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.

1849, was bailed, released and sold to a *bona-fide* purchaser without notice of the cause or claim pending, was sent to Hull by her new owner in August, 1849, and was arrested by warrant of the High Court of Admiralty. The new owner appeared under protest, alleging a *lis pendens* [pending suit] in Scotland; the Scottish action was subsequently abandoned, and Dr Lushington overruled the protest and found for the owners of the *William*.[1] The cause was taken on appeal to the Privy Council,[2] which held that the Scottish action—being *in personam* with collateral seizure—could not bar a suit *in rem* in the Admiralty Court, and, in regard to a second defence asserted below but not considered by Dr Lushington, that the collision lien survived even a *bona-fide* sale without notice.

The opinion of the Judicial Committee in *The Bold Buccleugh* was delivered by Sir John Jervis, Chief Justice of the Common Pleas.[3] It may be, as has been authoritatively stated, that the lien for collision was established by *The Bold Buccleugh*;[4] the concept of the maritime lien, however, was well-established prior to Jervis' opinion,[5] and it may be doubted for once that the accusation of a judicial *volte-face* which has been levelled against Lushington in regard to collision liens[6] is justified, as there appears to be a serious discrepancy between Dr William Robinson's report of Dr Lushington's judgment in *The Volant* to the effect that collision does not give rise to a maritime lien[7]—upon which later criticism has been based—and the report of the same judgment given in another contemporaneous source,[8] which has been said by both Sir John Jervis[9] and Sir Robert Phillimore[10] to be more accurate, and which reports no such statement. At any rate, it is accepted that Lushington held for a collision lien upon the *Bold Buccleugh* at instance, before the case ever came before Jervis.[11]

In enunciating the characteristics of the maritime lien, Jervis was able to draw upon several accepted authorities, including

[1] *The Bold Buccleugh*, (1850) 3 W. Rob. 220.
[2] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267.
[3] (1850–1) 7 Moo. P.C. 267. [4] Price, *L.M.L.*, p. 8.
[5] See, *e.g.*, A. Browne, vol. 2, p. 143.
[6] Price, *L.M.L.*, p. 36.
[7] *The Volant*, (1842) 1 W. Rob. 383, 387.
[8] *The Volant*, (1842) 1 Not. Cas. 503, 508.
[9] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 284.
[10] *The St. Olaf*, (1869) L.R. 2 A. & E. 360.
[11] Price, *L.M.L.*, p. 36.

Charles [Abbott], Lord Tenterden, and Mr Justice Story.[1] He relied heavily upon Story's opinion in *The Nestor*,[2] which incorporates the famous judgment in *DeLovio v. Boit*,[3] and which laid down the basic rule that the maritime lien gives rise to an action *in rem*, and can be executed only by a Court of Admiralty; what Jervis did, however, was to add his own observation that all actions *in rem* had their genesis in maritime liens,[4] and though he had shown earlier in the opinion that he was aware—as a common lawyer—of the differences between liens in the common law and liens in the civil law, this statement has been the cause of all of the subsequent controversy over the authority of *The Bold Buccleugh*.

What led Jervis to this observation was the assertion in argument that the action *in rem* was a purely procedural device, intended to secure the appearance of the owners and thus to gain personal jurisdiction over them, similar to the manner of a foreign attachment, the object being to establish the defence of *lis alibi pendens* with reference to the Scottish action by showing the English action to be of the same character; and an earlier decision of Dr Lushington's analogizing some aspects of the action *in rem* to foreign attachment in the City of London Court[5] was cited in support. Jervis took up this specific assertion at the outset of his opinion, pointing out that with attachment, as in the Scottish action, the process was directed initially at the person, and was thus in the nature of an action *in personam*, whereas the Admiralty action *in rem* was directed in the first instance at the ship—and he then went on to make, in the course of his exposition of the nature of maritime liens, the observation that every action *in rem* was brought upon a maritime lien. But of the argument that the action *in rem* was a procedural device, Jervis had this to say:

> but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners . . . and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, dicta have been referred to, which

[1] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 276, 284.
[2] 18 Fed. Cas. 9 (1 Sumn. 73, at 80–5) (No. 10126) (C. C. Me., 1831).
[3] 7 Fed. Cas. 418 (No. 3776) (C. C. Mass., 1815).
[4] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 284.
[5] *The Johann Friederich*, (1839) 1 W. Rob. 35, 37.

are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited.[1]

If Jervis' observation that maritime liens were the foundation of actions *in rem* was itself a dictum, at least there was in *The Bold Buccleugh* a firm substantive decision that the action *in rem* was a proceeding directly against the ship, and not a procedural device to gain personal jurisdiction over the owners.

So matters stood for over forty years, until Sir Francis Jeune's fateful decision in *The Dictator*. The steamship *Dictator* had lost her propeller in East Dungeness Bay in November, 1891, and was saved from going ashore by three tugs of the Gamecock Steam Towing Company, who subsequently caused a writ of summons *in rem* to be issued upon a claim of salvage, the sum claimed in the indorsement of the writ being £5000. The action was tried before Sir Charles Butt, P., and two Elder Brethren of Trinity House, and a salvage award of £7500 was decreed, exceeding by £2500 the claim indorsed upon the writ and the sum in which the *Dictator*'s owners consequently undertook to give bail, but leave was granted to amend the indorsement, increasing the claim to £8500.[2]

The amount of the £7500 award was confirmed upon appeal, and the *Dictator*'s owners paid the costs but denied their liability to satisfy the award, in any proceedings upon the original writ, beyond the £5000 which they had undertaken to give as bail in substitution for the ship; the plaintiffs, however, moved in subsequent proceedings upon the original (amended) writ for leave to proceed to recover the full amount of the award as a personal judgment against the shipowners as defendants. Sir Francis Henry Jeune, in one of his very first sittings as new President of the Division, heard these subsequent proceedings.[3] It was the argument of Sir Walter (later Lord) Phillimore for the defending shipowners that, the action being *in rem*, the bail as substitute for the ship must stand as the limit of liability, and that it was not proper to decree a judgment *in personam* in an action *in rem*, but that separate proceedings in an action brought *in personam* were necessary to obtain satisfaction of the balance of the salvage award.[4] Gorell Barnes, Q.C. (later Lord Gorell, P.), for the plaintiffs,

[1] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 282.
[2] *The Dictator*, [1892] P. 64.
[3] *The Dictator*, [1892] P. 304.
[4] [1892] P. 304, 307–8.

argued that the cost of new proceedings *in personam* ought to be avoided by granting complete relief in the present action, that (citing *The Bold Buccleugh*) a maritime lien arose for the full amount of the claim—as amended—indorsed upon the writ, and that the judgment for the balance of the award might, under the 1861 Admiralty Court Act (§15), be enforced as at common law; Barnes, it seems, treated the matter *in toto* solely as a question of procedure.[1]

The President's judgment also dealt with the matter solely as a question of procedure, though in two segments: (1) the Court's personal jurisdiction over the defending shipowners in an action *in rem*, and (2) the measure of liability in the action at bar; these segments will now be examined separately.

The Privy Council had firmly established in *The Bold Buccleugh* that the action *in rem* was not a procedural device for obtaining personal jurisdiction over shipowners, but a unique proceeding directly against the ship.[2] What has come to be known as the 'procedural theory' holds that the precise reverse is true, and 'this proposition was first advanced by Sir Francis Jeune, in *The Dictator*'.[3] Bearing in mind that *The Bold Buccleugh*, as a decision of the Privy Council when the highest court of appeal in Admiralty, should have had in Admiralty matters following the Judicature Acts the same status as a decision of the House of Lords,[4] it is well to examine Jeune's arguments for the procedural theory.

In evolving the procedural theory, Jeune based his reasoning upon 'the early practice of the Admiralty Court',[5] and commenced his investigation of the Court's procedural history with Clerke's *Praxis*, compiled by an Elizabethan Proctor-in-Admiralty, which describes a proceeding to seize the *res*, usable only when the defendant in a proceeding *in personam* was unavailable for personal arrest; failing to appear in response to a citation, the defendant was held in contempt and his *res* defaulted.[6] Jeune evidently felt that Clerke's reputation was in need of some support, for he cited an opinion of Lord Hardwicke referring to Clerke as 'an author of undoubted credit'.[7] How undoubted Clerke's credit

[1] *The Dictator*, [1892] P. 304, 308–9.
[2] *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 282.
[3] Hebert, pp. 390–1; see also Price, *L.M.L.*, p. 13.
[4] *English & Empire Digest*, vol. 1, p. 117; *cf. The Cayo Bonito*, [1903] P. 203, 215, 220 [App.].
[5] *The Dictator*, [1892] P. 304, 310.
[6] *Praxis*, pp. 61, 63, 65, 67, 69, 73.
[7] [1892] P. 304, 311.

really was to Admiralty practitioners of the last days of Doctors' Commons may perhaps be judged from the following:

> The miserable compilation which passes by the name of Clerke's Praxis . . . is inconsistent with the fact that the Civil Law was the fountain of the Admiralty jurisprudence, and also, that from the time of the Commonwealth, the hypothecal principle had been employed by the court, without doubt on its part or a question on the part of others.[1]

To support Clerke, Jeune then cited a passage from Ridley's *View of the Civile and Ecclesiasticall Law* (1639) which neither mentioned Admiralty proceedings specifically nor had any reference to the action *in rem*,[2] and followed with citations to Godolphin (1685) and Spelman (1641), whose remarks Jeune interpreted to mean that arrest of the ship was only a means to compel the owner's personal appearance.[3] Such was the entire body of evidence relied upon by Sir Francis Jeune to substantiate his assertion that the action *in rem* was a device to obtain personal jurisdiction.

What the President utterly failed to mention were the sources of equal antiquity which militate against his conclusion; indeed, no less an authority than *The Black Book of the Admiralty*—a work of considerably greater antiquity than Clerke's *Praxis*, says quite clearly that 'the ship has to pay' when arrested, not the shipowner.[4] Again, in an action of Clerke's day in the King's Bench to obtain a prohibition against suit in the High Court of Admiralty, Serjeant Nichols described the action *in rem*: 'the ship only is arrested, and the libel ought to be only against the ship and goods, and not against the party.'[5] Moreover, in citing no authorities for the proposition less than two hundred years of age, Jeune implied that the question had not arisen since, much less in modern times; in fact, the nature of the action *in rem* was considered in the nineteenth century, and the opinion of all who considered it save Sir Francis Jeune was, to the best of my ability to determine it, unanimous in its support for the holding of the Privy Council in *The Bold Buccleugh*. Maxwell, in giving the advantages of an Admiralty action *in rem* in his treatise of 1800, says 'the ship itself is responsible in the admiralty, and not the

[1] 17 *L. Rev.* 421, 423 (1855).
[2] *The Dictator*, [1892] P. 304, 312. [3] *Ibid.*
[4] Twiss, vol. 3, p. 103; also pp. 245, 345.
[5] *Greenway & Barker's Case*, (1613) Godb. 260.

owners';[1] Browne, in 1802, says that 'no person can be subject to that [Admiralty] jurisdiction [*in rem*] but by his consent';[2] Sir John Nicholl, in a judgment of 1834, said 'the ship is liable for wages and costs';[3] and Coote, in 1860, recites that 'a maritime lien, as being the tacit hypothec of the civil law, is a secret interest in a *res* which may be enforced against it *corporaliter*, the *res obligata* being the defendant and not its owners.'[4]

Nor did Jeune make any attempt to reconcile his theory with the ancient and (now obsolete, but) still extant proceeding *in rem* upon bottomry; the point did not escape Sir John Jervis, who recognized that suits upon bottomry bonds had to be brought *in rem*, for 'the advance is made upon the credit of the ship, not upon the credit of the owner; and the owner is never personally responsible.'[5] Perhaps the most remarkable omission in Jeune's argument, however, is any reference to the Privy Council's clear holding in *The Bold Buccleugh* directly against the proposition which he was advocating, and such an omission is all the more remarkable because Jeune considered the bearing of the *Bold Buccleugh* upon the second segment of his decision— that involving the amount of liability—and concluded, incredibly, 'that the Privy Council [had not] . . . intended to lay down that an action in rem could affect only the res.'[6]

It is of interest to look briefly into some of the history of Jeune's procedural theory subsequent to the decision in *The Dictator*. The most notable historian of the Admiralty Court to date, R. G. Marsden, reached the conclusion that the very early Admiralty action *in rem* was a procedural device because:

> Arrest of goods was quite as frequent as arrest of the ship . . . , [and] the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied.[7]

Marsden also seems to have based his argument largely upon Clerke's *Praxis*,[8] and the heart of his point seems to be that the

[1] p. 8. [2] Vol. 2, p. 100.
[3] *The Margaret*, (1834) 3 Hag. Adm. 238, 240.
[4] 1st ed., p. 3.
[5] *Stainbank v. Fenning*, (1851) 11 C.B. 51, 89.
[6] *The Dictator*, [1892] P. 304, 320.
[7] Marsden, *Select Pleas*, vol. 1, intro., p. lxxi.
[8] See Price, *L.M.L.*, pp. 8–9.

proceeding *in rem* against the vessel had no unique qualities, because proceedings were as often *in rem* in Admiralty against other goods of the defendant owner. But again, it may be questioned whether the description of the action *in rem* given by Clerke fits the original practice, because *The Black Book of the Admiralty* indicates that property of the defendant owner other than his ship was originally exempt from arrest,[1] and even the applicability of Clerke's statement in his own day must be judged against the argument of Serjeant Nichols that 'execution [of a judgment at law] ought to be only of the goods, for the ship only is arrested . . .'[2] But in no case does Marsden attempt to show or to intimate that the early jurisprudence of Admiralty endured without change until the 1890s, and his remarks are entirely concerned with the Court's very early practice, though they were subsequently cited in support of the historical accuracy of Jeune's opinion.[3]

The historical accuracy of Jeune's procedural theory is certainly open to question, especially as regards the authority and practice of the nineteenth century, but even if this doubt is overlooked, the question of the jurisprudential validity of the procedural theory itself has been the subject of some scrutiny, *e.g.*:

> The procedural theory, **assuming its historical accuracy,** requires a statement that a ship is liable in an action *in rem*, and subject to a maritime lien, only if the owner is personally liable at the time when the action is brought. *The Bold Buccleugh*, however, shows that this formula must be modified to read that a ship is liable *in rem* and subject to a maritime lien only if the person who was the owner at the time when the facts giving rise to the cause of action occurred could have been held answerable at common law. It will thus be apparent that the procedural theory which has been adopted in England involves considerable difficulties.[4] (emphasis supplied)

It is interesting to compare, without going into very great detail, the English and American theories of actions *in rem*. The American theory, known as the 'personification theory'[5] began to develop in the eighteenth century following the Revolution. The origins of the personification theory may be seen in the early

[1] Twiss, vol. 3, pp. 103, 245, 345.
[2] *Greenway & Barker's Case*, (1613) Godb. 260.
[3] *The Dupleix*, [1912] P. 8, 13–14.
[4] Price, *L.M.L.*, p. 16; *cf. The Monica S.*, [1967] 2 Ll. Rep. 113, 130.
[5] See *The Ville de St. Nazaire*, 124 F. 1008 (D. Ore. 1903).

decisions that contracts for ship construction were not maritime and hence not enforceable in Admiralty,[1] though it was not until the beginning of the present century that the last Admiralty specialist to sit upon the bench of the United States Supreme Court—Mr Justice Henry Billings Brown—gave the definitive opinion which declares the ship 'born' when she is first launched, and that thereafter 'she acquires a personality of her own . . . and is individually liable for her obligations.'[2] Correlatively, a 'dead' ship [permanently withdrawn from navigation] is now considered non-maritime property, and hence not individually liable in tort or upon warranty of seaworthiness.[3]

The idea of the ship as debtor became well developed in American Admiralty during the early nineteenth century, though the idea was almost certainly derived from the nature of the English proceedings of the period, which have been described, *e.g.* in Prize [the basic nature being similar to instance as to the *res*], as '*in rem*; in other words, the ship was considered to be a veritable defendant'.[4] Even before Mr Justice Story's opinion in *The Nestor* established the formal requisites for and character of the maritime lien,[5] the concept of the ship as an individual—the owner coming in to defend his *res* as a guardian would to defend his ward—had given rise to virtually as many varieties of maritime lien which could be executed only *in rem*[6] as there were causes upon which the owner himself could be sued *in personam*. It is thus that maritime liens in America became more numerous and diverse than in England, and not, as one scholar has suggested,[7] because there was no history of restraint of the Admiralty jurisdiction in America by common law prohibition; prohibition, though relatively rare, was employed by the common law courts to restrain the Admiralty jurisdiction in both colonial[8] and republican[9] times. With *The Nestor*, the maritime lien became the recognized foundation of the action *in rem*, and an American Admiralty court has ever since been the sole forum in the United States

[1] See, *e.g.*, *Clinton v. The Brig Hannah*, 5 Fed. Cas. 1056 (No. 2898) (Adm. Ct. of Pa., 1781).
[2] *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1901).
[3] See, *e.g.*, *Noel v. Isbrandtsen Company*, 287 F. 2d 783 (4 Cir. 1961).
[4] Nys, p. 113, ¶3.
[5] 18 Fed. Cas. 9 (No. 10126) (C. C. Me., 1831).
[6] See Gilmore and Black, §9–2, pp. 482–3.
[7] Price, *L.M.L.*, p. 116. [8] See Ubbelohde, p. 19.
[9] *E.g.*, *U.S. v. Peters*, 3 Dall. (3 U.S.) 121 (1795).

possessing cognizance of claims upon maritime liens arising under state, federal or international law.

Ironically, while the action *in rem* can give no jurisdiction *in personam*[1] in American Admiralty, the reverse has always been true. Admiralty attachment *in personam*, which fell into disuse in English Admiralty practice prior to the nineteenth century,[2] survived the practice of the Colonial Vice-Admiralty Courts to become a feature of post-Revolutionary practice. The really fascinating thing about this procedure, which is well described by Dr Browne,[3] is that it is certainly the same procedure described by Clerke and erroneously identified by Sir Francis Jeune as a proceeding *in rem*, upon which he based the procedural theory. 'Maritime attachment' was and is a remedy unique to Admiralty, without an exact counterpart in the civil law as a whole,[4] and is clearly designated by both Browne and Clerke (from whose *Praxis*, the standard reference work for Colonial Proctors and Advocates,[5] it was doubtless introduced into American Vice-Admiralty) as an adjunct to the proceeding *in personam*.

Throughout its continued use in American Admiralty, attachment has been carefully and consistently preserved in its original capacity as an adjunct to the action *in personam*. Oddly, the definitive decision as to the use of Admiralty attachment in the United States was contained in an opinion of Mr Justice Johnson, a foe of the Admiralty jurisdiction who led the opposition—eventually unsuccessful—to Mr Justice Story and those who advocated an unrestricted jurisdiction for Admiralty. Mr Justice Johnson was perhaps the least qualified member of the Supreme Court to discourse upon Admiralty procedure and the civil law, of whose history he was ignorant, and it was he who has caused such subsequent confusion about the nature of Admiralty attachment by referring to it as 'foreign attachment'—which it is not and has never been, though the two have often been analogized[6]—a term which has fortunately been supplanted in the present century by 'maritime attachment'.[7] But the main point did not escape even Johnson, 'The process of foreign [maritime] attachment in admiralty is governed by its own rules and principles, and does

[1] Price, *L.M.L.*, p. 117.
[2] See A. Browne, vol. 2, p. 435.
[3] *Id.*, pp. 434–5.
[4] *Ibid.*
[5] See Setaro pp. 28–9.
[6] See, *e.g.*, A. Browne, vol. 2, p. 434.
[7] See F.R.C.P. [1 July 1966] Adm. Rule A. (1).

not depend on, and is not derived from, the custom of London, or the local laws of the different [American] States.'[1] The procedure itself (which has earlier been described[2]) has been the same, evidently, since Clerke's day: the goods and chattels—including ships, if any—of a defendant who is absent from the jurisdiction of the Admiralty court may be attached to compel his appearance, and if the defendant does not respond to the citation to appear personally, the articles so attached are sold by order of the court to satisfy the claimants *in personam*, following the entry of a default judgment.[3] Sir Francis Jeune's error (and presumably that of R. G. Marsden as well) lay in the assumption that the seizure of a ship and goods under process of maritime attachment constituted an arrest *in rem*; this procedure has never been termed an action *in rem* by any authority which has come to my attention until so termed by Jeune in *The Dictator*, but it seems from subsequent authorities that this particular assertion by Jeune has never been questioned—doubtless because the only persons who might reasonably have raised the question were the already-extinct Fellows of Doctors' Commons.

The procedure of maritime attachment is similar in outline to that of the action *in rem*; indeed, because it involves seizure of a vessel, it is often referred to as a proceeding *quasi in rem*,[4] but the '*quasi*' is a vital distinction, for the *res* is attached and seized by special process of the court rather than arrested by warrant,[5] and sale under a default judgment is not a sale of the vessel in an action *in rem*, and so does not execute any maritime liens which may remain unsatisfied. Maritime attachment, like foreign attachment, is a device designed to compel the appearance of a defendant in an action *in personam*, and is by no means a proceeding *in rem*; it is this crucial distinction which was so deftly grasped by Sir John Jervis, and so unfortunately ignored by Sir Francis Jeune.

One mystery remains: it is clear that by the beginning of the nineteenth century the action *in rem* as known today had become the dominant feature of Admiralty practice, and yet Clerke makes no mention in the *Praxis* of the proceeding *in rem* nor does he describe such a proceeding therein. As to the origin of the action

[1] *Manro v. Almeida*, 10 Wheat. (23 U.S.) 473, 490 (1825).
[2] See *supra*, pp. 16–17.
[3] F.R.C.P. [1 July 1966] Adm. Rule B. (1), (2).
[4] See, *e.g.*, F.R.C.P. [1 July 1966] Adm. Rule E.
[5] See Rules B. (1), E. (4) (a), also A. Browne, vol. 2, pp. 344–5.

in rem, therefore, only two alternatives appear: (1) that it came into being during the late seventeenth or early eighteenth century, or (2) that it did in fact exist concurrently with maritime attachment in Clerke's day—and possibly before—but was for some reason omitted from mention in the *Praxis*. Considering the statements in *The Black Book of the Admiralty* and in *Greenway & Barker's Case* (and the opinion of Clerke held in 1855)—previously quoted—the evidence would seem to point to the second alternative given above. But I should acknowledge my general incapacity to declare beyond the scope of this work, and the mystery, if such it is, will have to be solved by scholars more competent to deal with the very early history of English Admiralty.

It was of course necessary to Sir Francis Jeune's theory that he offer some explanation of the 'shift' from seizure of a *res* primarily to compel the appearance of the owner, to arrest of a *res* primarily to satisfy a debt which had arisen in the course of its operation. The reason given by Jeune for this development was that the obsolescence of the proceeding *in personam* by personal arrest[1] gave rise to the modern action *in rem* commencing with arrest of the ship and proceeding directly against the ship rather than the owner, and that the emergence of the action *in rem* gave rise in turn to the doctrine of maritime liens[2]—in short, that the Court turned to the action *in rem* because it could no longer proceed directly against the person. There is a twofold difficulty in this explanation: (1) it does not, if Jeune's earlier theory about the origin of the action *in rem* was accurate, explain why the action *in rem* as a procedural device to gain personal jurisdiction had become obsolete, and (2) it ignores the development of the personal action by way of monition. In fact, as Dr Browne says,[3] it was Admiralty **attachment** *in personam* which had fallen into disuse, perhaps because it was found generally more expeditious to proceed directly *in rem*, and it seems reasonable that, the only means of acquiring jurisdiction *in personam* then being by personal arrest, the action *in personam* was simply abandoned (until its re-incarnation in the 1859 Rules[4]) and the vacuum filled by the development of the personal action by way of monition—which, as it did not commence with personal custody, could not terminate

[1] See *The Clara*, (1855) Swab. 1, 3.
[2] *The Dictator*, [1892] P. 304, 313; also Price, *L.M.L.*, p. 9.
[3] A. Browne, vol. 2, p. 435. [4] See *supra*, p. 64.

in a default judgment, and was usable only as an alternative to a warrant of arrest *in rem*, was in fact an adjunct to the action *in rem*, in which form it always appeared.[1] Indeed, just as maritime attachment was the procedural device to secure a kind of 'jurisdiction *in personam*' in the absence of the defendant, so the proceeding by monition was the procedural device to secure a kind of 'jurisdiction *in rem*' in the absence of the vessel.

Because it is fundamental to Admiralty jurisprudence that a maritime lien can be executed only by valid proceedings *in rem*,[2] any searching discussion of one must inevitably involve the other. The relevant characteristics of the maritime lien, then, are these: (1) it is an inchoate right which adheres to the ship *eo instanti* of the incident giving rise to it, and at execution relates back to the instant of adherence for determination of its priority[3] (on priorities in satisfaction of maritime liens, see Price generally), (2) it may be extinguished prior to execution by payment in full satisfaction,[4] (3) it is not extinguished by fruitless actions *in personam*,[5] (4) laches may prevent the execution of a maritime lien,[6] (5) it may be extinguished by giving bail for the ship's release following arrest upon a warrant *in rem*,[7] and (6) it is completely executed by sale of the ship by order of the Court pursuant to an action *in rem*,[8] which sale vests a perfect and indefeasible title in the purchaser of the ship, free from all maritime liens, 'suits and claims of every kind'; and upon sale the liens released from the ship attach to and may be enforced against the proceeds of the sale while in the hands of the Court.[9] In England the Admiralty Court will look to the *lex fori* to determine whether a maritime lien exists in any particular case,[10] but the American rule is that the *lex loci* will determine the existence of a lien, and the *lex fori* its priority.[11] (On maritime liens generally, see Robinson, Price, and Gilmore and Black.)

[1] See, *e.g.*, *The Trelawney*, (1801) 3 C. Rob. 216*n.*; *The Meg Merrilies*, (1837) 3 Hag. Adm. 346; also *supra*, pp. 63–5.
[2] Robinson, §48, p. 363.
[3] See *The Bold Buccleugh*, (1850–1) 7 Moo. P.C. 267, 284–5.
[4] See, *e.g.*, *William* [*Moakes's*] *Money*, (1827) 2 Hag. Adm. 136.
[5] Price, *L.M.L.*, p. 88.
[6] See, *e.g.*, *The Two Ellens*, (1872) L.R. 4 P.C. 161, 169.
[7] See, *e.g.*, *The Point Breeze*, [1928] P. 135.
[8] See, *e.g.*, *The Saracen*, (1847) 2 W. Rob. 451.
[9] Williams and Bruce, 3rd ed., p. 319.
[10] *The Acrux*, [1965] P. 391. [11] Robinson, §62, p. 434.

One other feature of maritime liens, especially of importance since the 1861 Admiralty Court Act, is that they may be extended in application by statutes extending Admiralty jurisdiction.[1] New jurisdiction granted by statute, however, such as that over aircraft or over ship mortgages, does not confer a maritime lien but instead a 'statutory right *in rem*', which differs from a maritime lien in that it adheres upon and only relates back to arrest of the *res*,[2] may be defeated by a *bona-fide* sale of the *res* for value,[3] and does not attach to the proceeds of sale of the *res* by the Court[4] (for other aspects, see Price, 'Statutory Rights'). The leading work states that statutory rights *in rem* are peculiar to English Admiralty and have no counterpart in American Admiralty,[5] but it is doubtful whether this observation is still accurate.[6] There is yet another type of right *in rem*, very scarce in England but fairly common in America, which is conferred by statute but specified therein to apply and have effect as if a maritime lien;[7] this right, to avoid confusion, may be called a 'semi-maritime lien'.

It was of course the grant of statutory rights *in rem* by the 1861 Court Act and subsequent enactments which invalidated Sir John Jervis' statement that the basis of every action *in rem* was a maritime lien[8]—rather a semantic quibble, but one which has been useful to detractors of *The Bold Buccleugh*. And even Sir Gorell Barnes, who declared in 1901 that both a maritime lien and an independent right *in rem* arose upon collision,[9] recognized that the statements made by Sir John Jervis as to the nature of maritime liens, which had been unconditionally reaffirmed by the House of Lords,[10] were still good law. E. S. Roscoe, however, in the introduction to the fifth edition of his *Practice*, attempted to demonstrate that some of the accepted characteristics of maritime liens were inaccurate—notably the feature of non-transferability.[11] In one case so cited to support transferability the lien was not in fact transferred,[12] and in another the right involved

[1] See, *e.g.*, *The Tolten*, [1946] P. 135.
[2] Price, *L.M.L.*, p. 90.
[3] Price, 'Statutory Rights', p. 25.
[4] *Id.*, pp. 92–3.
[5] Price, 'Statutory Rights', p. 21.
[6] See F.R.C.P. [1 July 1966] Adm. Rule C. (1)(b).
[7] Price, *L.M.L.*, p. 90.
[8] See *The Scotia*, 35 F. 907 (S.D.N.Y. 1888).
[9] *The Veritas*, [1901] P. 304, 310.
[10] *Currie v. M'Knight*, (1896) 24 Rett. 1; [1897] A.C. 97.
[11] Roscoe, *Practice*, pp. 28–9.
[12] *The Cornelia Henrietta*, (1866) L.R. 1 A. & E. 51, 52.

was actually a statutory right *in rem* under the 1861 Court Act and not a maritime lien at all;[1] moreover, the principle of non-transferability of maritime liens had been upheld by Sir Maurice Hill only a short time previously.[2]

Most other developments in the law of maritime liens have been paralleled in both England and America; it had long been established in the United States, for example, that maritime liens did adhere to sovereign vessels, but could not be sued upon unless and until such vessels were sold to private owners,[3] and the same view came to be held in England.[4] But the obvious inequities of that position led to a decision by the U.S. Supreme Court in 1921 that maritime liens did not adhere to sovereign vessels at all;[5] this is surely the more logical position under American theory, for a sovereign vessel could only be personified as a government officer, enjoying the protection of immunity unless deliberately waived as in the institution of suit by the sovereign upon the same cause of action, thus opening the sovereign vessel to counterclaims.[6] A similar position was taken in England very shortly thereafter, in a notable opinion by Atkin, L.J.,[7] which recognized that the procedural theory (in normal cases) is inconsistent with the enforceability of maritime liens following a transfer in ownership of the *res*.[8]

In extending the procedural theory in 1901 to hold charterers of a vessel personally liable to pay a salvage award in an action *in rem* against the vessel,[9] it was necessary for Sir Francis Jeune to retreat from an earlier holding[10] in agreement with Dr Lushington that the action *in rem* was 'the ancient foundation of a salvage suit';[11] but on the whole the procedural theory continued to fare quite well until the first test of the practicality of one of its essential corollaries, *i.e.*, that in the original action *in rem* it was possible to arrest property of the defendant other than his ship. It had been stated in 1885 as a gratuitous and unsupported dictum in an

[1] *The Wasp*, (1867) L.R. 1 A. & E. 367.
[2] *The Siren*, 7 Wall. (74 U.S.) 152 (1868).
[3] *The Petone*, [1917] P. 198.
[4] *The Crimdon*, (1918) 35 T.L.R. 81.
[5] *The Western Maid*, 257 U.S. 419 (1921).
[6] *E.g.*, *The Thekla*, 266 U.S. 328 (1924).
[7] *The Tervaete*, [1922] P. 259, 275; also Price, *L.M.L.*, p. 16.
[8] And see *The Monica S.*, [1967] 2 Ll. Rep. 113, 132.
[9] *The Cargo ex Port Victor*, (1901) 84 L.T.R. 363, 365.
[10] *The Elton*, [1891] P. 265, 269.
[11] *The Fusilier*, (1865) Br. & Lush. 341 [P.C.].

opinion of Fry, L.J., that 'any property of the defendant within the realm' might be arrested to enforce a statutory right *in rem*;[1] whether (as seems likely) Fry had also confused the very early action *in rem* with maritime attachment *in personam*, this aspect of the procedural theory, strengthened by the statements of R. G. Marsden,[2] eventually prompted the arrest in an action *in rem* of collateral property of a shipowner, in the particular case a sister-ship.[3] The Court of Appeal, in order to avoid sanctioning collateral arrest, found it necessary to modify the procedural theory—which it had previously accepted without question.[4] Abandoning the assertion of Marsden (and Jeune) that arrest in early actions *in rem* was purely a procedure to obtain security for any judgment which might be given, the Court of Appeal adopted instead[5] a suggestion made by E. S. Roscoe in the introduction to the third edition of his *Practice*,[6] that arrest of the *res* was a procedural device to obtain personal jurisdiction, but was not developed until such time as 'any attempt to assume jurisdiction *in personam* was prohibited by the common law courts'. Indeed, if the indications of *The Black Book of the Admiralty* and *Greenway & Barker's Case* are wholly incorrect, then Roscoe's version of the procedural theory would give an acceptable basis for the origin of the action *in rem*, though if accurate, it does not explain the necessity for resurrecting the procedural device long after the Admiralty Court had regained complete jurisdiction directly *in personam*; what seems more likely is a confusion by Roscoe of the action *in rem* itself with the personal action by way of monition, which probably developed as an adjunct to the action *in rem* when actions *in personam* by arrest became obsolete. This confusion was passed along to Merriman, P., who delivered the judgment in *The Beldis*, and who mentioned the personal action by way of monition[7] without recognizing it as the forerunner of the modern action *in personam*. *The Beldis*, in accepting Roscoe's version of the procedural theory, was able to disapprove Fry's dictum in *The Heinrich Björn* (which had been cited in support by Jeune in *The Dictator*[8]), permitting the theory itself to survive without

[1] *The Heinrich Björn*, (1885) 10 P.D. 44, 54 [App.].
See, directly *contra*, *The Victor*, (1860) Lush. 72, 76.
[2] *Viz.*, *Select Pleas*, vol. 1, intro., p. lxxi.
[3] *The Beldis*, [1936] P. 51.
[4] *The Gemma*, [1899] P. 285.
[5] [1936] P. 51, 73–4.
[6] At p. 44.
[7] [1936] P. 51, 75.
[8] [1892] P. 304, 313.

sanctioning collateral arrest, and it is the procedural theory as expressed in *The Beldis* which has found general acceptance,[1] though the entire portion of Lord Merriman's judgment dealing with the theory is itself dictum.[2]

The entire subject of maritime liens seems to be a source of great confusion in English Admiralty at the present time—so much so, in fact, that one of Her Majesty's Judges is reported to have remarked at a recent meeting of the *Comité Maritime International*: 'You Americans are crazy on the question of maritime liens. You shouldn't have any. You should follow the British rule; wipe them all out.'[3] It is very difficult to reconcile these words with the language of the 1956 Administration of Justice Act, which makes specific reference to the jurisdiction of the Admiralty Court to entertain proceedings *in rem* for enforcement of maritime liens.[4] Greater confusion may arise, however, in attempting to reconcile the very basis of maritime liens—that they are an inchoate right adhering to the wrongdoing ship and not transferable from her—with the action *in rem* against sister-ships permitted by the 1956 Act;[5] it would appear that actions against sister-ships could not execute any maritime liens adhering to the offending vessel, and that maritime lienholders whose claims are unsatisfied may thereafter proceed against a succession of sister-ships until the debt is paid—a paradox which strains the fabric of the Admiralty jurisprudence.[6]

The second segment of Sir Francis Jeune's decision in *The Dictator* is also of importance to the jurisprudence of Admiralty, for it was the first clear and supported holding that liability in an action *in rem* might exceed the value of the vessel against which the action was brought. Again, before examining this phase of Jeune's decision, it is useful to establish what the previous position was. The body of authority on the question is relatively small, and the first nineteenth-century case in which the issue was directly considered seems to have been *The Triune*,[7] a cause of collision in which Sir John Nicholl awarded damages in excess of the value of the ship and decreed a monition to the owner commanding

[1] Price, *L.M.L.*, p. 10.
[2] Price, 'Statutory Rights', p. 23.
[3] M.L.A.U.S. Doc. No. 496, p. 5290 (March, 1966).
[4] §3(3).
[5] See *Practice Direction* (*Arresting 'Sister' Ship: Pleadings*) (*No. 2*), [1969] 1 W. L.R. 613.
[6] And see *The Putbus*, [1969] P. 136 [Inst.], *rev'd.* [1969] P. 144 [App.].
[7] (1834) 3 Hag. Adm. 114.

him to pay the balance of the judgment upon pain of contempt. That case has a number of peculiarities: the shipowner was also the master whose negligence caused the collision; no bail was given for the ship and yet the owner entered an appearance to an action in which the claim exceeded the value of his ship; and no reasoning and no citation of authority was given by Sir John Nicholl in support of his judgment. Moreover, in the same year, Nicholl made the statement that 'the ship is liable for wages and costs',[1] which, if *expressio unius est exclusio alterius*, would indicate that the owner had no personal liability in a wages suit *in rem*.

The question next arose six years later before Dr Lushington in *The Hope*,[2] but Sir John Nicholl's decision in *The Triune* was neither cited in argument nor referred to by Dr Lushington in the judgment. *The Hope* was also a collision cause, but bail had been given for the ship following arrest in an amount which was nearly double her value; recognizing no precedent for enforcement of a judgment *in rem* beyond the value of the *res*, Lushington refused to do so because, in his view, this would be 'engrafting' an action *in personam* on to one *in rem*.

Ironically, the first judicial comment upon Sir John Nicholl's decision in *The Triune* seems to have come from America rather than England, and the comment came from no less than Mr Justice Story, who made specific reference in one opinion to *The Triune*—which had been cited in argument—saying, 'I confess that I do not well see how a proceeding, originally *in rem*, could be prosecuted *in personam* against a party, who in such proceeding intervened only for and to the extent of his interest. . . . At all events, I am not prepared to accede to the authority of this case . . . , [as] I do not understand how the proceedings can be blended in the libel.'[3] The question soon came before Dr Lushington again, and the conflict between *The Triune* and Lushington's earlier decision in *The Hope* did not escape him; noting the conflict, he said, 'It is, I think, my duty to consider the question an open question, and to pronounce that decision which in my judgment is most conformable to law . . .'[4] In addition to his misgiving expressed in *The Hope* that to hold for personal liability

[1] *The Margaret*, (1834) 3 Hag. Adm. 238, 240.
[2] (1840) 1 W. Rob. 154.
[3] *Citizen's Bank v. Nantucket Steamboat Company*, 5 Fed. Cas. 719, 733 (No. 2730) (C. C. Mass. 1841).
[4] *The Volant*, (1842) 1 W. Rob. 383, 386–7.

in such a case would be engrafting an action *in personam* on to an action *in rem*, Dr Lushington adverted in *The Volant* to the significance of bail posted to secure the release of a vessel from arrest; for bail may never be demanded in an amount greater than the value of the ship, and 'If bail could not be demanded beyond the value of the ship, I do not see how the owners, in that proceeding, can be made further responsible. It appears to me, therefore, that there is no personal liability beyond the value of the ship . . .'[1] With the decisions in *The Hope* and *The Volant*, the position had become well established, in the words of Baron Parke, that 'the Court of Admiralty proceeds in rem, and can only obtain jurisdiction by seizure and the value, when seized, is the measure of liability.'[2]

It would have been quite in character for Dr Lushington to have subsequently altered or reversed the position taken by him in *The Hope* and *The Volant*, but his consistency upon this question was absolute throughout his tenure as Admiralty Judge. When it next arose, in *The Kalamazoo*, he refused to give judgment beyond the amount of the bail—let alone beyond the value of the ship—and expanded upon his earlier reasoning:

> The bail represents the ship, and when a ship is once released [from arrest] upon bail she is altogether released from that action. [¶] But it is said that the party ought to receive the whole amount of the damage done, to the full extent of the value of the ship in fault. To this there are two answers. First, it was their [plaintiffs'] own fault if they did not arrest her to the full value of the ship; and, secondly, there is no authority to shew, that, having obtained bail for the ship, you can afterwards proceed against the owner [in the same action] to make up the amount of the loss. I cannot think that I can engraft a personal action upon an action *in rem*.[3]

And in a later case Lushington squarely laid down the collateral rule that the liability of the bail was limited to the value of the ship even where bail had been given in excess of the ship's value.[4] Clearly, the decisions in *The Hope*, *The Volant*, and *The Kalamazoo* constitute a firmly established case-line for the doctrine that liability in an action *in rem* cannot exceed the value of the *res*.

[1] (1842) 1 W. Rob. 383, 388–9.
[2] *Brown v. Wilkinson*, (1846) 15 M. & W. 391, 398.
[3] *The Kalamazoo*, (1851) 15 *Jur.* 885, 886.
[4] *The Duchess De Brabant*, (1857) Swab. 264, 266.

The sole exception to this doctrine appeared to lie in recovery of costs of an action *in rem*; it will be recalled that Sir John Nicholl, in *The Margaret*, said that 'the ship is liable for wages and costs'.[1] But this rule was not established as clearly as the *Hope–Volant–Kalamazoo* doctrine, for in an action *in rem* wherein Dr Lushington awarded costs which—added to the judgment—exceeded the value of the ship, Denman, L.C.J., upon a rule *nisi*, directed the issue of a prohibition out of the Queen's Bench to prevent execution.[2] And it is significant that Lushington's reasoning in awarding costs beyond the value of the ship was that also relied upon by Sir Francis Jeune in asserting that a *judgment* might exceed the value of the ship, *i.e.*, that the appearance of the owners to defend their ship in an action *in rem* introduces an element of 'personal responsibility'—but the extent of that responsibility was at least strictly limited by Lushington to the *costs* of an action, which liability is, jurisprudentially, entirely distinct from that upon the merits of the cause. It is perhaps fortunate for Jeune's decision in *The Dictator* that writs of prohibition against the Admiralty Court were effectively abolished by the Judicature Acts.

In a subsequent case, Dr Lushington refused to award costs beyond the amount of the bail,[3] but characteristically, fifteen years after his first attempt, he again awarded costs in excess of bail where the defending owner had deliberately chosen to indulge in a lengthy and expensive proceeding by plea and proof[4] and said that he was only applying 'the principle enforced in many cases—that the owners are liable for the full amount of the value of the ship and freight, and also for costs.'[5] It seems eminently fair that a party obstructing the progress of a suit in such a manner should pay the cost of harassment, and this reasoning of Dr Lushington's was given the force of statute a few years later.[6]

Prior to *The Dictator*, then, even the textwriters were in perfect accord that: (1) bail in an action *in rem* could not be required in an amount exceeding the value of the *res*,[7] (2) liability did not extend beyond the amount of the bail unless to pay costs incurred

[1] *The Margaret*, (1834) 3 Hag. Adm. 238, 240.
[2] *The John Dunn*, (1840) 1 W. Rob. 159 [Inst. & Prohib.].
[3] *The Mellona*, (1846) 10 *Jur.* 992. [4] See *supra*, pp. 14–16, 56.
[5] *The Temiscouata*, (1855) 2 Sp. 208, 210.
[6] Admiralty Court Act, 1861, §19.
[7] Williams and Bruce, 2nd ed., p. 283.

by the conduct of the defence,[1] and (3), on the point vital to Jeune's holding in *The Dictator*, the position was such 'Hornbook Law' that it was thus clearly presented in *The Student's Guide to Admiralty* in 1880:

Q: Can an action **in rem** be changed into an action **in personam**, or vice versa?

A: *It cannot; but must be continued in the form in which it was begun.*[2]

In this light, the second segment of Sir Francis Jeune's holding in *The Dictator* must be examined. That the case of *The Dictator* established the modern view of personal liability in actions *in rem* is acknowledged,[3] and it is clear from Jeune's own words that this holding is in turn based upon his procedural theory:

> I cannot help thinking that the fallacy lies in considering that to enforce a judgment beyond the value of the res, against owners who have appeared and against whom a personal liability, enforceable by Admiralty process, exists, is the grafting of one form of action on to another. The change, if it be a change, in the action, is effected at an earlier stage, namely, when the defendant, by appearing personally, introduces his personal liability.[4]

Oddly enough, Judge Addison Brown had considered this very question in New York just a decade previously; he rejected Nicholl's holding in *The Triune*, but accepted Lushington's position and quoted extensively from the *Hope* and *Volant* judgments, finding it 'the established practice in the English admiralty' that liability in an action *in rem* was limited to the value of the *res*, and citing *The Wild Ranger*[5] in support. Then Brown explained his rationale, citing various English and American decisions:

> In actions at common law, and in actions in admiralty *in personam*, a general appearance, though it cannot cure any essential defect of jurisdiction of the subject-matter, [*cit.*] cures any irregularities in the service of process, or even the want of any service. [*cit.*]
>
> In these cases, the action being general against the person, a general appearance is co-extensive with the nature of the action. But even in such actions, where the defendant's person or property has been arrested [*capias*] or attached irregularly, the defendant may appear specially to

[1] Coote, 1st ed., pp. 89–90. [2] Haynes, ¶149, p. 44.
[3] Hebert, pp. 390–1; Price, *L.M.L.*, p. 13.
[4] *The Dictator*, [1892] P. 304, 319. [5] (1863) Br. & Lush. 84.

vacate the proceedings, and the court will not acquire thereby any jurisdiction to proceed to a personal judgment. [*cit.*] But an action purely *in rem* is itself limited to a proceeding against the *res*, and a *general* appearance in such an action should, it seems to me, be deemed no more general than the limited nature and scope of the action itself, and of no greater effect than a *special* appearance to vacate an unauthorized arrest or attachment upon a general suit *in personam*.[1]

It is this simple question implicit in Judge Brown's holding—*viz.*, why should the shipowner's appearance in an action *in rem* be deemed 'more general than the limited nature and scope of the action itself'?—which is unanswered by Jeune, P., and is so difficult to reconcile with his judgment. And if the action *in rem* is purely a procedural device, then once its function of coercing the owner to appear and defend is fulfilled, the action, according to Jeune's reasoning, changes into and proceeds as an action *in personam*; yet the form and procedure of an action *in rem* is retained throughout the remainder of the proceedings, and so, in fact, an action *in personam* has been superadded to one *in rem*. The conflict between the views of Dr Lushington and Sir Francis Jeune could not, therefore, be more direct.

At the heart of Jeune's view of the action *in rem*, it seems, lay his training in the common law and his deficiency of knowledge of the civil law in general and the Law of Admiralty in particular. The idea of a procedural theory of actions *in rem* would occur most easily to a common lawyer, for 'at common law, proceedings are against persons; and if any property is taken, it is only as a method of coercing the debtor.'[2] Jeune himself makes affirmation of his aim to give in a single action in Admiralty as complete relief as could be given in the common law courts by quoting portions of Dr Lushington's decision in *The Aline*[3] contrasting the complete relief *in personam* afforded by the common law with relief in an Admiralty action *in rem* limited to the value of the ship and freight.[4] Moreover, the confusion of Admiralty and common law terminology which had been generated by the Judicature Acts and the 1883 Rules[5] was particularly severe with regard to the nature of the action *in rem*, for a certain type of **judgment** at common law was also known—and still is—by the same name.

[1] *The Monte A.*, 12 F. 332, 335 (S.D.N.Y. 1882).
[2] 5 *Am. L. Rev.* 581, 584 (1871).
[3] (1839) 1 W. Rob. 111, 117–18.
[4] *The Dictator*, [1892] P. 304, 316.
[4] See *supra*, pp. 121–2.

Both the distinction and the confusion between the common law judgment and Admiralty action *in rem* are very well illustrated in the comments of the editors of the fourteenth edition of *Abbott* (themselves common lawyers), which first show that their concept of 'an action *in rem*' is that it is simply an action *in personam* which, as in suits for divorce, may terminate in a judgment which is binding upon third parties (whereas the Admiralty action *in rem* in truth commences with the arrest of and continues to proceed against a definite *res*); failing to show that the two concepts are not identical, the note then uses the common law concept of a **judgment** *in rem* in explanation of the rule of international maritime law which holds an Admiralty decree *in rem* 'binding against all the world.'[1] Others have also confused the two *in rem* concepts in discussing the history of Admiralty and its doctrines; the language used by Sir William Holdsworth in discussing the Admiralty decree *in rem* makes it plain that he applied to it the common law concept.[2] The appearance to Sir Francis Jeune of the action *in rem* as one which was basically *in personam* is therefore not remarkable; but what must be borne in mind from this point forward is that, just as the maritime lien has little in common with the common law lien, so the Admiralty concept of the **action** *in rem* bears very little relation to the common law **judgment** concept.[3]

Faced with such clear words as those of Baron Parke in *Brown v. Wilkinson*,[4] previously quoted, to the effect that the limit of liability *in rem* was the value of the *res*, Jeune could only attempt to show that view as historically unfounded. This he did by making reference primarily to two decisions of the first half of the nineteenth century, and of these the first was that of Lord Stowell in *The Dundee*.[5] Lord Stowell's statement as quoted by Jeune certainly appears to declare that in an action under the general maritime law of Europe a full personal recovery could be had; what Jeune nowhere indicates, and what becomes clear when Lord Stowell's words are read in context, is that his consideration was devoted solely to an interpretation of the specific language of §§7 & 8 of the limitation of liability statute of 1813,[6]

[1] *Abbott*, p. 28, n. (*l*).
[2] *H.E.L.*, vol. 11, p. 271.
[3] See *The Belfast*, 7 Wall. (74 U.S.) 624, 644 (1868).
[4] (1846) 15 M. & W. 391, 398.
[5] (1823) 1 Hag. Adm. 109, 124–8.
[6] Responsibility of Shipowners Act, 1813, §§7, 8.

in an effort to find jurisdiction over some barrels of fishing gear not specifically named in the warrant of arrest. Read in context, Lord Stowell's statement in *The Dundee* does not support Jeune's contention that in nineteenth-century England the measure of liability *in rem* was not limited by the value of the *res*; indeed, in subsequent proceedings in the case of *The Dundee*,[1] not cited by Sir Francis Jeune in his references to the instance proceedings,[2] Lord Stowell explicitly stated—in his last decision as Admiralty Judge—that the shipowners could not be made liable beyond the value of the *res*.

Citation of *The Dundee*, a proceeding for limitation of liability, does prompt, however, consideration of the reasons for the pre-*Dictator* rule that there was no liability in an action *in rem* beyond the value of the ship and freight. One reason is terminological-procedural, and apparent in the designation of the action, namely, that the action *is* in fact '*in rem*'—'against the thing[/ship]'—and to proceed beyond the worth of the *res* is obviously to proceed against something else—the owner—which is clearly not the *res*; the elementary reason for the pre-*Dictator* view is therefore that the position taken by Sir Francis Jeune would have been a contradiction in terms. Another reason, not so obvious, is bound up with consideration of the enactment of statutes granting limitation of liability to shipowners. In a nutshell, the pre-*Dictator* view was an outgrowth of the public policy which developed during the eighteenth century and had as its aim the encouragement of Britain's maritime commerce. Of course the principle of limitation *in rem* to the value of the *res* is itself of much greater antiquity, antedating statutory law; Judge Ware saw its origin in the Roman Law regarding obligations *ex delicto*,[3] and Mr Justice Holmes analogized it to the surrender of a sheep-killing dog to offset liability at common law in the reign of Edward III.[4] And a sort of limitation, evidently under Article 32 of the Laws of Oleron, was applied in early times to free the ship and certain tackle from contribution in general average.[5]

But it is perhaps easier to envisage development of the principle

[1] *The Dundee*, (1827) 2 Hag. Adm. 137 [subs. proc.].
[2] *I.e.*, *The Dictator*, [1892] P. 304, 313–15.
[3] *The Rebecca*, 20 Fed. Cas. 373, 376 (No. 11619) (D. Me. 1831).
[4] *Liverpool &c. Navigation Co. v. Brooklyn Terminal*, 251 U.S. 48, 53 (1919).
[5] See, *e.g.*, *Barons of the Cinque Ports v. Rokesle, et al.*, Coram Rege Roll, no. 93 (Trinity 1285), m. 1 [K.B.].

across the long years of sea-trading in the inability to proceed *in personam* against foreign shipowners over whom the maritime courts could gain no jurisdiction whatever; the *res* being all of the owner which could be had, his liability became personified therein and the actual value became also the constructive limit. The extension of that benefit to domestic ship-owners decrying the unfair advantage of foreigners would then have been only a matter of time—this, however, is merely my own speculation, prodded by such echoes as: 'What more natural and just, when the ship has been the cause or occasion of the loss or damage, than to look to the ship for reparation?'[1]

The common law of England, having no cognizance of such actions *in rem*, naturally could not comprehend the principle of limitation of liability to the value of a *res*; and Admiralty, prohibited during the seventeenth century from exercising its jurisdiction *in personam*,[2] came during the eighteenth to act almost exclusively *in rem*.[3] The upshot was that the shipowner, as defendant in an action at common law, was without the protection which he came to enjoy in Admiralty. The obvious remedy would have been a statutory extension of the principle applicable in actions *in rem* to those *in personam*,—under the circumstances then prevailing, to create a new type of proceeding at law, with the jurisdiction originally assigned to Chancery for reasons earlier discussed.[4]

Dr Lushington described the origin of the limitation of liability statutes as 'political',[5] *i.e.*, commercial, and one method of stimulating expansion of the merchant navy was to offer to shipowners a statutory protection of their personal assets by limiting their liability upon suit to the amount of their interest and investment in the ship, her tackle, and the particular voyage in which she was engaged at the time the cause of action arose (as represented by the freight)—a public policy perfectly analogous to that which led to the protection of business investors by the formation of limited liability corporations. The specific language of the limitation of liability statutes, most notably that of 1813, allowed shipowners against whom actions had been brought upon causes arising out of the operation of their vessels to claim the protection of the

[1] *The Rebecca*, 20 Fed. Cas. 373, 376 (No. 11619) (D. Me. 1831).
[2] See *supra*, pp. 5–7.
[3] See *supra*, p. 62.
[4] See *supra*, p. 22.
[5] *The Amalia*, (1863) 1 Moo. P.C. (n.s.) 471, 473.

statute unless it could be proved that they were privy to the actual negligence out of which the cause arose;[1] privity to the act of negligence could of course be shown in virtually every case in which the shipowner was also her master, and he then could not claim limitation of his liability under the statute, which seems the likely explanation for Sir John Nicholl's decision in *The Triune*.[2] But the policy remained a general one, and in the Admiralty Court the principle of limitation was broadly applied *in rem* also; that this was so prior to the enactment of the limitation statutes is indicated by Dr Lushington in *The Volant*,[3] and if Lushington was correct in that case in finding that the form of the warrant, commanding the Marshal to cite for appearance 'all persons in general who have any right, title or interest' in the arrested ship, implied a limitation of their liability to the extent of that 'right, title or interest',[4] then it is not without significance that this form is set out by Marriott in his *Formulare* of 1802,[5] and it may be presumed to antedate limitation statutes even prior to that of 1813.

Had the *res* not been considered the sole object of actions *in rem* before the decision in *The Dictator*, and had its value not likewise been considered the limit of liability, there would have been no obstacle to a succession of arrests of the same ship upon the same cause of action. But in fact the rule, recognized by Dr Lushington in the case of *The Kalamazoo*,[6] was that there could be no re-arrest following bail for release in any action *in rem*; though in two later cases he made heavily qualified exceptions to this rule,[7] and though Sir Robert Phillimore maintained that it was always possible to re-arrest for costs of the suit,[8] the view taken in the present century repudiates these later decisions and reverts to the rule of *The Kalamazoo* that re-arrest after bail for release is not permissible.[9]

At the end of his judgment in *The Dictator*,[10] Sir Francis Jeune attempted to show that in the last case in which Dr Lushington

[1] Responsibility of Shipowners Act, 1813, §1.
[2] (1834) 3 Hag. Adm. 114; *cf. The Annie Hay*, [1968] P. 341.
[3] (1842) 1 W. Rob. 383, 389.
[4] *Ibid.*; *The Dictator*, [1892] P. 304, 317–18.
[5] Pp. 326–7. [6] (1851) 15 *Jur.* 885.
[7] *The Hero*, (1865) Br. & Lush. 447, 448.
The Flora, (1866) L.R. 1 A. & E. 45, 46.
[8] *The Freedom*, (1871) L.R. 3 A. & E. 495, 499.
[9] *The Point Breeze* [1928] P. 135. [10] [1892] P. 304, 318–19.

considered the question of the limit of liability in actions *in rem* he had retreated from his earlier holdings in *The Hope*, *The Volant*, and *The Kalamazoo*. But in the case cited, *The Zephyr*, Lushington refused an application to amend the praecipe to institute so as to insert the names of the owners and thereby render them personally liable, on the grounds—wholly consistent with his earlier decisions—that to amend the praecipe and issue a *citation in personam* would be to engraft an action *in personam* onto one *in rem*, only one anomalous instance of which, *The Triune*, was known to him—and of which he disapproved.[1] What Lushington did do in *The Zephyr*—quite inexplicably (as Jeune acknowledges[2])—was to declare that the 1861 Court Act, §15, gave him power to issue a monition to the owners (which he does not, in fact, appear to have done), obliging them to pay the balance of the judgment upon pain of contempt, though the judgment exceeded the value of the ship. That statement of Lushington's was unsupported dictum, but in refusing the motion to amend he upheld the substance of the *Hope-Volant-Kalamazoo* doctrine—and even in cases not calling for direct consideration of the question, such as *The Clara*, Lushington took the opportunity to express his view that the limit of liability in an action *in rem* was 'the extent of the value of the ship.'[3]

The final authority relied upon by Sir Francis Jeune was the second of the two decisions of Lord Stowell which were cited, and this one, *The Jonge Bastiaan*, was said by Jeune to be 'on all fours' with the case at bar because it was a cause of salvage in which Lord Stowell made an award in excess of the claim and bail;[4] what Jeune did not point out was that the circumstances of the decision in *The Jonge Bastiaan* were most peculiar—the action was brought and a claim entered by the first salvors alone, but Lord Stowell later permitted the second salvors to join, thus necessitating an award beyond the amount of the original claim and consequent bail.[5] Clearly there were no similar circumstances to justify Jeune's holding in *The Dictator*, and of his assertion that *The Jonge Bastiaan* is 'clear authority' for the proposition that 'the claim in the praecipe could be exceeded with or without formal amendment',[6] it need only be pointed out that the praecipe was

[1] (1864) 11 L.T.R. 351.
[2] [1892] P. 304, 319.
[3] (1855) Swab. 1, 3.
[4] *The Dictator*, [1892] P. 304, 322.
[5] (1804) 5 C. Rob. 322, 323–4.
[6] [1892] P. 304, 323.

not introduced into Admiralty procedure until well after Lord Stowell's day.

Finally, there are three notable features of Sir Francis Jeune's decision: (1) *The Hope*, *The Volant*, and *The Kalamazoo*[1] were a clear line of precedent establishing that an action *in rem* could not be converted into one *in personam*, and *The Dictator* violates the principle that 'the Admiralty Court is bound to adhere without deviation to a course of precedents adopted by its predecessors, though not to a single decision';[2] (2) it was unnecessary to make the owners liable *in personam* in *The Dictator*, for it was clear at that time that an action *in personam* could have been brought against the owners for the balance of the judgment over the amount of the bail;[3] and (3) because *The Dictator* was a salvage cause, and—in Jeune's own words in the very case—'the salvage award never goes beyond the value of the property salved',[4] no award in that case could possibly have been made in excess of the value of the *res* (as distinct from the lesser amount of the bail), and the entire portion of the decision purporting to state that recovery in an action *in rem* could exceed the value of the *res* is therefore dictum, and not binding.

Jeune's procedural theory was quickly accepted by Smith, L.J., in *The Gemma*:

> The President, in a judgment full of learning and research, in which he dealt with all the cases from the earliest time, whether in conflict or not with each other, has held in the case of *The Dictator* [*cit.*] that a person appearing in an action in rem becomes personally liable. I do not doubt that the President came to the correct conclusion, and I adopt it.[5]

Jeune himself viewed this uncritical acceptance as complete substantiation of the procedural theory,[6] and thereafter it remained only for some cause other than salvage to arise in which the claim was greater than the value of the ship. This occurred in *The Dupleix*, in which Sir Samuel Evans, P., declared that *The Dictator* 'stated that the law was that in a collision action *in rem*, where the

[1] *The Dictator*, [1892] p. 304, 321.
[2] *English & Empire Digest*, vol. 1, p. 118; *cf. The Leucade*, (1855) 2 Sp. 228, 229 [Prize].
[3] Williams and Bruce, 2nd ed., p. 81; see *supra*, pp. 158–9.
[4] [1892] P. 304, 310.
[5] [1899] P. 285, 292 [App.].
[6] *The Cargo ex Port Victor*, (1901) 84 L.T.R. 363, 365.

defendant appeared', liability could exceed the value of the ship, and he proceeded to put Jeune's theory into execution for the first time.[1] Lord Merrivale found the *Dictator–Gemma–Dupleix* line of 'precedent' as binding authority, and rebuffed the argument of Sir Gainsford Bruce in the introduction to the third edition of his *Practice* that *The Dictator* was both legally and historically inaccurate,[2] with the statement that 'the trend of modern cases is entirely contrary'.[3]

The current view of the action *in rem* has adopted the procedural theory, and is based upon the *Dictator–Gemma–Dupleix* case line.[4] It is interesting to note that a modern American Admiralty decision permitted a recovery in excess of bail in an action *in rem*, citing the *Dictator–Gemma–Dupleix* case line[5] and the only prior American case to so hold,[6] which had in turn cited *The Jonge Bastiaan*. The decision was approved upon appeal in its own Circuit[7] and cited with approval by another Circuit Court,[8] but the most recent appellate decision comes from a most authoritative Circuit in Admiralty, the Second (which includes New York), and it overrules the earliest decision and repudiates the more recent ones.[9]

'Arrest', Sir Francis Jeune declared in *The Dictator*, 'became the distinctive feature of the action *in rem*'—and yet the steamship *Dictator*, though her owners appeared in the action, was never in fact arrested.[10] This fact has a significance which requires examination of the procedure by which the Admiralty Court assumes jurisdiction *in rem*. Some attempts have been made to trace certain fundamentals of the Admiralty action *in rem* out of the Roman Law,[11] but no definite source has appeared for the most characteristic feature—arrest of the ship—which is said by Lord Stowell to be the 'ancient' method of acquiring jurisdiction *in rem*.[12] That arrest was a step of greatest importance is reflected in

[1] [1912] P. 8, 12.
[2] Williams and Bruce, 3rd ed., pp. 18–26.
[3] *The Joannis Vatis* (*No. 2*), [1922] P. 213, 214.
[4] See McGuffie, *Practice*, §325, p. 142 & n. 14.
[5] *The Fairisle* (*Dean v. Waterman SS Co.*), 76 F. Supp. 27 (D.Md. 1947).
[6] *The Minnetonka*, 146 F. 509 (2 Cir. 1906).
[7] *The Fairisle*, 171 F.2d 408 (4 Cir. 1948).
[8] *Mosher v. Tate*, 182 F.2d 475 (9 Cir. 1950).
[9] *Logue Stevedoring Corp. v. The Dalzellance*, 198 F.2d 369 (2 Cir. 1952); and see 'Personification of Vessels', 77 *H.L.R.* 1122 (1964).
[10] [1892] P. 304, 313, 305.
[11] *E.g.*, see Conkling, pp. 427–32.
[12] *The Dundee*, (1823) 1 Hag. Adm. 109, 124.

Stowell's first standing order as Admiralty Judge, by which he appears to have introduced the affidavit to lead warrant into Admiralty practice.[1] Dr Browne makes it clear that 'when the proceeding is against the ship, . . . process commences by a warrant directed to the marshal of the court, commissioning him to arrest the ship . . .'[2]

Arrest of the ship is a unique process, not—as has previously been stressed—to be confused with seizure in maritime attachment, or with the power of detention which all Courts of Record once possessed by statute,[3] or with the power which still exists to detain foreign ships 'in respect of salvage.'[4] Arrest of a ship under Admiralty warrant is not merely a restraint analogous to injunction, but vests an actual custody of the ship in the Admiralty Marshal,[5] including custody of any tackle and rigging which may have been removed from the ship prior to arrest,[6] and the Marshal is absolutely responsible for ships and property while in *custodia legis*.[7] Warning is given to all persons that the arrested vessel is not to be moved or interfered with while under arrest,[8] and moving the vessel without the permission of the Marshal, whether to remove her from possible danger[9] or under the mistaken impression that she has been bailed,[10] constitutes a contempt of the Court, even if the warrant has not been formally served but notice of its imminent arrival has been given.[11] An official such as a sheriff or Harbour-Master commits contempt by attempting a seizure of the arrested ship or her tackle,[12] and the mere incitement of arrest-breaking is likewise contumacious.[13] And because arrest is such a restrictive condition, damages for wrongful arrest of a ship may be recovered in an action *in personam*.[14]

But as in the case of *The Dictator*, it is also possible for the Admiralty Court to assume 'jurisdiction *in rem*' without arresting the *res*; the method evolved to permit this was the substitution for

[1] See Marriott, p. 31.
[2] Vol. 2, p. 397.
[3] Shipowners' Negligence (Remedies) Act, 1905, §1.
[4] McGuffie, *Practice*, §259, p. 196.
[5] *The Arantzazu Mendi*, [1939] A.C. 256, 266 [H.L.].
[6] *The Alexander*, (1811) 1 Dod. 278.
[7] *The Hoop*, (1801) 4 C. Rob. 145.
[8] R. G. M. Browne, p. 104.
[9] *The Selina Stanford*, (1908) *The Times*, 17 November.
[10] *The Jarlinn*, [1965] 1 W.L.R. 1098.
[11] *The Seraglio*, (1885) 10 P.D. 120.
[12] *The Harmonie*, (1841) 1 W. Rob. 179.
[13] *The Bure*, (1850) 14 *Jur.* 1123, 1124.
[14] *The Walter D. Wallet*, [1893] P. 202.

the *res* of a promise to appear personally and defend the action, and upon the strength of this promise, or undertaking, a *caveat*, or warning against arrest, would be entered in a ledger under the ship's name. This caveat procedure makes its first formal appearance in the 1855 Rules, [Fees] r. 4, which declares that the *caveat warrant book* shall be kept in the Admiralty Registry, that proctors may secure the entry therein of an undertaking to appear and answer and give bail to any claim which may be entered against a particular ship, and that, without 'good and sufficient cause' the extraction of a warrant and arrest of a ship on whose behalf a caveat has been entered renders the plaintiff liable to condemnation in costs. Caveats might also be entered in a *caveat release book* to ensure that a named ship would not be released from arrest without notification to second claimants,[1] and in a *caveat payment book* to prevent payment of proceeds or other monies out of the fund of the Court.[2] The principle is in each case the same, as the entry of a caveat is procured on behalf of a party or interested person; but in the context of the action *in rem*, consideration will be limited to caveats against the arrest of a *res*.

Of the antiquity of the caveat procedure, all that can presently be stated with any certainty is that it must have arisen subsequent to the practice of arresting the ship by warrant; the appearance of the procedure in the 1855 Rules is completely 'out of the blue', for neither the Admiralty Registry nor the Public Record Office have any record of *caveat warrant books* prior to 1855, and no mention of the practice is made by Dr Browne or other text-writers previous to the same year. Nor does there appear to be any mention of the caveat against arrest in the reports prior to 1855, even in cases where one might expect to see the practice utilized, such as those in which there was no arrest of the ship, and the proceeding was a personal action by way of monition;[3] yet in one case Lord Stowell speaks of a caveat against payment,[4] which indicates that the basic idea was not an 1855 innovation. Mr Lionel Bell of the Public Record Office, a scholar of the Court's early history and records to whom this writer turned for information quite beyond the reach of his own expertise, has produced

[1] See, *e.g.*, Williams and Bruce, 1st ed., p. 197.
[2] See, *e.g.*, R.S.C., 1883, O. 22, r. 21.
[3] *E.g.*, *The Trelawney*, (1801) 3 C. Rob. 216*n*.
[4] *The Hercules*, (1819) 2 Dod. 353, 368.

evidence of the caveat warrant procedure from two seventeenth-century warrant books of the Admiralty Court. The procedure then seems to have been entirely informal, and the caveat itself took the form of an entry in the warrant book of the notation: *cave ne aliquod warrantum extranatur ad arrestandum navem the Tiger* . . .[1] or similar wording, with the name of the proctor to be notified. One of these entries is accompanied by a note in the margin to the effect that the caveat is by order of the Admiralty Judge,[2] though it is suggested by Mr Bell that in some of the cases entry might be explained by a mild corruption of Registry clerks by some proctors, and it is plausible that the procedure may have originated in this way. The caveat against arrest, says Mr Bell, was not frequently entered, and the more ordinary procedure seems to have been that of the caveat against release on bail.[3] It is interesting to note that in one instance the notation in the warrant book was accompanied by the entry of the single word '*caveat*' in the margin,[4] which would seem to remove any doubt that this is the origin of the modern practice.

That the caveat was a creature of the civil law in general is doubtful; certainly the procedure never developed in the Colonial Vice-Admiralty Courts, nor in the High Court of Admiralty of Ireland, which, like that of England, was entirely in the hands of the civilians.[5] The caveat did enter Canadian Admiralty practice, however, via adoption of most of the English 1883 Rules.[6]

The origin of the execution of a formal undertaking to appear, make answer and give bail to the claim—a procedure necessary under the 1855 Rules to procure entry of a caveat[7]—is even more obscure, though Dr Browne makes reference to a 'stipulation' to submit to the Court's jurisdiction.[8] After the introduction of praecipes into Admiralty practice, the undertaking took the form of a praecipe for entry of a caveat against arrest, by which the defendants promised to appear and give bail to the claim within three days of the institution of any action; the caveat thus pro-

[1] *The Tiger*, (1622) W.B. 14, p. 51; [P.R.O.] H.C.A. 38/14/51.
[2] *Ex parte Trinity House*, (1624) W.B. 15, p. 22; H.C.A. 38/15/22.
[3] Letter to me of 21 June 1966.
[4] *The John and Humphrey*, (1624) W.B. 15, p. 43; H.C.A. 38/15/43.
[5] Parl. Paper [1864] (219) xxix (R.C.), p. 20.
[6] See Howell (1893) for Canadian Rules.
[7] See 1855 Rules, [Fees] r. 4.
[8] Vol. 2, p. 100.

cured was valid for six months and could be renewed thereafter,[1] and the current procedure is virtually identical, even to the preservation of the praecipe.[2]

The caveat procedure became very popular, and it is noteworthy that a 1920 text on commercial maritime law takes it for granted that the procurement of a caveat following a claim upon a cause of collision was standard.[3] But at some time in the late nineteenth century, the entry of caveats began to be bypassed with the giving of undertakings in private form by the defendant's to the plaintiff's solicitors directly upon notification that a claim would be brought, and in return for such an undertaking to appear and give a bail for the claim, the plaintiff would agree not to take out a warrant for the arrest of the ship in that particular cause; it appears that this is what took place in the case of *The Dictator*, and by 1931 undertakings were said to be 'the usual practice'.[4]

Though the procedure is still available, caveats are becoming increasingly rare in the present day,[5] as the allied practice, whereby cash may be deposited in the fund of the Court by a defendant in lieu of the execution of a bail bond, has always been.[6] It must be stressed that the bail given in pursuance of an undertaking is no guarantee that the ship will not be arrested, even if the entry of a caveat has been procured, and the defendant's only recourse if his ship should be arrested over an undertaking or caveat lies in an application for release of the ship and consequential damages.[7] The breach of an undertaking, on the other hand, renders the undertaking solicitor liable to immediate personal attachment committal,[8] and the undertaking continues in binding force despite sale of the ship by order of the Court in an unrelated action.[9] Undertakings in individual suits brought upon causes of action *in rem* are now the usual practice,[10] and this is reflected in the issue of warrants for arrest, which number less than 20% of the quantity of writs *in rem* issued since 1960,[11] and in the figures for 1964, when in the 310 actions listed as *in rem* there were but 47 arrests

[1] See Williams and Bruce, 1st ed., pp. 197–8.
[2] See R.S.C. 1965, O. 75, r. 6 and Ap. B, form 5.
[3] Saunders, pp. 45, 49.
[4] Roscoe, *Practice*, p. 271.
[5] McGuffie, *Practice*, §239, p. 102.
[6] *Id.*, §291, p. 125; §344, p. 153.
[7] *Id.*, §322, p. 139.
[8] R.S.C., 1883, O. 12, r. 18.
[9] *The Ring*, [1931] P. 58.
[10] McGuffie, *Practice*, §243, p. 104.
[11] Figures supplied by Admiralty Registry, 1966.

(and there were releases from arrest in 34 of those cases).[1] It is certainly true that arrest once was the 'distinctive feature of the action in rem', as stated by Sir Francis Jeune;[2] it certainly is no longer the distinctive feature, and its absence in *The Dictator* proves one of the most distinctive aspects of that case.

Though the caveat procedure as such never developed in American Admiralty, a partial counterpart had evolved by the late eighteenth century. The American version has two procedures, a 'special bond' and a 'general bond'. The special bond was originally known as a 'stipulation', which strongly indicates that it may have been a descendant of the 'stipulation' described by Dr Browne;[3] it was formally introduced in Rule 12 of the old General Admiralty Rules in 1845, but this was probably codification of a pre-existing procedure.[4] The procedure was and is in essence an undertaking, which can be given pending the issuance of a process for maritime attachment or a warrant for arrest of the ship, and which will stay the execution of process in the hands of the Marshal or effect the release of the vessel if the process has been served. The amount of the special bond under Rule 12 was stipulated by the parties, but a statute of 1847 also permitted a bond to the same effect without agreement by the parties if posted in double the amount of the claim[5]—a procedure which was obviously not very popular with Rule 12 as an alternative;[6] the two procedures are now consolidated in the new unified Rules of Civil Procedure, which permit the parties to stipulate the amount of the bond or the Court to fix it in any amount not exceeding twice the sum of the claim—and in no case exceeding the value of the *res*.[7] An 1899 amendment to the 1847 statute first permitted a general bond to be posted,[8] and its substance is the same under the new rules; in form it is an undertaking, to appear and answer generally any action which may be entered against a named vessel, upon security approved by the Court.[9]

The general bond is not equivalent to a caveat, because (1) the

[1] C.J.S., 1964 [Cmd. No. 2666], pp. 42–5.
[2] *The Dictator*, [1892] P. 304, 313.
[3] Vol. 2, p. 100; and see *Lane v. Townsend*, 14 Fed. Cas. 1087 (No. 8054) (D. Me. 1835).
[4] See Benedict, vol. 1, §373, p. 445.
[5] Act of March 3, 1847, c. 55.
[6] See Gilmore and Black, §9–89, p. 650.
[7] F.R.C.P. [1 July 1966], Adm. Rule E.(5)(a); see also 28 U.S.C., §2464.
[8] Act of March 3, 1899, c. 441.
[9] F.R.C.P. [1 July 1966], Adm. Rule E.(5)(b).

effect of a caveat is usually the prevention of issuance of the warrant of arrest, whereas the process for Admiralty attachment or warrant of arrest is never prevented by a general bond, which only stays execution in the hands of the Marshal; (2) the caveat may not prevent arrest, whereas the general bond absolutely prevents arrest or maritime attachment; and (3), the caveat is entered upon payment of a set fee and is valid for six months, whereas the general bond remains valid for so long as the security posted under it equals at least twice the sum of all claims pending against the named vessel (a feature which eliminates the usefulness of the general bond when the aggregate of claims becomes equivalent to the value of the vessel); despite these differences, the general bond and caveat are designed to serve the same basic purpose. And the special bond, commonly known as an 'undertaking', is roughly equivalent to the procedure of the same name in England, being the usual practice in American actions *in rem* also;[1] but there is a fundamental distinction—liability on the special bond cannot exceed the value of the *res* it protects.[2]

The special bond may also serve as bail for release of an arrested *res*; in both England and America, however, bail is more commonly in the form of a 'consent' of the parties to release (pursuant to privately-agreed security), with payment of the costs of detention —and this has long been, according to Mr Justice Story, the 'known course of the Admiralty.'[3] But it is unfortunate that a long-standing confusion in America is perpetuated by the newly-unified Federal Rules of Civil Procedure, which use the terms 'consent' and 'stipulation' interchangeably with reference to the release of a *res* from arrest[4] (except in possessory, petitory or partition suits, where release is only upon Court order[5]); the result is that the vital distinction between a stipulation to *prevent* arrest (*i.e.*, a general or special bond) and a stipulation to *release from* arrest (*i.e.*, a consent; or, rarely, a special bond) is very generally ignored. Without having the distinction in mind at the outset, it is often difficult to ascertain the meaning and significance of nineteenth-century decisions; in the present century, where a

[1] See *The Agwinsun* [*In re. Atlantic Gulf & West Indies SS. Lines*], 20 F.2d 975 (S.D.N.Y. 1927).
[2] F.R.C.P. [1 July 1966], Adm. Rule E.(5)(a).
[3] *The Palmyra*, 12 Wheat. (25 U.S.) 1, 10 (1827).
[4] F.R.C.P. [1 July 1966], Adm. Rule E.(5)(c).
[5] *Id.*, Rule E.(5)(d).

Court of Admiralty may speak of a 'special bond', 'undertaking', or 'stipulation' all with reference to the same procedure, the difficulties are even greater; clearly, an overhaul of nomenclature is indicated.

In England, it was declared by the 1883 Rules that service of process in actions *in rem* should not be required where the defendant has executed an undertaking;[1] but that is far from saying that arrest is in general unnecessary in actions *in rem*, a proposition which has since been advanced largely on the strength of a single decision by Sir Gainsford Bruce, sitting as relief Judge in Admiralty.[2] The proposition so advanced by Bruce in the case of *The Nautik*[3] has serious jurisprudential implications and must therefore be examined. In that case an undertaking had been given by the owners of the *Nautik*, and a writ *in rem* was issued and served upon them, whereupon they withdrew their undertaking; a warrant of arrest was then extracted, but before it could be served the vessel had left the jurisdiction of the Court. Upon these facts Sir Gainsford proceeded to try the action as if the warrant had been served, on the basis that service of the writ was notice of the claim and that it was not necessary that the vessel should be 'actually in the possession of the Court or under the arrest of the Court'. Taking the last point first, Bruce based the conclusion quoted above upon the statements of two eminent judges, whom he quoted in turn—and which shall be examined in turn.

'It is enough that it [the ship] should, according to the words of Lord Chelmsford, in the case of *Castrique v. Imrie*, "be within the lawful control of the State under the authority of which the Court sits." '[4] In *Castrique v. Imrie*, the question was one of a conflict of laws arising out of the sale of a vessel in a French action *in rem*, and the decision of the House of Lords affirmed the principle of comity in international maritime law that the sale of a vessel by a Court vested with authority to act *in rem* will—provided that jurisdiction *in rem* was validly acquired—universally be held valid and binding. It is clear from the context of Lord Chelmsford's statement[5] that the portion quoted by Sir Gainsford Bruce in *The Nautik* was made in reference to the general principle of comity

[1] R.S.C., 1883, O. 9, r. 10.
[2] See McGuffie, *Practice*, §50, p. 26; §378, p. 165.
[3] [1895] P. 121. [4] *Ibid.*
[5] *Castrique v. Imrie*, (1870) L.R. 4 H.L. 414, 448.

and not to the Admiralty Law of England; to attempt to negate the procedural requirements of English Law because the requirements of international maritime law are less specific is clearly preposterous.

But Bruce placed even greater reliance upon another authority: 'The same view is expressed by Jessel, M.R. in *The City of Mecca*. That learned Judge says: "An action for enforcing a maritime lien may, no doubt, be commenced without an actual arrest of the ship." '[1] The question in *The City of Mecca*, like that in *Castrique v. Imrie*, was one of comity, and required an examination of the character of the foreign action. A proceeding had been entertained in Portugal, and the Portuguese judgment was sought to be enforced in England under the principle of comity by an action *in rem* against the *City of Mecca* in the Admiralty Division. A considerable portion of the opinion of Jessel, M. R., was given over to consideration of the Admiralty Law of Portugal, and Bruce's quotation was lifted directly from that portion;[2] it must be made clear that when Jessel, M.R., said that 'an action for enforcing a maritime lien may, no doubt, be commenced without an actual arrest of the ship', he was referring specifically to **Portuguese Law**, and not to the Admiralty Law of England. What makes this misleading excontextual quotation even more incredible is that Bruce himself actually argued as counsel in *The City of Mecca*, both at instance[3] and on appeal,[4] and lost—appropriately enough—to the team of Judah P. Benjamin, Q.C. (onetime Attorney-General, Secretary of War, and Secretary of State of the Confederate States of America during the American Civil War) and Edward S. Roscoe (later Admiralty Registrar and Bruce's thumbnail biographer in *Studies*).

Clearly, Sir Gainsford Bruce's decision in the case of *The Nautik*, attempting to subordinate the procedural requirements of English Admiralty Law to those of the international maritime law and the Law of Portugal, cannot continue to be sustained as support for the proposition that arrest is wholly unnecessary in actions *in rem*.[5]

The argument that a writ of summons *in rem* is by itself as effective as a warrant of arrest is tantamount to an assertion that

[1] *The Nautik*, [1895] P. 121. [2] (1881) 6 P.D. 106, 112 [App.].
[3] (1879) 5 P.D. 28. [4] (1881) 6 P.D. 106 [App.].
[5] But see *The Monica S.*, [1967] 2 Ll. Rep. 113, 127.

the warrant is nothing more than a redundant notice. It is impossible to reconcile such an argument with the fact of the warrant's alteration in the status of the arrested vessel and of the powers which arrest confers upon the Marshal in respect of the vessel in *custodia legis* as previously discussed,[1] or with the specific rules for the service of such process—unchanged for centuries[2]—violation of which has consistently been held to nullify the efficacy of the process even in the present day.[3]

Under the civilians, the English position was quite clear: 'But as no prudent person will hesitate to proceed *in rem if the res be within the jurisdiction of the Court*, so a personal proceeding is never adopted *unless the res be inaccessible to arrest*.'[4] The vessel had to be physically present within the Court's jurisdiction to enable a proceeding *in rem*; if it was not, the alternative was a personal action against the owner. Such was the established rule observed by the civilians. But since the case of *The Nautik*, the attitude toward the institution of proceedings against the vessel has changed; Hill, J., perhaps relying upon *The Nautik*, declared (reasonably, but without citation of authority in support) that he could 'see no reason why the writ cannot be issued [in the absence of the vessel] and then served when the *res* comes within the jurisdiction.'[5] But in cases where an undertaking is executed, the present position is far more extreme:

> In fact, it is common practice for an owner of a res threatened with arrest to give an undertaking either direct or through his solicitors to accept service of any writ issued, to enter appearance and to provide bail, even *before the writ has been issued*. Such an undertaking sometimes includes an agreement to accept English jurisdiction as, for example, *where the defendant is here but his res is threatened with arrest in some foreign court*.[6]

The significance of this statement is that it now appears possible to conduct an entire proceeding upon a cause of action *in rem*—from start to finish—during the whole of which the vessel proceeded against has been absent from the jurisdiction of the Court.

[1] See *supra*, p. 184.
[2] See A. Browne, vol. 2, p. 398.
[3] See, *e.g.*, *The Prins Bernhard*, [1963] 2 Ll. Rep. 236.
[4] Coote, 1st ed., pp. 131–2 (emphasis supplied).
[5] *The Espanoleto*, [1920] P. 223, 225.
[6] McGuffie, *Practice*, §232, p. 98 (emphasis supplied).

The American rule has always been that no proceeding *in rem* may be maintained unless the *res* be physically present within the Court's jurisdiction. Compliance with this requirement was assured under the old General Admiralty Rules by the demand of Rule 22 for inclusion in every instance libel [writ] a statement upon oath by the plaintiff's proctor that the *res* was present within the jurisdiction of the Court, and a similar requirement has been prescribed for complaints in Admiralty actions *in rem* under the unified rules.[1] This was clearly the practice in the Colonial Vice-Admiralty Courts of North America,[2] and has passed not only into American practice but into that of Canada as well, where the presence of the *res* within the jurisdiction of the Court is absolutely required by statute before a writ of summons *in rem* may be issued.[3]

The firm American view is that: 'an Admiralty court in order to have jurisdiction in rem must be in a position to secure the res'[4]; and the corollary is that: 'the foundation of jurisdiction *in rem* is the taking of the vessel into the custody of the court'.[5] The advantage of this custody, perfected by arrest, has long been the distinctive feature of the action *in rem* in the United States,[6] and even an action in which the owner has posted a general or special bond cannot be instituted by a plaintiff unless the vessel is or will be present in the Court's jurisdiction. This position is even clearer under the unified rules,[7] eliminating the misinterpretation which led to one anomalous decision.[8] Moreover, the position is clear that the posting of a general or special bond does not constitute a personal submission to the jurisdiction of the Court save to enforce the security specified in the bond,[9] and in case of an award in an action in which there has been a special bond (which cannot exceed the value of the *res*[10]), the surety is liable only to the extent of the stipulated sum even if the award exceeds that sum.[11] Arrest

[1] F.R.C.P. [1 July 1966], Adm. Rule C.(2).
[2] See Dunlap, p. 91.
[3] The Admiralty Act, *R.S.C.* 1952, c. 1, §20(1)(a).
[4] Robinson, §59, p. 415.
[5] Benedict, vol. 1, p. 16; and see *The Resolute*, 168 U.S. 437, 439 (1897).
[6] *Jennings v. Carson*, 4 Cranch (8 U.S.) 2 (1807); *The General Pershing* [*Criscuolo v. Atlas Imperial Diesel Engine Co.*], 84 F.2d 273, 275 (9 Cir. 1936).
[7] F.R.C.P. [1 July 1966], Adm. Rule C.(2).
[8] *The Providence*, 293 F. 595, 596 (D. R.I. 1923); erroneously followed in *The New England*, 47 F.2d 332, 335 (S.D.N.Y. 1931).
[9] Conkling, p. 448.
[10] F.R.C.P. [1 July 1966], Adm. Rule E.(5)(a).
[11] *Brown v. Burrows*, 4 Fed. Cas. 360 (No. 1996) (C. C. S.D. N.Y. 1851).

of the ship is not a procedural device,[1] and any appearance of an owner to defend an Admiralty or maritime claim upon which his ship has been arrested or seized may be entered as a 'restricted' appearance which will not submit him to the jurisdiction of the Court for any other purpose,[2] so that a defending owner in an American action *in rem* cannot be held personally liable beyond the value of his ship against his will.

At this point it is necessary to digress momentarily, and to examine the nature and function of bail before discussing the modern English proceeding upon causes of action *in rem*. The standard axiom in both American and English Admiralty Law is that bail is a substitute for the *res* and that, when posted in an action *in rem*, it becomes the subject of the proceeding and the *res* itself is thereupon discharged from the action,[3] which is why, in both America[4] and England,[5] re-arrest of a ship released upon bail is not permissible upon the same cause of action. What is significant about the cases establishing this axiom of bail as a substitution for the *res* is that in each instance, whether declared by Lord Stowell,[6] Dr Lushington,[7] or common lawyers upon appeal[8] or at instance,[9] the ship proceeded against had been duly arrested by warrant *in rem*. Bail, of course, can only be given upon entry of an appearance in any action,[10] and the question which quite naturally arises must be whether bail given in a proceeding upon a cause of action *in rem* in which the *res* has not been arrested differs from bail given after arrest by warrant *in rem*.

In *The John Dunn*,[11] the case in which Dr Lushington attempted to award costs which, when added to the judgment, would have exceeded the value of the *res*, but against the enforcement of which award a prohibition was issued, the rationale of Lushington's decision was that the defending shipowner's appearance rendered him personally responsible, and he referred to bail given in another case to secure the release of an arrested ship as a substitution of

[1] *Reed v. The Yaka*, 307 F.2d 203 (3 Cir. 1962); *rev'd. on other grounds*, 373 U.S. 410 (1963).
[2] F.R.C.P. [1 July 1966], Adm. Rule E.(8).
[3] See, *e.g.*, *The Christiansborg*, (1884) 10 P.D. 141, 155 [App.].
[4] *The Thales*, 23 Fed. Cas. 884 (No. 13856) (C.C.S.D.N.Y. 1872).
[5] *The Point Breeze*, [1928] P. 135.
[6] *The Peggy*, (1802) 4 C. Rob. 304.
[7] *The Wild Ranger*, (1863) Br. & Lush. 84, 87.
[8] *The Christiansborg*, (1884) 10 P.D. 141, 155.
[9] *The Point Breeze*, [1928] P. 135.
[10] McGuffie, *Practice*, §232, p. 97.
[11] (1840) 1 W. Rob. 159 [Inst. & Prohib.].

'personal responsibility'. And in the present century, when undertaking rather than arrest has become the dominant feature of practice, the same notion is put forward by a leading textwriter, who states flatly that 'bail is the substitution of personal security for that of the *res*'.[1] This view, of course, dovetails very neatly with the procedural theory—bail as the substitution of personal security is logical if the appearance upon which bail is posted has itself the effect of converting the action into one *in personam*.[2] But the same neatness is not present with regard to the proceeding upon a cause of action *in rem* in which there has been no actual arrest of the *res*. This is so because the Admiralty Court 'perfects' its jurisdiction over the *res* by taking it into custody, and the instrument by which that custody is obtained is arrest upon Admiralty warrant;[3] only such arrest can give the Court custody, for only in cases in which the Court has perfected its jurisdiction by arrest of the *res* can the *res* be defaulted and sold by order of the Court.[4] The question therefore arises as to the plausibility of bail as a 'substitution' in cases in which the Court has no custody of the *res* for which to substitute custody of the bail—it is difficult to 'substitute' X for Y, if Y does not exist. But if bail in actions without arrest of the vessel is not a substitute, then it must have some independent nature—a nature which is present today in most of the actions described as *in rem*, for in most of these there is no arrest of the ship.[5]

A hint of the answer is given in one of the first works on Admiralty practice to be published after the Judicature Acts and 1883 Rules: 'The Writ of Summons is addressed "to the owners and parties interested in" the property against which the Action is in effect brought. In terms, therefore, even an Action *in rem* is commenced as though it were a personal Action.'[6] Each action in the Admiralty Court since the Judicature Acts has begun with a writ of summons addressed to the defending party, and thereafter the actions have fallen into one of four categories: (1) the action in which the Court acquires jurisdiction of the cause *in personam* —there is no arrest, the only process served is the writ of summons, and whether by default or adverse judgment the defendant is

[1] Roscoe, *Practice*, p. 272.
[2] See Marsden, *Collision*, ¶274, p. 205.
[3] *Annual Practice 1966*, vol. 1, pp. 1863–4.
[4] McGuffie, *Practice*, §232, p. 97.
[5] R. G. M. Browne, p. 19.
[6] See *The Dictator*, [1892] P. 304, 319.

personally liable to the extent of the award; (2) the action in which the Court acquires jurisdiction of the cause *in rem*—there is arrest, and both a writ and warrant are served, but the action is undefended and the vessel sold by order of the Court pursuant to a default judgment, and the limit of liability is thus the value of the *res*;[1] (3) the action which is commenced by writ of summons and a warrant *in rem* arresting the vessel—the action is defended and there is personal liability under the procedural theory to pay the amount of the judgment whether or not exceeding the value of the *res*; and (4) the action in which an undertaking has been given—there is no arrest, the only process served is the writ of summons, and if (a) the action is defended there is personal liability to the extent of the award. Now if category (4)(a) is compared to the others, it will be seen to be substantially identical to (1)—the action *in personam*; but the action in category (4) is commenced by a writ of summons *in rem* and the name of the defendant's vessel appears in the title of the cause and in practice the action is designated as an action *in rem*; therefore, if (b) such an action is undefended it would seem to follow that upon a default judgment the Court may without further ado order the sale of the vessel as in category (2). In fact, this cannot be done—for the Court in category (4) has never had jurisdiction over the *res* at all. Authority is unanimous to the effect that in such case:

> The judgment is only in the nature of a judgment *against the defendant* on whose behalf the [undertaking or] *caveat* has been entered, [and] it seems that the property cannot be sold, nor can any final judgment be pronounced absolutely affecting the rights of other persons interested in the property until . . . similar steps [have been] taken to those required in other actions *in rem* where the property has been arrested.[2]

This statement, in virtually identical wording, is repeated in the latest treatise upon Admiralty practice,[3] and it is clear that both past[4] and present[5] rules of procedure support the statement, as does the general practice manual.[6] Moreover, the point is illustrated in at least one decision,[7] referring to another case[8] in which

[1] See Price, *L.M.L.*, p. 118.
[2] Williams and Bruce, 2nd ed., p. 281 (emphasis supplied); see also *The Reina Victoria*, 299 F. 323, 324 (S.D.N.Y. 1924), *per* Learned Hand, D.J.
[3] McGuffie, *Practice*, §645, p. 288.
[4] R.S.C., 1883, O. 29, r. 17.
[5] R.S.C. (Revision) 1962, O. 75, r. 20.
[6] *Annual Practice 1966*, vol. 1, pp. 1863–4.
[7] *The City of Mecca*, (1879) 5 P.D. 28.
[8] *The Troubador*, (1878) [unrep.].

'the Court directed the issue of a warrant after judgment, for the purpose of enforcing payment of an award of salvage.'

In practice, the difficulties of enforcing a default judgment in an action in category (4) are great if attempted against the *res*, for what is required appears to be a complete new action in category (2), and, as the vessel may not be within reach of the Court's process, and cannot be compelled to present herself for service,[1] a considerable delay may ensue. Since the judgment is 'in the nature of a judgment against the defendant',[2] it has, both in the past[3] and in the present,[4] been found more expedient to enforce the judgment in the manner of a default judgment in an action *in personam*. As a result, default judgments *in personam* may not in substance be as rare in modern practice as hitherto thought.[5]

What the nature of the proceeding upon a cause of action *in rem* in which there has been no arrest of the *res* actually is, may be deduced from its characteristics; there is personal service of a copy (and in some cases, the original) of a writ of summons directed to the person, a personal undertaking is given, and there is either a personal appearance or a default judgment against the person, with a personal liability enforceable against the person—all the attributes of an action '*in personam*'. Yet the action—said to be *in rem*—does not proceed against the *res*, does not take the *res* into custody nor give the Court any jurisdiction over it, and cannot result in a default and sale of the *res* unless and until the Court's jurisdiction over it is perfected by arrest—none of the attributes of an action '*in rem*'. Manifestly, an action which proceeds against the person rather than the thing ought not to be called an action *in rem*; this category of action deserves some distinctive term of reference—*quasi-in-rem* would be ideal if not already in use in America to describe maritime attachment[6] and also foreign attachment at common law[7]—and therefore, in deference to its present classification in English Admiralty practice, I suggest the term '*para-in-rem*', by which name this category of action will be hereafter identified in this work; the intended

[1] See *Thyssen Steel Corp. v. Federal Commerce & Nav. Co., Ltd.*, 274 F. Supp. 18 (S.D.N.Y. 1967).
[2] Williams and Bruce, 2nd ed., p. 281.
[3] See Williams and Bruce, 1st ed., p. 229.
[4] See McGuffie, *Practice*, §645, p. 289.
[5] See *id.*, p. 247, n. 27a.
[6] See *supra*, p. 165.
[7] See *Hanson v. Denckla*, 357 U.S. 235, 246, n. 12 (1958).

literal significance of this term is that the shipowner, in executing an undertaking (whether or not to procure a caveat), volunteers to submit himself as the subject of an action rather than his ship—and thereby offers his personal liability—in return for which the plaintiff agrees to forego a proceeding against the ship.

Indeed, the action *para-in-rem* is closer in substance to an action *in personam* than was the old 'personal action by way of monition' which was utilized in causes of action *in rem* where the ship was unavailable for arrest. This is so because the action *para-in-rem*, like that *in personam*, may if undefended result in a default judgment against the person, whereas the monition—being only an order to appear and not a process against the person—could if disobeyed result only in a personal attachment for contempt. The most important distinction, however, is that the action *para-in-rem* proceeds directly against the person, whereas the 'traditional' action *in rem* proceeds directly against the *res*—a substantive distinction, which has been hinted at (but not clearly drawn) by such notable English lawyers as Patrick (now Lord) Devlin, K.C.,[1] and Dr Griffith Price.[2]

The greatest irony, therefore, of Sir Francis Jeune's labour to evolve the procedural theory in order to find personal liability in *The Dictator* is that the action in that case, being *para-in-rem*, was at its institution a direct proceeding against the person of the shipowner, who had already undertaken to submit his personal liability. But the procedural theory has ultimately prevailed, and there have been no judicial decisions inconsistent with Jeune's decision in *The Dictator*, according to all of the treatises which have subsequently examined or stated the procedural theory. In fact, that is *not* the case, for two decisions having a considerable bearing upon both the authority of *The Dictator* and the procedural theory exist in the reports—and have elsewhere been virtually ignored.

The first of these decisions was *The Longford*, in which a vessel belonging to the City of Dublin Steam Packet Company was arrested upon an Admiralty warrant *in rem*; the defence of the owners in the Admiralty Court was based upon a portion of a local and personal Act of Parliament dealing with 'any action against the Company'. In giving judgment for the plaintiff, Sir

[1] See *The Tolten*, [1946] P. 135, 136.
[2] See Price, *L.M.L.*, p. 42.

Charles Butt held, very simply, that an action *in rem* is a proceeding solely against a *res*, and hence could not in any way be construed as an action against the Company. This view was unanimously affirmed upon appeal, and the appeal dismissed, Lord Esher, M.R., saying: 'That action [*in rem*] is now what it always was, except that the Judicature Act has slightly altered the procedure in regard to it.'[1] Remarkably, though *The Longford* was decided only three years before *The Dictator*, it was neither cited as authority in the argument nor considered by Sir Francis Jeune in the course of his decision; but even more surprisingly, with *The Longford* and *The Dictator* obviously in conflict, *The Longford* was not cited in argument before or cited or considered by the Court of Appeal in *The Gemma*,[2] which wholeheartedly adopted the procedural theory and approved *The Dictator*.

Thus matters stood until 1907, and the second and more direct decision upon the procedural theory in *The Burns*, in which a vessel owned by the London County Council was arrested in an action *in rem*; the Council's defence was based upon a statute of limitations barring actions against 'any person' where the cause arose out of the performance of a public duty. The cause was tried at instance in the Admiralty Division by Sir Bargrave Deane, who held that an action *in rem* could not be an action against a person, and with specific reference to the procedural theory he said:

> I see the difficulties and quite appreciate the force of the arguments which have been addressed to me by counsel for the defendants, and on looking at *The Dictator* [*cit.*], which was approved by the Court of Appeal in *The Gemma* [*cit.*], it is clear that in the opinion of the learned judge in that case if the owners appear in an action *in rem* to contest the suit, by their appearance they become responsible not only for the amount of the *res*, but beyond that for extra damage which the *res* might not cover.[3]

Despite the approval of the procedural theory in *The Gemma*, this decision of Deane, J., was clearly in conflict with the notion of personal liability in actions *in rem*; as would be expected, therefore, the cause was taken up on appeal. Again as might be expected, the argument of Scrutton, K.C., before the Court of

[1] *The Longford*, (1889) 14 P.D. 34, 37 [App.].
[2] [1899] P. 285 [App.].
[3] *The Burns*, [1907] P. 137, 139.
cf. The Monte A., 12 F. 332 (S.D.N.Y. 1882); p. 175, *supra*.

Appeal on behalf of the County Council premised that *The Gemma*'s approval of Jeune P's. rationale in *The Dictator* was binding as to Jeune's statement that arrest of the *res* was solely a device to compel the personal appearance of the owner, and that the action *in rem* was, in the end, merely a different way of proceeding against the person.[1] The Court of Appeal, however, affirmed the decision of Deane, J., below—and the crucial point was dealt with by Lord Justice Fletcher Moulton, who said of Scrutton's argument:

> I am of opinion that this view cannot be supported. The two cases upon which counsel have chiefly relied—*The Dictator* [*cit.*] and *The Gemma* [*cit.*]—appear to me to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action in personam. In other words, it is not the institution of the suit that makes it a proceeding in personam, but the appearance of the defendant. And further, I think that *the contrary is conclusively established by the case of The Bold Buccleugh* [*cit.*], supported and approved as it was by the House of Lords in the case of *Currie v. M'Knight* [*cit.*].[2]

Thus Moulton, L.J., repudiated the essential of the procedural theory—that the action *in rem* is a procedural device—and in effect overruled Jeune's holding in that regard.

As to the matter of personal liability, it was the view of Dr Lushington, expressed in *The Volant*,[3] that the process in an action *in rem* only called upon the owners to appear to defend their interest, and that, the extent of their interest being the value of the ship, their liability ought not to be greater than the interest possessed by them in the ship which they appeared to defend. But the Judicature Acts and 1883 Rules changed the form of the process (though the 'persons interested' are still cited[4]), so that it might be thought the introduction of a personally-served writ had altered the situation, connoting thereafter a proceeding directed against the persons of the owners. This point was also taken up by Moulton, L.J., as follows:

> I am . . . of opinion that the action in rem is an action against the ship itself . . . it is evident from the language of that [pre-Judicature Acts] warrant that the process was regarded then as being directed against the ship itself. That old form was abandoned, and a new form of writ was employed, by . . . the Judicature Act . . . in 1883 . . . the rule was passed which directed the present form of writ to be issued in Admiralty actions in rem. The direction itself shews that . . . the writ was intended to apply to the old-established Admiralty action in rem, and was not intended to have the effect of creating a new type of action or altering the nature of the action . . .[1]

[1] *The Burns*, [1907] P. 137, 141 [App.].
[2] *Id.*, at 148 (emphasis supplied). [3] (1842) 1 W. Rob. 383, 388.
[4] R.S.C. 1966, form of Admiralty writ *in rem*.

Though the cases of *The Longford* and *The Burns* arose upon points of statutory interpretation, they nevertheless stand as authority contrary to the procedural theory of actions *in rem*, and have never been judicially considered in any attempt to resolve the conflicting views. *The Longford* was cited in argument in the case of *The Dupleix*,[2] which first gave recovery beyond the value of the ship under the procedural theory, but Sir Samuel Evans, P., neither cited nor considered *The Longford* in the course of his decision; and neither *The Longford* nor *The Burns* was cited in argument or decision in *The Joannis Vatis* (*No. 2*),[3] which approved, per Lord Merrivale, P., the *Dictator–Gemma–Dupleix* case line and the procedural theory.

What is more surprising is that textwriters of the present century have likewise made no attempt to resolve the conflict of authority; but there is perhaps an explanation for this. The leading text upon Admiralty Practice for many years was that of E. S. Roscoe, who, having been appointed Admiralty Registrar by Sir Francis Jeune, P., in 1904, could scarcely have been unaware of the decision in *The Burns* in 1907; but either through oversight or in deference to the procedural theory, which he heartily endorsed, Roscoe omitted in his subsequent editions any mention of either *The Longford* or *The Burns* in his consideration of the nature of the proceeding *in rem*, and instead, citing the *Dictator–Gemma–Dupleix* case line as authority, he asserted that 'an action *in rem* is not a limited process against a particular thing, but a process auxiliary to the ordinary process against individuals'[4]—a view diametrically opposed to the decisions of the Court of Appeal in *The Burns* and *The Longford*. The influence of Roscoe's text, particularly as the author was Admiralty Registrar, has naturally been very great, and it may be that this influence was felt by the author of a later and most competent study of the

[1] *The Burns*, [1907] P. 137, 149. [2] [1912] P. 8.
[3] [1922] P. 213. [4] Roscoe, *Practice*, p. 272.

law of maritime liens, Dr Griffith Price, who likewise did not consider either *The Longford* or *The Burns* in the course of his lengthy discussion of the procedural theory. Certainly the effect of Roscoe's text upon judicial decision was considerable, for in the case of *The Majfrid*, Bucknill, J., granting recovery in excess of bail in an action *in rem*, cited the statement in Roscoe's text quoted above, saying: 'I have taken my statement of the law very largely from Mr. Roscoe's book.'[1]

Textwriters of the present day have cited *The Longford* and *The Burns* for the proposition that 'an action *in rem* is an action against a *res*',[2] and that changes in form by the Judicature Acts and 1883 Rules did not alter the previous character of actions *in rem*,[3] but as yet no attempt has been made to reconcile the major incongruities.

Unless and until the incongruities affecting the modern English Admiralty action *in rem* [and *para-in-rem*] are resolved, some difficulty with regard to the effectiveness of English Admiralty judgments may arise abroad, and by way of illustration I will point to difficulties which might arise in North American courts. Primarily, these may occur because of the fact that Admiralty Courts in the United States and Canada 'have universally followed the doctrine of *The Bold Buccleugh*',[4] regarding the execution of maritime liens in actions *in rem*, and the collateral rule that liens are not executed by 'fruitless actions *in personam*'.[5] Arguments to the effect that bail 'is equivalent to the arrest of the res'[6] to the contrary notwithstanding, this writer has yet to see a decision or hear a cogent argument holding that bail in an action *in personam* (or *para-in-rem*) works execution of a maritime lien upon a vessel over which the Court has not perfected jurisdiction. The point has been made by English authority, such as Lush, J., 'I do not see how it was possible for them to carry and execute a maritime lien when they [Portuguese Courts] had not possession of the thing'.[7] And by American authority such as Judge Ware, who said—relying upon Lord Stowell—that the ship must be within

[1] *The Majfrid*, (1943) 77 Ll. L.R. 127, 129.
[2] *Annual Practice 1966*, vol. 1, p. 1863, n.
[3] McGuffie, *Practice*, §9 ,p. 10.
[4] *Partenreederei Wallschiff v. The Pioneer*, 120 F. Supp. 525, 527 (E.D. Mich., S. Div. 1954).
[5] Price, *L.M.L.*, p. 88.
[6] *The Christiansborg*, (1884) 10 P.D. 141, 155 [per Fry, L.J.].
[7] *The City of Mecca*, (1881) 6 P.D. 106, 118 [App.].

the jurisdiction of the Court in order to operate directly upon it; indeed, Judge Ware's statement has direct applicability to the action *para-in-rem* in which the ship is proceeded against while absent from the Court's jurisdiction: 'In proceedings in rem, the forum rei sitae is the natural and proper forum, for it is the only one which can make its jurisdiction effectual by operating directly on the thing [*cit.*]. A court sitting in another jurisdiction can only reach the thing through the person of the owner.'[1] The same is agreed by Dr Price, who said that to him it 'seems logical, that to proceed *in rem* a plaintiff must be in a position to arrest a wrong-doing *res*'.[2]

Essentially, it is the current popularly-accepted English view that the action *in rem* commences with the issuance of the writ of summons—that this alone is sufficient to 'seize' the jurisdiction of the Admiralty Court, and that actual arrest (or the lack thereof) cannot therefore make the action any more or less *in rem* than at its institution. Moreover, the view has been expressed to this writer that the 1956 Act, in setting forth the conditions whereby an action is brought *in rem*,[3] has eliminated any controversy which might have existed under the prior law—and the same view has recently received judicial expression.[4] But I must say, that view appears to disregard the significance of the warrant as the instrument by which the Court has since the earliest times perfected its jurisdiction over the *res*; it is the indifferent—or, if one prefers, disagreeable—existence of the *fact* that the Court cannot act directly upon the *res* (*i.e.*, *in rem*) without perfecting jurisdiction by arrest under warrant,[5] which transcends semantic dispute over the form in which the plaintiff institutes his action and thereby indicates the direction in which he **wishes** it to proceed. It seems to follow that what is embodied in the writ is the **potential** of the action, and that the **actual** proceeding against the *res* does not commence until process enables the Court to exercise directly upon the vessel the jurisdiction *in rem* conferred by the 1956 Act.

The situation which actually prevails in the United States is more difficult to evaluate, principally because the *res* must be in a

[1] *The Bee*, 3 Fed. Cas. 41, 43 (No. 1219) (D. Me. 1836).
[2] Price, *L.M.L.*, p. 42.
[3] Administration of Justice Act, 1956, §§3(2), (3), (4).
[4] *The Monica S.*, [1967] 2 Ll. Rep. 113, 131–2.
[5] *Supra*, p. 196.

position to be arrested before an action *in rem* can be maintained.[1] But it is still necessary for arrest under warrant to have been effected in order for the Court to be able to decree a sale of the *res*,[2] and one must therefore conclude that any action in which the defendant has given a general or special bond to prevent arrest is merely *para-in-rem*, with personal liability the absolute and fundamental consequence.[3]

It is even more remarkable that the basic question has thus far escaped the focus of attention in America, because a flurry of excitement has been aroused by the innovation at common law of personal liability in excess of *res* value in actions *quasi-in-rem* [foreign attachment] upon **default** judgments taken after notice to the defendant; the theory has a familiar ring—notice converts an action *quasi-in-rem* into one *in personam*.[4] Moreover, there have been holdings in American Admiralty that personal liability may exceed *res* value in actions *in rem*,[5] that actual arrest is not necessary in actions *in rem*,[6] and even that the action *in rem* employs the fiction of personification to satisfy a claim whose true nature is *in personam*.[7] The overwhelming weight of authority, however, establishes in the Admiralty Law of the United States that the value of the *res* is the limit of liability in actions *in rem*,[8] that personification, while patently a fiction, nonetheless gives rise to an action which is truly against the ship rather than the owner,[9] and that arrest is the foundation of jurisdiction *in rem*.[10] The roots of this modern doctrine tap the jurisprudential wisdom of Mr Justice Story,[11] Judge Ware,[12] and others.[13] It reflects poorly indeed upon the Admiralty Bar as well as upon the Bench, that in general the names—much less the decisions—of the most eminent Admiralty jurists of the nation have been almost completely forgotten in present-day American practice. There are certain types of cases which call for close examination of the fundamentals

[1] F.R.C.P. [1 July 1966], Adm. Rule C. (2). [2] *Id.*, Rules C.(5), E.(9).
[3] *The Ulrik Holm*, 298 F. 849, 851, 853 (1 Cir. 1924), and cases cited therein.
[4] See *Fishman v. Sanders*, 15 N.Y. 2d 298; 258 N.Y.S. 2d 380; 206 N.E. 2d 326 (Ct. App. N.Y. 1965). But *cf.* N.Y. Civil Practice Law and Rules, R. 320 (c) (1) [1969]. [5] See *supra*, p. 183, nn. 5–8. [6] See *supra*, p. 193, n. 8.
[7] See *The Caribe* (*Pichirilo v. Guzman*), 290 F.2d 812 (1 Cir. 1961).
[8] See *supra*, p. 183, n. 9.
[9] See *supra*, p. 194, n. 1. [10] See *supra*, p. 193, n. 6; *infra*, p. 206, n. 2.
[11] *The Palmyra*, 12 Wheat. (25 U.S.) 1 (1827).
[12] *The Orpheus*, 15 Fed. Cas. 492 (No. 8330) (D. Mass. 1858).
[13] *The Berkeley*, 58 Fed. 920 (D. So. Car. 1893).

of jurisdiction *in rem*, the most common perhaps being those involving transfer of actions *in rem* between Districts; this is a problem over which American Courts of Admiralty have long agonized, and yet the distinction between those cases in which the *res* has actually come within the jurisdiction of the Court by arrest under warrant, and those in which the owner has substituted personal liability to prevent arrest, has not been clearly drawn as a step toward solution.[1]

Aside from the probability that an American Court considering the effect of an action *para-in-rem* upon a maritime lien would not hold the lien executed by such an action and would permit arrest of the ship in an action *in rem* upon the same cause earlier tried in the English action—to the obvious detriment of shipowners who had given undertakings in England—it is likely that an American Court would refuse to permit enforcement *in rem* of a judgment given in an English action *para-in-rem*. The enforcement of foreign Admiralty judgments by American Courts is a policy of long standing,[2] and in keeping with the principle of comity in international maritime law, but even English precedent acknowledges that a foreign judgment given in an action against the person will not be enforced by a domestic action *in rem*,[3] and the same rule is established in the United States by a case with both *para-in-rem* and English involvements, *The Harrogate*.[4] In that case, the owners of the *Hazelmere*, with which the *Harrogate* had been in collision, caused a writ of summons *in rem* to issue from the Admiralty Division; however, as a later American decision noted, 'there was no arrest of the ship, but, as in the United States practice, the owners gave bail as substitution for the seizure and appeared'.[5] The judgment in the Admiralty Division held the *Harrogate* solely at fault, and subsequently the owners of a damaged cargo of oats aboard the *Hazelmere* caused the *Harrogate* to be libelled *in rem* and arrested in the Eastern District of New York. Upon the hearing, only the English decree was submitted to the District Court as evidence of fault, and enforcement of that judgment was prayed; the District Court held the English decree not *res judicata* and dismissed the libel. The U.S. Court

[1] But *cf. Internatio-Rotterdam v. Thomsen*, 218 F. 2d 514 (4 Cir. 1955).
[2] See *Penhallow v. Doane's Administrators*, 3 Dall. (3 U.S.) 54 (1795).
[3] *The City of Mecca*, (1881) 6 P.D. 106 [App.]. [4] 112 F. 1019 (2 Cir. 1901).
[5] *The General Pershing* (*Criscuolo v. Atlas Imperial Diesel Engine Co.*), 84 F.2d 273, 276 (9 Cir. 1936).

of Appeals, Second Circuit, affirmed the dismissal on grounds that there had been no arrest or publication of arrest, etc., in the English action; the Supreme Court of the United States denied a petition for review by *certiorari*,[1] and *The Harrogate* therefore enunciates a binding principle which has been recognized in a number of subsequent decisions that affirm arrest of the *res* as a necessary prerequisite to jurisdiction *in rem*.[2]

For the same reasons which indicate that an English *para-in-rem* proceeding might not bar a subsequent action *in rem* elsewhere, the reverse proposition seems to have been recognized in the recent case of *The Mansoor*.[3] There an undertaking was given in Antwerp to prevent arrest of the *Mansoor* in Belgium upon a cause of collision; subsequently, plaintiffs who had accepted the undertaking in Belgium obtained a writ *in rem* against the *Mansoor* in the Admiralty Division. Mr Justice Cairns, on a motion to set aside the writ and stay proceedings, first observed that the defendants ought to have been aware of the possibility of a subsequent action, and then said:

> I am satisfied that the plaintiffs were entitled to bring an action in respect of their damage in the Courts of another country notwithstanding their acceptance of the defendants' undertaking . . . But did the fact that the present action is an action *in rem* make it a breach of faith? In my opinion it did not.[4]

In dismissing the motion, Cairns, J., then put a finger upon the vital distinction in the case at bar, *viz.*:

> It is not as if the only way of proceeding in an action *in rem* were arrest of the ship or the obtaining of further bail. The *plaintiffs deliberately refrained from arresting* the *Mansoor* when they could have done [in England] . . . If I dismiss this application the action will become one *in personam* as well as *in rem*.[5]

Thus in *The Mansoor*, a foreign action *para-in-rem* was no bar to the subsequent English action [*para-*] *in rem*, actual arrest never having been effected in either.

The basic philosophy of the American position has been well put by the late Chief Justice Charles Evans Hughes:

> The proceeding *in rem* which is within the exclusive jurisdiction of Admiralty is one essentially against the vessel itself . . . By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant . . . [Even] actions in personam with a concurrent attachment to afford security for the payment of a personal judgment are in a different category.[1]

[1] *Cert. den.* 184 U.S. 698.
[2] *E.g., The Transfer No. 7*, 176 F. 2d 950 (2 Cir. 1949), and cases cited therein.
[3] [1968] 2 Ll. Rep. 218. [4] *Id.*, at p. 227. [5] *Ibid.* (emphasis supplied).

Under a strict reading of the American position, then, the action *para-in-rem* would be viewed as an action *in personam*, and even the typical English action with arrest of the ship but terminating in a personal judgment might be viewed as a form of Admiralty attachment in a proceeding essentially against the person, and therefore not enforceable by action *in rem* elsewhere—a very real possibility in view of the procedural theory's declaration that a personal appearance in an action *in rem* changes its character to that of an action *in personam*.

The delightful irony of the American position is, of course, that its jurisprudence is as easily applicable to the proceeding *para-in-rem* in the United States as to that in England; but ironies aside, the potential for serious problems remains—albeit in the background—for so long as the two modern views stay unreconciled with each other as well as with their internal contradictions. One approach to resolution lies via the judiciary, but there may be considerable resistance to overcome, *viz.*:

> Where general principles of law have been laid down by learned judges in considered judgments, it does not appear to me to be right, or in the public interest, to look minutely at the facts of the particular case and to say that the case might have been decided on narrower grounds, and that the general principles need not have been enunciated, and that, therefore, they are to have no judicial authority.[2]

This position, the writer submits, though put forth by a worthy Admiralty Judge—Sir Samuel Evans, P.—is itself unworthy of the jurisprudence of the common law; one cannot, however, ignore the difficulties which beset judges in ruling upon such matters, and the restrictions pointed out by Brandon, J., are valid, *viz.*:

> It is no doubt helpful to see what views have been expressed in textbooks

[1] *Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303, 304 (1915).
[2] *The Dupleix*, [1912] P. 8, 13.

over the years. But in the end I have to determine this question not on the views of textbook writers and editors, however eminent, but by construing the relevant statutes with the guidance of the cases decided on them.[1]

Ultimately, though, with the realization that even the finest scholars of English Admiralty have based the whole of their considerations in the area of the action *in rem* upon the premise that the procedural theory as propounded in *The Dictator* was both historically accurate and judicially unchallenged,[2] the necessity must also be realized for some judicial review of the present position which will either successfully reconcile its incongruities, or will put into practice the principles recently enunciated by the House of Lords regarding the status of judicial precedent.[3] The alternative would seem to be a diplomatic approach, seeking to embody the solution in an international convention; this, however, would be much more difficult of accomplishment—the writer well knows that Americans, for example, are notoriously talkative but inactive in this regard.

But whatever the future holds for English Admiralty, the historical point must be made that the substantive Law of Admiralty has undergone considerable change in the period since the scholarly training of the civilians was replaced by the interpretive faculties of the common lawyers. The action *para-in-rem* is a civilian legacy, but the procedural theory (and its ramifications) was and is essentially a creature of the common law.

It is that amalgamation of civilian legacy and common law creativity which has profoundly affected the Admiralty Law of England during the period spanned by this work.

[1] *The Monica S.*, [1968] P. 741, 768.
[2] *E.g.*, Price, *L.M.L.*, p. 117.
[3] *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234 [H.L.].

CONCLUSION

THE theme of this study becomes apparent only at the last: the development of Admiralty jurisdiction and practice since 1800 has not been confined to the dry stuff of enactments and repeals, or even to the more interesting matter of establishment, following of or departure from judicial precedents. Men, as types and individuals, have been responsible for the Law during every second of every day; it is the change in the philosophy of men—sometimes slow and sometimes abrupt—which gives substance to raw and otherwise uninspiring data.

Some have viewed one important change as a great conquest of the civilians by the common lawyers, and lamented the change in the status and structure of the Admiralty Court. But while the facts of history may legitimately give rise to lament for the passing of a noble body of scholars and the venerable status of the Court as a direct instrument of the Royal Prerogative, it must be observed that this development has had no great effect upon either the function or operation of the Court. It was noted after Sir Robert Phillimore's retirement that the intimate atmosphere of the Court under the civilians had not wholly changed with the move to the Strand and a common lawyer upon the bench,[1] and the picture today is still one of a calm and unhurried administration of maritime justice, free from the drama and sensation of juries and crowds of spectators, and with a small and select professional attendance. And yet it cannot be denied that there have been developments apart from changes in simple philosophy—the transition in doctrine from: 'the ship itself is responsible in the admiralty, and not the owners',[2] to: 'an action *in rem* is not a limited process against a particular thing, but a process auxiliary to the ordinary process against individuals',[3] is one of the more dramatic illustrations.

The observation of R. G. Marsden that 'the chequered career of the court accounts for much of this uncertainty in its law',[4] is both shrewd and accurate. But the degree of change in the Admiralty Law as a whole would certainly have been much greater had not

[1] Roscoe, *H.C.A.*, p. 14.
[2] Maxwell, p. 8.
[3] Roscoe, *Practice*, p. 272.
[4] 'Six Centuries', p. 176.

the common lawyers, once the Court of Admiralty had passed into their hands, shown an unexpected concern for the preservation and extension of the legal system bequeathed by the civilians. Only in relatively few respects has the procedure and substance of the common law intruded into Admiralty. And even where change has taken place as a result of misapprehension of Admiralty jurisprudence, such as in the classification by the 1883 Rules of a proceeding for apportionment and distribution of salvage as an action *in rem*,[1] there has been a good deal of rectification; the action just described, for example, has now been properly reclassified as one *in personam*.[2] Adaptation and extention of the principles of the Law of Admiralty are also evident in the statutory provisions which have given the Court jurisdiction over claims involving aircraft,[3] and the liberal scope of recent enactments such as the 1956 Administration of Justice Act evokes visions of a comprehensive Admiralty jurisdiction which might at some time in the future see the Court again trying causes such as slander at sea (a maritime tort), even as they came before Dr Lewes four centuries ago,[4] and come before American judges today.[5]

F. W. Maitland called Lord Stowell's service as Admiralty Judge the civilians' 'chief contribution to the jurisprudence of the world'.[6] Yet in the present that great heritage, together with the entire jurisprudence of the civil law in general and of the Law of Admiralty in particular, strives for recognition against the most formidable barrier which can be imagined—an almost total lack of interest. In great measure, this is due to the shortsightedness and perhaps even the selfishness of the last of the civilians themselves, for had they not voted to dissolve the College of Advocates, Doctors' Commons might have fulfilled the great role envisioned for it by Dr Lee, who pleaded in 1858 that 'The wants of the age point to the necessity of a collegiate institution for furnishing the means of education in those branches of jurisprudence, which are the sources and contain the principles of maritime and international law.'[7]

The wants of the present in this regard are no less severe than

[1] R.S.C., 1883, O. 5, r. 16(38)(d). [2] McGuffie, *Practice*, §425, p.189.
[3] *E.g.*, Administration of Justice Act, 1956, §§1(1)(*j*–*l*), (3) (5).
[4] *E.g.*, *Raynes c. Osborne*, (1579) 2 *Sel. Pl. Adm.* 156.
[5] *E.g.*, *Foster v. United States*, 156 F. Supp. 421 (S.D.N.Y. 1957).
[6] See Senior, p. 109.
[7] Parl. Paper [1859] (19) xxii (H.C. 20 January), p. 14.

were those of Dr Lee's day, but they have not been supplied. Where the great scholars of the maritime law who were both Fellows of Doctors' Commons and teachers of the law once answered the need for instruction, not one of the Universities of England is today prepared to give instruction in the Law of Admiralty. The bald statement that the Admiralty Court of the present is a court of civil law evidently has the power to elicit surprise and even shock, but it is nonetheless a true statement, and will continue to be for so long as the law applied by that Court is that portion of the civil law which is the Admiralty Law; unless some entirely novel code is invented to supplant the Law of Admiralty which has descended from the prerogative power of the Lord High Admiral, and which will not take as its basis the mercantile and maritime law, the law of the Admiralty Court will remain a part of the civil law. With this must come the realization that the extinction of the English civilians did not ordain the extinction of the English civil law, and with that realization must come in turn an understanding that a living branch of the English legal system is deserving of more formal study than it has enjoyed in the present century.

Illustrations of the necessity for this abound even in the honest efforts of the common lawyers of the present day to preserve the essentials of the Law of Admiralty while extending its operation, such as the construction of the Administration of Justice Act, 1956, which purports to allow an action *in personam* upon causes of bottomry.[1] It was elementary knowledge even to the common lawyers of the last century that the shipowner could never be held personally liable upon a bottomry bond, because the essence of bottomry is the pledge of the keel of the ship rather than the credit of the owner;[2] thus one result of indifference to Admiralty jurisprudence in the twentieth century—encouraged in this instance by the virtual disappearance of bottomry suits—has been the enactment of a monstrous paradox.

Perhaps the final irony of reconstruction of the courts of civil law and their consolidation with the common law courts in a single structure has been the 'discovery' of an unreconstructed court of civil law in which—long after the extinction of the civilians—common lawyers technically do not possess the right of audience.

[1] Administration of Justice Act, 1956 §§3(1), 1(1)(*r*).
[2] See, *e.g.*, *Stainbank v. Fenning*, (1851) 11 C.B. 51, 89.

This is, of course, the High Court of Chivalry [Constable and Marshal], which was not dealt with at all by the Judicature or Consolidation Acts because it had fallen into dormancy in the eighteenth century and was not awakened until a cause within its exclusive jurisdiction came to hearing in 1954. The story of its revival has been well and interestingly told in a work which also reveals how similar was the constitution and procedure of the Court of Chivalry to the old Court of Admiralty.[1] A familiarity with the procedures and principles of the civil law might have been somewhat useful to many of those concerned with the handling of the Court of Chivalry's most recent case (but the fitting and proper course was at any rate taken of reporting the decision together with those of the P.D.A. Division[2]).

The greatest goal ahead lies not in further extensions of Admiralty jurisdiction, nor in refinements of procedure or practice, but in the fostering of knowledge and appreciation of Admiralty jurisprudence. If the old hostility between Admiralty and the common law has 'even in our own days . . . shown a spark or two of life',[3] then it is because even such a great scholar of the common law as Mr Justice Oliver Wendell Holmes, in saying of the Law of Admiralty that: 'There is no mystic overlaw to which the United States must bow',[4] had thereby to indicate that the Law of Admiralty was to him a mysterious thing. Removal of the mystery will only be accomplished through the achievement of an understanding of the jurisprudence of Admiralty; perhaps this examination of the development of the Court of Admiralty, with some light upon its jurisprudence, will prove useful in that direction.

It is with that wish—and in quest of that goal—that this work has been undertaken.

[1] Squibb, pp. 12–13, 17.
[2] *Manchester Corporation v. Manchester Palace of Varieties, Ltd.*, [1955] P. 133 [High Court of Chivalry].
[3] Marsden, 'Six Centuries', p. 169.
[4] *The Western Maid*, 257 U.S. 419, 432 (1921).

BIBLIOGRAPHY

Abbott, Charles [Lord Tenterden]: *Abbott's Law of Merchant Ships and Seamen*, 14th (Aspinall and Moore) edition, London, 1901.

Ackermann, Rudolph: *Microcosm of London*, vol. 1 of 3, London, 1808.

'Admiralty Court and its Reform', 5 *L. Mag. & Rev.* 34 (1858).

'Admiralty Court', 77 *L.J.* 53 (1934).

Benedict, Erastus C.: *The American Admiralty: its Jurisdiction and Practice with Practical Forms and Directions*, 5th (McCloskey) edition, vol. 1 of 3, Albany, New York, 1925.

Betts, S. R.: *U.S. Admiralty Practice in the Southern District of New York*, New York, 1838.

Black, H. C.: *Black's Law Dictionary*, 4th edition, St Paul, 1957.

Boyd, A. C.: *The Merchant Shipping Laws*, London, 1876.

Brown, [Judge] Addison, *Index-Digest of Decisions*, Lancaster, Pennsylvania, 1902.

Browne, Arthur, LL.D.: *Compendious View of the Civil Law and the Law of the Admiralty*, 2nd edition, vol. 2 of 2, London, 1802.

Browne, R. G. M.: *Admiralty Procedure against Merchant Ships and Cargoes*, London, 1887.

Campbell, Lord John: *Lives of Lord Lyndhurst and Lord Brougham*, London, 1869.

Chronological Table of the Statutes, 1235–1965, London, 1966.

Civil Judicial Statistics, London [annual].

Clerke, Francis: *Praxis Supremae Curiae Admiralitatis*. Oughton, ed., London, 1829.

Coke, Sir Edward: *The Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of Courts*, London, 1797.

Conkling, Alfred: *Admiralty Jurisdiction, Law and Practice* [U.S.], 1st edition, Albany, New York, 1848.

Coote, H. C.: *Practice of the High Court of Admiralty*, 1st & 2nd editions, London, 1860, 1869.

Dicey: *Conflict of Laws*, 7th edition, London, 1958.

Dictionary of American Biography, New York, 1958 *et seq.*

Dictionary of National Biography, [Sir L. Stephen & Sir S. Lee, eds.], London, 1882 *et seq.*

Dunlap, Andrew: *Admiralty Practice in the United States*, 2nd (S. F. Dunlap) edition, New York, 1850.

Dunne, G. T.: 'Joseph Story', 77 *Harvard Law Review* 240 (1964).

Edwards, Edwin, LL.D.: *Jurisdiction of the High Court of Admiralty of England*, London, 1847.

English and Empire Digest, vol. 1 [*Admiralty*], London, 1961.

'Evidence Receivable in Admiralty', 50 *L. Mag.* 57 (1853).

Farwell, Capt. R. F. and Prunski, Lcdr. A.: *Rules of the Nautical Road*, 4th edition, Annapolis, Md., 1968.

Fifoot, C. H. S., ed.: *Letters of Frederic William Maitland*, London, 1965.

Gilmore, Grant, and Black, C. L.: *The Law of Admiralty* [U.S.], Brooklyn, New York, 1957.

Gloag, W. M., and Henderson, R. C.: *Introduction to the Law of Scotland*, 6th (Gibb & Walker) edition, Edinburgh, 1956.

Hall, J. E.: *Practice and Jurisdiction of the Court of Admiralty* [U.S.], Baltimore, 1809.

Halsbury's Laws of England, 3rd (Simonds) edition, London, 1952 & cumulative supplements.

Halsbury's Statutes of England, 2nd (Burrows) edition, London, 1948 & cumulative supplements.

Haynes, J. F.: *Student's Guide to Admiralty*, London, 1880.

Hebert, Paul M.: 'The Origin and Nature of Maritime Liens', 4 *Tulane Law Rev.* 381 (1930).

Heuston, R. F. V.: *Lives of the Lord Chancellors 1885–1940*, Oxford, 1964.

'High Court of Admiralty', 76 *L.T.* 286 (1884).

'History of Admiralty Jurisdiction in the Supreme Court of the United States', 5 *Am. L. Rev.* 581 (1871).

Holdsworth, Sir W. S.: *Charles Dickens as a Legal Historian*, New Haven, 1929.

Holdsworth, Sir W. S.: *A History of English Law*, 7th (Goodhart & Hanbury) edition, 16 volumes, London, 1956–66.

Holt, F. L.: *System of the Shipping and Navigation Laws of Great Britain*, 2nd edition, London, 1824.

Hough, C. M.: *The United States District Court for the Southern District of New York, 1789–1919*, New York, 1934.

Howell, Alfred: *Admiralty Law* [Canada], Toronto, 1893.

Ivamy, E. R. H.: 'Admiralty Court: Sixth Centenary', 110 *L.J.* 330 (1960).

Kent, [Chancellor] James: *Commentaries on American Law*, 8th (W. Kent) edition, New York, 1854.

McGuffie, K. C.: *Notes on Four Admiralty Registry Letter Books*, London, 1964.

McGuffie, K. C., Fugeman and Gray: *Admiralty Practice*, London, 1964 and supplement 1965.

McGuffie, K. C. *et al.*: *The Annual Practice, 1966*, London, 1965, 1966.

MacLachlan, D.: *A Treatise on the Law of Merchant Shipping*, 7th (Pilcher & Bateson) edition, London, 1932.

McMillan, A. R. G.: *Scottish Maritime Practice*, Edinburgh and Glasgow, 1926.

Marriott, Sir James: *Formulary of Instruments* [*Formulare Instrumentorum*], London, 1802.

Marsden, R. G.: *Select Pleas in the Court of Admiralty (1390–1602)*, 2 volumes, London, 1894 and 1897.

Marsden, R. G.: 'Jurisdiction of Admiralty; The Zeta', 10 *L.Q.R.* 113 (1894).

Marsden, R. G.: 'Six Centuries of the Admiralty Court', *Nautical Magazine*, February 1898 *et seq.*

Marsden, R. G.: *Digest of Cases relating to Shipping and Marine Insurance from Elizabeth I to end of 1897*, 1st edition, London, 1899.

Marsden, R. G.: *The Law of Collisions at Sea*, 11th (McGuffie) edition, London, 1961 and supplement 1965.

Maxwell, J. I.: *The Spirit of Marine Law*, 1st edition, London, 1800.

Merriman, Sir F. B. [Lord Merriman]: *Address to the Canadian Bar Association, 28 August 1935.*

Moore, E. G.: *An Introduction to English Canon Law*, Oxford, 1967.

Nys, Ernest: *Le Droit Romain, le Droit des Gens, et le Collège des Docteurs en Droit Civil*, Brussels, 1910.

Papers Relating to the Proposed 1855 H.C.A. Rules, London, 1855.

Parry, Clive, ed.: *British Digest of International Law*, volumes 7 & 8, London, 1965.

Parsons, Theophilus: *A Treatise on the Law and Practice of Admiralty* [U.S.], vol. 2 of 2, Boston, 1869.

'Personification of Vessels', 77 *H.L.R.* 1122 (1964).
Price, Griffith: *The Law of Maritime Liens*, London, 1940.
Price, Griffith: 'Statutory Rights *in rem* in English Admiralty Law', 27 *J.C.L. & I.L.* (3rd ser.) 21 (1945).
Pritchard, W. T., and Hannen, J. C.: *Digest of Law and Practice of the Court of Admiralty*, 3rd edition, 2 volumes, London, 1887.
'Prospects of the Admiralty Court', 10 *L. Mag. & Rev.* 262 (1861).
Public Record Office: *Guide to Contents*, 2 volumes, London, 1963.
Reddie, James: *Researches in Maritime International Law*, vol. 1 of 2, Edinburgh, 1844–1845.
Reeve, F. A.: *Cambridge*, London, 1964.
Roberts, David: *A Treatise on Admiralty and Prize* [U.S.], New York, 1869.
Robinson, Gustavus Hill: *Handbook of Admiralty Law in the United States*, St Paul, 1939.
Roscoe, E. S.: *The High Court of Admiralty—The Last Phase*, London, 1927.
Roscoe, E. S.: *Admiralty Jurisdiction and Practice*, 5th (Hutchinson) edition, London, 1931.
Roscoe, E. S.: *Studies in the History of the Admiralty and Prize Courts*, 2nd edition, London, 1932.
Roscoe, E. S.: *Lord Stowell, His Life and the Development of English Prize Law*, London, 1916.
Rothery, H. C.: *Suggestions for an Improved Mode of Pleading*, London, 1853.
Saunders, Albert: *Maritime Law*, 2nd edition, London, 1920.
Senior, William: *Doctors' Commons and the Old Court of Admiralty*, London, 1922.
Setaro, F. C.: 'The Formative Years of American Admiralty', 5 *New York Law Forum* 9 (1959).
Smith, T. E.: *Law and Practice in Admiralty*, 4th edition, London, 1892.
Squibb, G. D.: *The High Court of Chivalry*, Oxford, 1959.
Talbot, G. F.: *Ashur Ware*, Address to the Maine Historical Society, 20 May 1887.
Temperley, R.: *The Merchant Shipping Acts*, Porges and Thomas ed., London, 1964 and supplement 1965.
Thompson, G. H. M.: *Admiralty Registrars*, McGuffie ed., London, 1958.

Twiss, Sir T., ed.: *Black Book of the Admiralty*, 4 volumes, London, 1871–6.
Ubbelohde, Carl: *The Vice-Admiralty Courts and the American Revolution*, Chapel Hill, North Carolina, 1960.
Van Heythuysen, F. M.: *An Essay upon Marine Evidence*, London, 1819.
Wendt, E. E.: *Papers on Maritime Legislation*, 3rd edition, London, 1888.
Who Was Who, Chicago, 1943 *et seq.*
Who's Who, 1966, London, 1966.
'Why Abolish the Admiralty Court?', 177 *L.T.* 54 (1934).
Williams, R. G., and Bruce, Sir G.: *Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals*, 1st, 2nd & 3rd editions, London, 1868, 1886, 1902.
Wiswall, F. L., Jr: 'Admiralty: Procedural Unification in Retrospect and Prospect', 35 *Brooklyn Law Review* 36 (1968); *161 New York Law Journal* 4, Nos. 15–17 (22–4 January 1969).
Yale, D. E. C.: 'A Historical Note on the Jurisdiction of the Admiralty in Ireland', 3 *Irish Jurist* (n.s.) 146 (1968).

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