in the area of maritime liens is still *The Bold Buccleugh*, though the decision retains less force today in England than in North America. The steamship *Bold Buccleugh* ran down and sank the barque *William* in the Humber in 1848, was seized under process in Leith in an action against her owners upon that cause in the Court of Session in Scotland in January

[1] Coote, 1st ed., p. 10.

[2] See *The Black Book of the Admiralty*, vol. 3, p. 103.

[3] A. Browne, vol. 2, p. 396.

[4] Gilmore and Black, §9–2, p. 483.

[5] E.g. Hebert or Price.