

**THE NATURE AND SCOPE OF THE CONTEMPORARY MARITIME LIENS IN
SOUTH AFRICAN ADMIRALTY LAW**

by

GRAHAM BRADFIELD

University of Cape Town

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

This dissertation is the property of the University of Cape Town and is loaned to the reader. It is to be returned to the University of Cape Town, Cape Town, South Africa.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**THE NATURE AND SCOPE OF THE CONTEMPORARY MARITIME LIENS IN
SOUTH AFRICAN ADMIRALTY LAW**

CONTENTS

Section	Title	Pg
1	Nature and definition of the maritime lien	1
2	Scope of the 'established' maritime liens	14
2.1	The damage maritime lien	14
2.2	The seaman's and master's wages maritime liens	24
2.3	The master's disbursements maritime lien	32
2.4	The salvage maritime lien	37
2.5	The bottomry and respondentia maritime liens	43
3	Scope of the 'uncertain' maritime liens	48
3.1	Implied maritime liens in English law	48
3.2	Foreign maritime liens	52
4	Recognition extended to other classes of maritime lien	55

BIBLIOGRAPHY

- Bamford The Law of Shipping and Carriage in South Africa 3rd ed (Juta 1983)
- Dillon, C & Van Niekerk, J P South African Maritime Law and Marine Insurance: Selected Topics (Butterworth 1983)
- Forsyth, C 'The Conflict between Modern Roman-Dutch Law and the Law of Admiralty as Administered by the South African Courts' (1982) 99 South African Law Journal 267
- Friedman, D 'Maritime Law in the Courts after 1 November 1983' (1983) 100 South African Law Journal 678
- Friedman, D 'Maritime Law in Practice and in the Courts' (1985) 102 South African Law Journal 45
- Gilmore, G & Black, C L The Law of Admiralty 2nd ed (The Foundation, Press Inc 1975)
- Hebert, P C 'The Origin and Nature of Maritime Liens' (1930) 4 Tulane Law Review 381
- Hofmeyr, G 'Admiralty Jurisdiction in South Africa' 1982 Acta Juridica 30
- Jackson, D C Enforcement of Maritime Claims (Lloyds of London Press Ltd 1985)
- Jackson, D C 'Foreign Maritime Liens in English courts - Principle and Policy' 1981 (3) Lloyd's Maritime and Commercial Law Quarterly 335
- Joubert, D (ed) Law of South Africa vol 15 paras 98-136
- Joubert, D (ed) Law of South Africa vol 25 paras 169-194
- Laing, L 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 Michigan Law Review 163
- Mansfield, J 'Maritime Lien' (1888) vol XVI Law Quarterly Review 379
- Price, G 'Maritime Liens' (1941) vol LVII Law Quarterly Review 409
- Price, G 'Statutory Rights *in rem* in English Admiralty Law' (1945) 27 Journal of Comparative Legislation and International Law (3rd series) 21
- Price, G The Law of Maritime Liens (Sweet & Maxwell 1940)

- Ryan, E F 'Admiralty Jurisdiction and the Maritime Lien: an historical perspective' (1968) 7 Western Ontario Law Review 173
- Rabie, M A & Lusher, J R 'South African Marine Pollution Control Legislation' 1986 Acta Juridica 161
- Shaw, D J Admiralty Jurisdiction and Practice in South Africa (Juta 1986)
- Staniland, H 'Developments in South African Jurisdiction and Maritime Law' 1984 Acta Juridica 271
- Staniland, H 'Should a Seaman Sue for his Wages as a Favoured Litigant?' 1986 Industrial Law Journal vol 7 part 3 at 451
- Staniland, H 'Should foreign maritime liens be recognised?' (1991) 108 South African Law Journal 293
- Staniland, H 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 South African Law Journal 350
- Staniland, H 'The Halcyon Isle revisited: a South African perspective' 1989 (2) Lloyd's Maritime and Commercial Law Quarterly 174
- Staniland, H 'The implementation of the Admiralty Jurisdiction Regulation Act in South African' 1985 (3) Lloyd's Maritime and Commercial Law Quarterly 462
- Staniland, H 'Towards a New Remedy for Pollution of the Sea' (1989) 1 Marine Policy Reports 151
- Steel, D W & Rose, F D Kennedy's Law of Salvage British Shipping Laws vol 12 (Stevens & Sons 1985)
- Tetley, W Maritime Liens and Claims Business Law Communications Ltd (1985)
- Thomas, D R Maritime Liens British Shipping Laws vol 14 (Stevens & Sons 1980)
- Thomas, D R 'Life Salvage in Anglo American Law' 10 Journal of Maritime Law and Commerce 79
- Van Niekerk, J P 'Ships' mortgages; bottomry and *respondentia* bonds; pledges of cargo on board' 1986 Modern Business Law 58
- Wiswall, F L The Development of Admiralty Jurisdiction and Practice since 1800 (Cambridge University Press 1970)

TABLE OF CASES

South African

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

Brady-Hamilton Stevedore Co and Others v MV Kalantiao 1987 (4) SA 250 (D)

Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 (3) SA 264 (A)

Crooks & Co v Agricultural Co-operative Union Ltd 1922 AD 423

Euromarine International of Mauren v The Ship Berg and Others 1984 (4) SA 647 (N)

'Georgetta Lawrence' v 'Calcutta' (1878) 8 Buch 102 at 105

Gulf Oil Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the MV Emerald Transporter; Irving Trust Co v Gulf Trading Co and Others; Gulf Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the MV Jade Transporter 1985 (4) SA 133 (N)

JT Rennie & Sons v Minister of Railways & Harbours 1913 NPD 396

'JW Sauer', Master etc of v 'Sellasia', Owners of SS 1926 CPD 437

Mackie, Dunn & Co v South British Insurance Co (1885) 3 SC 405

Maytom v 'Harry Escombe' 1920 AD 187 at 192

Orbit Motors (Pty) Ltd v Reed (Cape) Ltd 1975 (2) SA 333 (C)

Oriental Commercial and Shipping Co Ltd v MV Fidias 1986 (1) SA 714 (D)

Southern Steamship Agency Inc and Another v MV Khalij Sky 1986 (1) SA 485 (C)

Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others 1987 (3) SA 794 (C)

Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others 1989 (4) SA 325 (A)

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

United Building Society v Smookler's Trustees & Golombik's Trustee 1906 TS 623

United Kingdom

Alexander, The (1812) 1 Dods 278

Alexander Larsen, The (1841) 1 W Rob.288

Aline, The (1839) 1 W Rob 111

Ambietalos, The; The Cephalonia [1923] P 68

Annapolis, The (1861) Lush 295 at 355

Atlas, The (1827) 2 Hag Adm 48

Banker's Trust International Limited v Todd Shipyard Corporation The Halcyon Isle
[1980] 3 AllER 197 (PC)

British Trade, The [1924] P 104

C & CJ Northcote v The Owners of the Henrich Björn, The Henrich Björn (1886) 11
App Cases 270

Castlegate, The [1893] AC 38

Cayo Bonito, The [1904] P 310

Charlotte, The (1848) 3 W Rob 68

Constable's Case (1601) 5 Co Rep 106a

Currie v M'Knight [1897] AC 97

Dowthorpe, The (1843) 2 W Rob 73

Druid, The (1842) 1 W Rob 391

Edwin, The (1864) B & L 281

Ella Clarke, The (1863) B & L 32

Emancipation, The (1840) 1 W Rob 124

Eschersheim, The [1974] 2 Lloyd's Rep 188; [1976] 2 Lloyd's Rep 1

Eugenie, The (1873) LR 4 A & E 123

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

Feronia, The (1868) LR 2 A & E 65

Five Steel Barges (1890) 15 PD 142

Foreman (Thomas, Henry) & Others v Pretoria and her Cargo and Freight (1920) 5 Lloyd's Rep 112

Gas Float Whitton No 2, The [1896] P 42

Harmer v Bell, The Bold Buccleugh (1850) 3 W Rob 220; (1850-1) 7 Moo PC 267

Halcyon Skies, The [1977] 1 QB 14

Howe v Napier (1766) 4 Burr 1944

Kangaroo, The [1918] P 327

La Constancia (1845) 2 W Rob 404

Limerick, The (1876) 1 PD 411

Lomonosoff, The [1921] P 97

Magdalen, The (1861) LJ Adm 22

Mary Anne, The (1865) LR 1 A & E 8

Melanie (Owners) v San Onofre (Owners) [1925] AC 246

Nelson, The (1823) 1 Hag Adm 169

Orphans, The (1871) LR 3 A & E 308

Parlement Belge, The (1880) 5 PD 197

Rigby Grove, The (1843) 2 W Rob 52

Ripon City, The [1897] P 226

Royal Arch, The (1857) Swab 269

Sandeman v Scurr (1866) LR 2 QB 86

Sara, The (1889) 14 App Cas 209

St George, The [1926] P 217

Sylph, The (1867) LR 2 A & E 24

Tervaete, The [1922] P 259

Thompson v Royal Exchange Assurance Co (1813) 1 M & S 30

Tobago, The (1804) 5 C Rob 218

Tojo Maru, The [1972] AC 242 (HL)

Tolten, The [1946] P 135

Trobadour, The (1866) LR 1 A & E 302

Two Ellens, The (1872) LR 4 PC 161

Two Friends, The (1799) 1 C Rob 271

Veritas, The [1901] P 304

Wells v Osman (1704) 2 Ld Raym 1044

Westminster, The (1841) 1 W Rob 229

Westrup v Great Yarmouth Steam Carrying Co (1889) 43 ChD 241

Wilhelm Tell, The [1892] P 337

Zephyr, The (1827) 2 Hag Adm 43:

TABLE OF STATUTES**South African Legislation**

Admiralty Jurisdiction Regulation Act 105 of 1983
Admiralty Jurisdiction Regulation Amendment Act 87 of 1992
Merchant Shipping Act 57 of 1951

United Kingdom Legislation

Administration of Justice Act 1956 (4 & 5 Eliz 2 c 46)
Admiralty Court Act 1840 (3 & 4 Vict c 65)
Admiralty Court Act 1861 (24 & 25 Vict c 10)
Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27)
Merchant Shipping Act 1844 (7 & 8 Vict c 112)
Merchant Shipping Act 1854 (17 & 18 Vict c 104)
Merchant Shipping Act 1889 (52 & 53 Vict c 46)
Merchant Shipping Act 1894 (57 & 58 Vict c 60)
Merchant Shipping Act 1970 (18 & 19 Eliz 2 c 36)

THE NATURE AND SCOPE OF THE CONTEMPORARY MARITIME LIENS IN SOUTH AFRICAN ADMIRALTY LAW

1 Definition and nature of the maritime lien

The phrase 'maritime lien' appears in the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended¹ (to be referred to as the 'Act'), in three instances. The first is in paragraph (y) of the definition section² which enumerates the maritime claims in respect of which the Supreme Court of South Africa is to exercise admiralty jurisdiction. One of the effects, therefore, of the existence of a maritime lien is to confer admiralty jurisdiction on the Supreme Court. The second instance is in section 3(4)(a) which provides that a maritime claimant may enforce a claim by way of an action *in rem* if that claimant has a maritime lien over the property to be arrested, so that a further effect of the existence of a maritime is to furnish a maritime claimant with a form of remedy that claimant might not otherwise be able to invoke. Finally, the phrase appears in s 11(4)(e) which provides for the ranking of maritime creditors' claims against a limited fund. The maritime lien, therefore, confers a priority on the claimant against a limited fund formed by the proceeds of the sale of the property attached or arrested. This preference constitutes a form of security for the lienee.

Despite these various references to the maritime lien, the Act does not define the concept, an undertaking acknowledged to be fraught with difficulties. Shaw³ has suggested that it,

'is perhaps fortunate that the Legislature has refrained from attempting to deal with the intractable subject of the definition of a maritime lien'.

But this reticence on the part of the Legislature has spawned difficulties of its own not the least of which have been the issues of which maritime claims are to be recognised as giving rise to maritime liens, and the nature and scope of those liens.

1 By the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.

2 Section 1(1).

3 Admiralty Jurisdiction and Practice in South Africa at 86.

In *Oriental Commercial and Shipping Co Ltd v MV Fidias*⁴ Nienaber J, as he then was, articulated the generally accepted view of the significance of the Legislature's failure to provide a definition of the phrase 'maritime lien', namely that,

'[t]he Legislature, for some reason or another, deliberately chose not to define the term 'maritime lien'. That can only mean that the Legislature was content to leave it to the English law to fix the limits and the contents of this legal phenomenon.'⁵

The reason for the referral, as it were, to English law is to be found in s 6(1) of the Act which provides for the law to be applied by the courts in the exercise of their admiralty jurisdiction. The import of this provision has been explained by Marais J in *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* in the following terms;

'... if the matter before me is one in respect of which a Court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom had jurisdiction before the commencement of the Act on 1 November 1983, I must apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied on 1 November 1983 insofar as that law can be applied.'⁶

Claims based on maritime liens were part of the jurisdiction of the Supreme Court in the exercise of its admiralty jurisdiction under the Colonial Courts of Admiralty Act, 1890, before the enactment of the 1983 Act⁷, and therefore, in terms of s 6(1) of the Act and according to the explanation of their import by Marais J, the approach⁸ of a South African court to a dispute involving maritime liens would be to ascertain what a notional court of the United Kingdom would determine English law to have been as at the relevant date, being 1 November 1983, the date of the commencement of the 1983 Act. This would be

4 1986 (1) SA 714 (D).

5 *Ibid* at 717I-J.

6 1987 (3) SA 794 (C) at 801I-J.

7 *Crooks & Co v Agricultural Co-operative Union Ltd* 1922 AD 423 at 441-2; *Trivett & Co (Pty) Ltd and Others v Wm Brandt's Sons & Co Ltd and Others* 1975 (3) SA 423 (A), and *Beaver Marine (Pty) Ltd v Wuest* 1978 (4) SA 263 (A) at 274.

8 Adopted, *inter alia*, in the cases of *Oriental Commercial and Shipping Co Ltd v MV Fidias* (*op cit* at 718G-H); *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 801I-J and *Brady-Hamilton Stevedore Co and Others v MV Kalantiao* 1987 (4) SA 250 (D) at 253F-H, and approved by the Appellate Division in *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 336B.

subject to the qualification that the provisions of s 6(1) would yield to any South African statute where the two were in conflict⁹.

It is therefore, to English law, as it stood at 1 November 1983, that one must turn to discover the nature and scope of the 'creature' that is the maritime lien. Perhaps, the most appropriate point of departure in an investigation of the English law relating to maritime liens is the decision of Sir John Jervis in the case of *Harmer v Bell, The Bold Buccleugh*¹⁰ in which he adopted Lord Tenterden's definition of the maritime lien in Abbott's Law of Merchant Ships and Seamen¹¹, which was that,

'... a maritime lien is well-defined ... to mean a claim or privilege upon a thing to be carried into effect by legal process ...'.

The learned judge continued;

'... that process to be a proceeding *in rem* ... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.'¹²

Ryan¹³ has argued that *The Bold Buccleugh*, though not the case where the concept of the maritime lien was 'born', was rather where it was 'unveiled and placed in full view'. Before that decision, so he contends, the courts had been aware that certain maritime causes produced concomitant rights or groups of rights in the litigants, but had, at least until *The Bold Buccleugh*, been unable to abstract from the case law any controlling rationalisation for the recognition of those rights. Before 1851, so Ryan suggests, there had been a sculpturing process in progress and as each case or series of cases was decided, the rough outline of the maritime lien began to be perceived. This 'conceptual hiatus' in English law, Ryan submits, was finally bridged by the Privy Council in the *Bold Buccleugh*.

9 This is the effect of the phrase in the section 'in so far as it can be applied' when read together with s 6(2) - see Staniland 'Should a Seaman Sue for his Wages as a Favoured Litigant?' 1986 Industrial Law Journal vol 7 part 3 451 at 452-3.

10 (1850) 3 W Rob 220, a decision confirmed on appeal (1850-1) 7 Moo PC 267.

11 14th ed (1901) at 1012.

12 (1850-1) 7 Moo PC 267 at 284.

13 'Admiralty Jurisdiction and the Maritime Lien: an historical perspective' (1968) 7 Western Ontario Law Review 173 at 198.

Hebert¹⁴, referring specifically to the description in *The Bold Buccleugh*¹⁵ of the maritime lien as a proprietary interest subject to the risks of ownership, has said that,

'The Bold Buccleugh is the first enunciation of the principle that all maritime liens from whatever source arising are to be treated as a property interest in the vessel, and as such subject to all the risks of ownership.'

Subsequently, Gorell Barnes J in *The Ripon City*¹⁶ described the maritime lien in the following terms;

'... a lien is a privileged claim upon a vessel in respect of services done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another - à ius in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing.'

While there can be little doubt that the maritime lien does confer a proprietary interest in the encumbered property, a warning must be sounded. That caution has been articulated by Diplock LJ in *Banker's Trust International Limited v Todd Shipyard Corporation, The Halcyon Isle*¹⁷ where, referring in particular to the definition of Gorell Barnes J in *The Ripon City*, he said,

*'... the second sentence is inaccurate if it is to be regarded as suggesting that the owner of a ship, once it has become the subject of a maritime lien, can no longer create a charge on the whole property in the ship which will rank in priority to the existing lien.'*¹⁸

Atkin LJ in *The Tervaete* defined a maritime lien as consisting,

*'... of the right by legal proceedings in an appropriate form to have the ship seized by the officers of the court and made available by sale if not released on bail.'*¹⁹

But, as is pointed out by Thomas,

*'[t]his is a highly proceduralistic kind of definition and suffers from the defect that it fails to distinguish clearly a maritime lien and a statutory right of action in rem.'*²⁰

14 'The Origin and Nature of Maritime Liens' (1930) 4 *Tulane Law Review* 381 at 406.

15 *Hamner v Bell, The Bold Buccleugh* (1850-1) 7 Moo PC 267 at 285.

16 [1897] P 226 at 242.

17 [1980] 3 AllER 197 (PC) at 202f-g.

18 See too, in this regard, Marais J's comments in *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 821C-D.

19 [1922] P 259 at 273.

20 *Maritime Liens* Vol 14 British Shipping Laws (1980) at 10 footnote 59.

This must be considered a serious defect in the definition because the distinction is of some considerable importance given the differing nature and consequences of each²¹.

Scott LJ in *The Tolten*²², in drawing a comparison between the English notion of a maritime lien and its Continental counterpart, generally referred to as a 'privilege', said,

'[t]he essence of the "privilege" was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the privileged creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has certain ranking with other maritime liens, all of which take precedence over mortgages.'²³

These attributes identify and characterise the maritime lien.

Some tentative attempts at a definition of the concept have been essayed by the South African courts. Nienaber J, in *MV Fidias*²⁴ approved the description of Howard J, as he then was, in *Gulf Oil Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the MV Emerald Transporter; Irving Trust Co v Gulf Trading Co and Others; Gulf Trading Co and Others v The Fund Comprising the Proceeds of the Sale of the MV Jade Transporter*²⁵:

'Without attempting to define the concept, I think it is trite to say that a maritime lien is a charge in the nature of a *ius in re aliena* which encumbers the ship against or in respect of which the claim lies.'²⁶

Of this description, and, perhaps, some of the others referred to, the following remarks by Marais J in *The Andrico Unity*²⁷ may be apposite:

'The metaphorical and sometimes exaggerated language which is occasionally used by Judges to highlight the special characteristics of a maritime lien should not be taken too literally and should not be allowed to obscure the fact that it is not in truth a *ius in re aliena*, nor is it a subtraction from the absolute property of the owner in the ship. It is a concept *sui generis* and its reason for existence is to improve the

21 See generally Thomas *op cit* at 31-2; Price 'Maritime Liens' (1941) *LQR* 409 at 414-5, and Dillon & Van Niekerk *Maritime Law and Marine Insurance: Selected Topics* Chapter 1 at 14.

22 [1946] P 135.

23 *Ibid* at 150.

24 *Op cit* at 715I.

25 1985 (4) SA 133 (N).

26 *Ibid* at 142B-C.

27 *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C).

holder's prospect of his claim being paid. It is therefore designed to secure payment and to confer some priority when there is competition for payment.²⁸

In the case of *Euromarine International of Mauren v The Ship Berg and Others*²⁹, Milne JP, as he then was, referred to the definition proffered by the American authors Gilmore and Black³⁰:

'The learned authors define a maritime lien as follows: "Upon the occurrence of certain mishaps or the non-fulfilment of certain obligations arising out of contract or status, the maritime law gives to the party aggrieved a right conceived of as a property interest in a tangible thing involved (usually but not always a ship), in the (often as yet unascertained) amount of the accrued liability. This right is called a maritime lien".³¹

But again, of this definition it may be said that the suggestion that the maritime lien is a property interest or right is open to exception if it is taken to suggest a right of ownership which might be exercised without the aid of a court of law. The holder of a maritime lien certainly does not acquire a right in the vessel³² in that sense.

Perhaps, towards the close of any quest to define the concept, all that can be said is that the maritime lien is 'more easily recognised than defined'³³. But while it may be that there is no one entirely satisfactory definition that has been widely accepted, the attributes of a maritime lien, as gleaned from these and various other judicial pronouncements, are relatively well settled³⁴.

The maritime lien gives the lienee a charge on a maritime *res*. That charge accrues from the moment the circumstances out of which the lien arises occur. The charge travels secretly - 'like a mollusc to the hull of a ship'³⁵ - and unconditionally with the *res* even into the hands of a *bona fide* purchaser without notice. The charge is inchoate until enforced by

28 *Ibid* at 821D-F.

29 1984 (4) SA 647 (N).

30 The Law of Admiralty 2nd ed at 36.

31 *Op cit* at 652G-H.

32 Mansfield 'Maritime Lien' (1888) LQR 379 at 381.

33 Sheen J in *The Father Thames* [1979] 2 Lloyd's Rep 364 at 368.

34 For a comprehensive description of these attributes see the judgment of Marais J in the case of *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 811F-G, 819A, 821D.

35 Staniland 'Should foreign maritime liens be recognised?' (1991) 108 SALJ 293.

an action *in rem* in which a maritime *res*, encumbered by a maritime lien, is arrested and thereafter, may be sold. The claim which is underpinned by the maritime lien is then satisfied out of the proceeds of that sale. The claim enjoying maritime lien status is privileged in that it enjoys a relatively high priority, which, in South African admiralty law, is assigned by the Act³⁶, among the claims against any limited fund for the satisfaction of creditors' claims.

Although it has been said that maritime liens are available against 'maritime property', that statement is misleading to the extent that it may suggest that all maritime liens are available against any and all maritime property. Precisely what property may be burdened, as it were, by any particular maritime lien is a matter to be determined in relation to each of the maritime liens recognised³⁷.

The unique nature of the maritime lien is thrown into stark relief when it is compared with a concept to which, from its name, it might be considered to be related or, at least, bear some resemblance, namely the liens, or perhaps more accurately named rights of retention, recognised at common law. From the description of the features of a maritime lien, it must be evident that it differs fundamentally from the common law conception of a lien, to the extent that Gilmore and Black³⁸ felt constrained to comment that, '[a] maritime lien so-called, is not a lien at all in the common law sense of the term'.

Some of the more striking differences may serve the purpose of this comparison. The term 'lien' is generally understood to describe the right to retain physical control of another's property, as a means of securing payment of a claim relating to the expenditure of money or money's worth by the possession of that property until the claim is satisfied³⁹. A lien is a very limited right of security over goods. It remains good, in the sense of being effective both against the property owner and third parties asserting rights in respect of those goods,

36 Section 11.

37 See the discussion on this aspect in relation to each of the maritime liens.

38 *Op cit* at 586.

39 *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) at 270E; *United Building Society v Smookler's Trustees and Golombik's Trustee* 1906 TS 623 at 626-7.

only so long as the lienee does not part with possession of the goods, that possession being the equivalent of notice, certainly to third parties, of the interest held by the lienee in the encumbered property. The lien is lost when the lienee deals with the goods in any way inconsistent with its continuance⁴⁰.

By contrast the maritime lien is not in any way dependent for its existence or its efficacy against third parties, on possession of the encumbered goods or, for that matter, notice of the encumbrance it constitutes. That is, perhaps, one of its more valuable attributes but also one that holds the potential for the greatest hardship, especially in the hands of third parties who may, for example, find themselves confronted by claimants seeking to enforce rights against the property the third party has acquired without any notice of the existence of such rights.

Furthermore, common law liens afford merely a defence against the property owner's vindicatory action and never a cause of action⁴¹. This too, differs fundamentally from the maritime lien which constitutes a maritime claim in itself and would therefore be the basis of any remedy to enforce that claim⁴².

Priority among competing common law liens is in general determined by the time at which they attached or became perfected: the general principle being *qui prior est tempore potior est iure*. Priority among competing maritime liens is, in principle, not determined in that way though it is by no means a simple task to formulate a general guiding principle that holds for all instances in this regard.

40 *Orbit Motors (Pty) Ltd v Reeds (Cape) Limited* 1975 (2) SA 333 (C).

41 *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* (op cit at 270F).

42 Section 1(1)(v).

Furthermore, common law liens are accessory rights to a principal obligation, inseparable from that obligation in the sense that they are incapable of being assigned⁴³. They are founded on the personal liability of the owner of the property that is the subject of the lien. By comparison, this is not true of all maritime liens⁴⁴.

The consequences of classifying a claim as giving rise to a maritime lien have already been adverted to briefly. More specifically though, the more important consequences must be considered to be that the existence of a maritime lien provides a claimant with the form of remedy known as the action *in rem*⁴⁵. This enables the maritime litigant to arrest the encumbered vessel and conduct proceedings for relief against that vessel without the necessity of locating the owner of the property. This remedial aspect of the right is of considerable value in the field of maritime law where the identity and location of the owner may be extremely difficult to ascertain and the opportunities for enforcing the claim rare and of extremely short duration. Furthermore, the existence of the lien has procedural consequences in that it secures a preference for the lien holder in the ranking of claims against a limited fund for the satisfaction of the debts of the property; and that preference affords the maritime claimant a measure of security for the claim⁴⁶.

While the general effects of the maritime lien then are relatively clear, the difficulties of determining which claims give rise to maritime liens in South African admiralty law and, furthermore, in defining the precise nature and scope of these liens remain. These difficulties arise partly because of the reticence of the Legislature on this aspect⁴⁷ but also partly because of the all-encompassing nature of s 6(1) which it has been argued⁴⁸ imported indiscriminately, even perhaps unwittingly, all the English law relating to maritime liens including its uncertainties into South African law. These uncertainties

43 Joubert (ed) LAWSA Vol 15 at 86.

44 See the discussion on this aspect in relation to each of the maritime liens.

45 Section 3(4)(a) of the Act.

46 Section 11 of the Act.

47 *Supra* at 2.

48 Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350 at 354.

include whether there is a closed list or *numerus clausus* of maritime liens in that legal system; whether the maritime lien is a substantive or procedural right, and whether personal liability of the owner is required for the existence of the maritime lien.

The first problem then is to determine what maritime liens are recognised in contemporary South African admiralty law and, the second, the precise nature and scope of these liens. And for a solution to this problem, for the reasons already outlined, one must turn to English admiralty law. By the mid-nineteenth century the claims giving rise to maritime liens were relatively well established⁴⁹. The 1840 Admiralty Act⁵⁰, however, extended the court's jurisdiction in respect of certain of the claims traditionally recognised as giving rise to maritime liens. This was done for the purpose of enlarging the court's jurisdiction but it did raise the question of whether the liens arising from those claims were in each case extended commensurately.

This issue was dealt with by the English courts on the basis that where the statutory enactment enlarged, territorially or substantively, the ambit of a claim which was an established maritime lien then the presumption of statutory construction in respect of that provision was that the Legislature intended the maritime lien to be extended to the same degree, and where the enactment extended the court's jurisdiction by creating a claim that was not originally a maritime lien, the presumption was against the creation of a new maritime lien⁵¹.

By time of the passing of the Colonial Courts of Admiralty Act in 1890, the Act which fixed the limits of admiralty jurisdiction in the colonies and which was to fix that jurisdiction in South Africa until the enactment of the Admiralty Jurisdiction Regulation Act in 1983, the law relating to maritime liens in England was relatively well-settled. It was that body of law that was applied in South Africa until the passing of the Admiralty Jurisdiction Regulation Act in 1983 which, *inter alia*, abolished the Colonial Courts of Admiralty Act. It may have

49 Thomas *op cit* at 30 and the authorities cited therein.

50 Admiralty Court Act 1840 (3 & 4 Vict c 65).

51 *The Mary Anne* (1865) LR 1 A & E 8; *The Sara* (1889) 14 App Cas 209; *The Castlegate* [1893] AC 38.

1890 ————— 1983
 well defined ————— abolished

been through a fear of losing, particularly the body of law relating to maritime liens, that, in order to preserve it, s 6 of the Act was worded in the convoluted way it was.

What then are the established contemporary liens in South African admiralty law? And furthermore what is the scope of each of the maritime liens and the requirements for their existence?

The argument advanced by counsel in *Oriental Shipping Co Ltd v MV Fidiyas* was that the claims listed in, what was before the 1992 amendment, s 11(1)(c) of the Act, by virtue of the fact that they were listed alongside each other and some clearly gave rise to maritime liens, all constituted claims which gave rise to maritime liens. It must have been the intention of the Legislature, so it was argued, that all the claims in s 11(1)(c) therefore conferred maritime liens on the claimants. From this it followed, according to counsel in that case, that the claim in s 11(1)(c)(v) for the supply of goods or rendering of services, which was the claim in that case, conferred a maritime lien on such claimant⁵².

Nienaber J⁵³, however, rejected the argument on the basis that s 11 did not purport to be a definition clause but concerned itself merely with the ranking of claims. It therefore could not be used to determine the existence of maritime liens. The learned judge held accordingly that not all the claims in that section gave rise to maritime liens. He had, earlier in the judgment, stated that,

[a] maritime lien is a secured maritime claim which originates in a particular manner. English law at present recognises a *numerus clausus* of maritime liens, restricted to debts incurred in respect of or occasioned by the vessel and which may arise, to employ South African legal terminology, *ex contractu* (such as seaman's and master's wages), *ex delicto* (collision damage) or *quasi ex contractu* (for instance master's disbursements and claims for salvage).⁵⁴

52 *Op cit* at 717F-G.

53 *Ibid* at 717I-718F.

54 *Ibid* at 715F-G.

The view that seems widely held among South African courts⁵⁵, is that English law recognised only a limited number of claims as giving rise to maritime liens. The views in England on this point are not unanimous. There are dissenters such as Griffith Price⁵⁶ who contend that,

'[i]n this country maritime liens arise where the claims are for bottomry, damage by collision, salvage, seamen's and masters' wages, and masters' disbursements. These are the only "genuine" maritime liens in our law, but in a few cases liens arise indirectly out of the provisions of some statute.'⁵⁷

Thomas⁵⁸, somewhat more equivocally, says that,

'[u]nder English maritime law maritime liens arise in respect of damage done by a ship, salvage, seamen's and masters' wages, masters' disbursements and bottomry. These represent the "principal" or "genuine" maritime liens although others may arise by implication from statutory enactments.'

The view of the South African courts that English law recognises only a closed list of liens has been criticised by Staniland⁵⁹ who argues that,

'[a]lthough Nienaber J said that English law recognises a *numerus clausus* of maritime liens, it would with respect be more accurate to speak of "established" and "uncertain" lists of maritime liens. It is established that maritime liens attach to claims for salvage, damage done by a ship, seaman's wages, master's wages, master's disbursements, and bottomry and *respondentia* bonds. But it is uncertain in English law whether maritime liens attach to claims for fees and expenses by the receiver of wreck (s 567(2) of the Merchant Shipping Act 1894); remuneration for coastguard services in respect of wreck (s 568(1) of the Merchant Shipping Act 1894); damage done to lands in the rendering of assistance to shipwrecked persons or property (s 513 of the Merchant Shipping Act 1894); pilotage (*The Ambatielos and The Cephalonia* [1923] P 68); damage done by ships to harbours, piers and docks (s 74 of the Harbours, Docks, and Piers Clauses Act 1847; *The Merle* (1874) 31 LT 447) and finally towage (*Westrup v Great Yarmouth Steam Carrying Company* (1889) 43 ChD 241).'

55 See for example the cases of *Oriental Commercial and Shipping Co Ltd v MV Fidias* (op cit at 715F-G); *Southern Steamship Agency Inc and Another v MV Khalij Sky* 1986 (1) SA 485 (C) at 491J; *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 805J-806A, and *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 331G-H, though admittedly this was not necessary for deciding the disputes before the courts on these occasions.

56 'Maritime Liens' (1941) Vol LVII LQR 409.

57 *Ibid* at 409.

58 *Op cit* at 5.

59 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 SALJ 350 at 355.

Staniland⁶⁰ has argued that rather than a *numerus clausus* of liens there are 'established' and 'uncertain' liens. He points to authorities in South African case law that have indicated a limited number of liens such as the *MV Fidias*⁶¹ and says that for the purposes of what those courts had to decide in the matters before them, the statements were sufficient but as general statements about South African law relating to maritime liens they are insufficient and even misleading⁶².

Hofmeyr⁶³ refers to liens arising by implication from the provisions of the English Merchant Shipping Acts of 1854 and 1894 as being those for life salvage⁶⁴; fees and expenses of the receiver of wrecks⁶⁵, and damage sustained by the owner or occupier of land used to facilitate the rendering of assistance to wreck⁶⁶.

Despite this criticism by Staniland of the notion there that there is such a closed list of maritime liens and the acceptance by Hofmeyr of additional liens arising by implication, the position in South African law remains unclear because the issue has not yet arisen for consideration by our courts. It certainly seems, from the decisions referred, to that South African admiralty law, at least implicitly, recognises only the limited categories of lien recognised under English admiralty law.

60 'Should foreign maritime liens be recognised?' (1991) 108 *SALJ* 293.

61 *Op cit* at 715F-G.

62 See the discussion *infra* at 48 relating to the 'uncertain' maritime liens in English law.

63 'Admiralty Jurisdiction in South Africa' 1982 *Acta Juridica* 30 at 40.

64 Section 55 of the Merchant Shipping Act which re-enacted ss 458 and 459 of the Merchant Shipping Act of 1854 as extended by s 9 of the Admiralty Court Act of 1861.

65 Section 567 of the Merchant Shipping Act of 1894 which re-enacted s 455 of the Merchant Shipping Act of 1854 and provided that the receiver should, in respect of his fees and expenses, have the same rights and remedies as a salvor.

66 Section 513 of the Merchant Shipping Act of 1854 provided that such damage should be a charge on the maritime *res* and would be recoverable in the same manner as salvage.

2 The scope of the 'established' modern South African Admiralty maritime liens and the necessity for personal liability of the asset owner

The distinction drawn by Staniland¹ between 'established' and 'uncertain' liens offers a convenient entry point into the subject of the contemporary maritime lien in South African admiralty law. The classes of 'established' liens would include those for bottomry and *respondentia* bonds; damage; salvage; seamen's wages, and master's wages and disbursements². The 'uncertain' maritime liens encompass those which it has been suggested³ might arise by implication from certain of the United Kingdom statutes, and so-called 'foreign' maritime liens by which is meant maritime liens recognised by foreign jurisdictions, but not by South African courts. It is then to the 'established' liens that we first turn.

2.1 The damage maritime lien

In South African admiralty law the Act confers jurisdiction on the Supreme Court in the exercise of its admiralty jurisdiction in respect of 'any claim for, arising out of or relating to ... any damage caused by or to a ship, whether by collision or otherwise'⁴. The admiralty jurisdiction over damage claims existed before the enactment of the 1983 Act⁵, and therefore in terms of s 6(1) of the Act, English admiralty law as at 1 November 1983, being the date of commencement of the South African Act, is applicable. To determine whether and, if so, to what extent, a claimant for relief for collision damage enjoys a maritime lien, the South African Courts must apply the law which the High Court of Justice in the United Kingdom in the exercise of its admiralty jurisdiction would have applied as at 1 November 1983.

1 'Should foreign maritime liens be recognised?' (1991) 108 SALJ 293.

2 *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D) at 715F-H.

3 *Supra* at 12-3.

4 Section 1(1)(e).

5 Admiralty Court Act 1840 (3 & 4 Vict c 65), s 6.

The question of whether collision damage gave rise to a maritime lien in English law was settled in *Harmer v Bell, The Bold Buccleugh*⁶, a decision which was subsequently approved in *Currie v M'Knight*⁷.

Before the passing of the 1840 Act⁸, the jurisdiction of the court in respect of the damage maritime claim and the scope of the maritime lien associated with that claim had been restricted to damage 'on the high seas'. But the 1840 Act saw the court's jurisdiction extended to incorporate those instances in which the damage had been received while the ship or vessel was either within the 'body of a county', or 'upon the high seas'⁹.

This extension of jurisdiction raised the question as to whether the lien previously recognised had likewise been extended. The issue was resolved by the adoption of a canon of statutory construction that presumed that where the statute extended the geographical jurisdiction in respect of a claim which was an established maritime lien, then the Legislature intended to extend the maritime lien as well¹⁰.

Section 6 of the 1840 was narrowly construed to exclude damage done by a ship, a *lacuna* that was filled by s 7 of the 1861 Act which made provision for a claim for such damage. The combination of these two claims has been reproduced in subsequent United Kingdom legislation.

6 (1850) 3 W Rob 220 at 229, a decision confirmed on appeal (1850-1) 7 Moo PC 267 by the Privy Council.

7 [1897] AC 97 at 106.

8 Admiralty Court Act 1840 (3 & 4 Vict c 65).

9 Section 6: 'The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of ... damage received by any ship or sea-going vessel,... and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the ... damage [was] received, ... in respect of which such claim is made.'

10 *The Sara* (1889) 14 AC 209 at 216.

Before the passing of the 1861 Act¹¹ there had been a tendency to restrict damage claims to those resulting from the direct physical contact of the vessel¹² but the 1861 Act¹³ which conferred a claim for any damage 'done by a ship' caused this issue to fall away: it was clear from the statutory provision that what was envisaged was damage caused by a ship even if there had not been physical contact with the damaged property¹⁴. Despite the apparently restrictive wording, the phrase has been construed as incorporating claims 'arising out of damage received so that it includes consequential loss¹⁵. The damage need not be caused by another ship but where the damage is so caused considerable overlap exists with the claim for 'damage done by' a ship.

In the South African Act of 1983 the two claims were differentiated. In s 1(1)(d) the claim was for 'damage caused by a ship, whether by collision or otherwise' and in paragraph (e) it was 'for damage done to a ship, whether by collision or otherwise'. As far as the change in wording from the English 'damage done by' to the South African 'damage caused by' is concerned there would appear to be no difference for the purpose of determining jurisdiction. The English term 'done by' is a term of art familiar to English law and has been widely construed¹⁶.

The 1992 amendment to the South African Act¹⁷ combines the formerly separate claims and the relevant paragraph now reads 'damage caused by or to a ship, whether by collision or otherwise'¹⁸. This wording is drawn from the corresponding provision in the Convention Relating to the Arrest of Sea-going Ships, 1952¹⁹, which Thomas²⁰, points out reflects the 'broad contemporary construction given to the more succinct phrase in English law'. Given

11 Admiralty Court Act 1861 (24 & 25 Vict c 10).

12 *The Robert Pow* (1863) B & L 99 quoted in Thomas *op cit* at 105.

13 Section 7

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

14 This interpretation was accepted by Lord Herschell in *Currie v M'Knight* (*op cit* at 108).

15 *The Eschersheim* [1976] 2 Lloyd's Rep 1 (HL) at 9.

16 Thomas *op cit* at 105 and the authorities cited therein.

17 Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.

18 Section 1(1)(e).

19 The provision reads, 'damage caused by any ship either in collision or otherwise'.

20 *Op cit* at 105.

that there would appear to be no difference in the wording for the purposes of determining jurisdiction, it would appear safe to assume that there would also be no difference for the purpose of determining the extent of the lien.

The developed admiralty damage jurisdiction of English law is far more comprehensive than the ambit of the damage maritime lien. The lien is only available where the damage can be shown to have been 'done by a ship'²¹. In relation to damage claims therefore there is no exact concurrence between the scope of the admiralty jurisdiction and the availability of the lien.

It was a pre-requisite for the existence of the maritime lien that the ship had to have been the 'instrument of mischief'²². That was the interpretation placed on s 7 of the 1861 Admiralty Act. In other words, it had to be shown that the damage complained of had been actively caused by the ship herself. That interpretation would exclude from 'damage done by a ship', for example, negligent mismanagement of the ship and also damage done by the personnel on board a ship, independently of the instrumentality of the ship herself.

In the case of *Currie v M'Knight*, crew members cut loose moorings attaching their ship to an adjacent ship causing that ship to drift and incur damaged. It was held that the cause of the damage was the conduct of the crew in cutting the moorings and the ship itself could not be said to have been the instrument of the damage.

In the words of Lord Halsbury LC:

'... the phrase that it must be the fault of the ship itself is not a figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.'²³

21 *Ibid* at 131.

22 *Currie v M'Knight* (*op cit* at 107).

23 *Ibid* at 101.

Lord Watson delivering a separate judgment in the same case said:

'I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated, but it is, in the language of maritime law, attributed to the ship, because the ship in their negligent or unskillful hands is the instrument which causes the damage.'²⁴

It is not sufficient to show merely that the ship was the active means by which the damage was inflicted. It has to be established that those in control of the vessel are in breach of a duty. The maritime lien is based on fault. The damage complained of has to be shown to be the direct or consequential result of a breach of duty on the part of a person in lawful charge or control of the wrongdoing ship²⁵.

Whereas it is clearly established that a maritime lien for damage is founded on fault there has existed less certainty about the associated question of whether the fault must be attributable, either directly or vicariously, to the owner of the ship at the time when the cause of action arose. The view that has prevailed in English law is that the personal liability of the owner is a condition precedent to the accrual of a damage lien²⁶.

The rather obvious implication of this principle is that where the damage is done by a ship when in the possession and control of an independent contractor, or some other person or undertaking, to whom possession and control have been lawfully transferred, no damage maritime lien arises. But there is a distinction to be drawn between an independent contractor and an employee for whose negligent actions the ship-owner will be held vicariously liable. On that basis the ship-owner would be, for example, vicariously liable for the negligent acts of a pilot voluntarily engaged but generally not for the acts of a pilot

24 *Ibid* at 106-7.

25 *The Tolten* [1946] P 135 at 146; *The Tervaete* [1922] P 259 at 270; *The Eschersheim* [1976] 2 Lloyd's Reports 1 (HL).

26 *The Druid* (1842) 1 W Rob 391 appears to be the earliest authority where concurrence between the liability of a ship and the personal liability of the ship-owner was categorically stated and it was followed in *The Parlement Belge* (1880) 5 PD 197.

whom the ship-owner is compelled to engaged which would be the case in South African ports²⁷.

An exception to the requirement of personal liability on the part of the ship-owner seems to exist in the case of charter-parties by demise²⁸. In respect of damage caused by a breach of a duty on the part of a master of a demised ship, it is the demise charterer who is vicariously liable and not the ship-owner because the master in such circumstances is the employee of the demise charterer. Yet it seems that in such instances a lien does arise in respect of the ship concerned though the judicial reasoning for so holding seems to vary²⁹. The correctness of this view depends, of course, on the view taken about the nature of the position of the charterer by demise; in other words, whether one considers that the demise charterer becomes the temporary owner.

The damage envisaged clearly encompasses direct damage to property but there is less certainty as to whether the lien would extend to damages for personal injury and or loss of life resulting from a collision. In South Africa, the Merchant Shipping Act³⁰ provided that claims for damage relating to collisions should be '... deemed to include damage for loss of life'. Although this section has been repealed, section 1(1)(f) of the Admiralty Jurisdiction Regulation Act provides for jurisdiction in respect of 'any claim for loss of life or personal injury caused by a ship or any defect in a ship, or occurring in connection with the employment of a ship; ...'. From this it is clear that the jurisdiction of the court extends to loss of life or personal injury but this concerns only the question of jurisdiction and not whether there is a maritime lien in respect of such a claim.

With no clear indication in the South African legislation in this regard it is necessary to have recourse to English law. The question of whether personal injury caused by negligent

27 Bamford *The Law of Shipping and Carriage in South Africa* at 67; *J T Rennie & Sons v Minister of Railways & Harbours* 1913 NPD 396 at 415.

28 In broad terms a charter-party is a contract for the hire of a ship in terms of which possession and control is transferred to the charterer, and the master and crew are engaged by the charterer and are not the servants of the ship-owner (*Sandeman v Scurr* (1866) LR 2 QB 86).

29 Thomas *op cit* at 129 and the authorities cited therein.

30 Act 57 of 1951, s 322.

navigation of a ship created a maritime lien has not been expressly decided by the English courts. The view prevailed that such claims did not enjoy maritime lien status and this was based on the view that s 7 of the 1861 Act did not confer such jurisdiction in respect of such claims on the courts. In terms of the section neither personal injury nor loss of life arising from a collision involving a ship were expressly stated to give rise to a maritime claim. The section was interpreted initially to exclude a claim for either injury or loss of life. It was, however, inevitable that once the judicial mood was set to construe the statute's wording according to its ordinary and grammatical meaning, it would be interpreted as covering both damage to property and personal injury³¹.

Staniland³² suggests that the Admiralty court had inherent jurisdiction to determine claims for personal injury and, if he is correct in that contention, he would argue that ss 7 and 35 of the 1861 Act extended the traditional maritime lien for damage done by ships to include claims for personal injury as simply a further consequential loss.

Thomas' view³³ is that it is without question in English Law that a maritime lien does now exist for a claim for damages for personal injury. He refers to *The Tolten*³⁴ as authority. In this case it appeared to be accepted, albeit *obiter*, that there existed a maritime lien in respect of claims for personal injury.

The position in South African law is determined by the view one holds of that in English law. If a maritime lien exists for personal injury in English law then by virtue of the provisions of s 6(1) of the Admiralty Jurisdiction Regulation Act, such maritime lien exists in our law. It would be difficult to defend preferential treatment of a claim for damage to property over that of a claim for personal injury, and strong policy considerations would militate in favour of dealing with such claims on an equal footing at least.

31 *The Sylph* (1867) LR 2 A & E 24.

32 'Should foreign maritime liens be recognised?' (1991) 108 SALJ 293 at 302-4.

33 *Op cit* at 132.

34 [1946] P 135 (CA) at 147.

Staniland³⁵ considers that since the lien is commensurate with the jurisdiction under English admiralty law, there is significance to be attached to the fact that the jurisdiction of the South African court is apparently wider than that of the English courts, namely, 'injury occurring in connection with the employment of the ship'. He would argue that such extension of the court's jurisdiction is indicative of a Legislative intent to extend the traditional maritime lien accordingly.

As regards the claim for loss of life, Staniland argues that no action *in rem* existed in English law for such dependant's actions. Presently the claim for loss of life is established in English law statutorily under the Fatal Accidents Act 1976. It seems generally accepted that there is no maritime lien in such case but only a statutory right of action *in rem*. Since the courts had no jurisdiction to determine such claims before the enactment of the 1983 Act, Roman-Dutch law, and not English law would be applicable. Under the *Lex Aquilia*, where a party wrongfully causes the death of a person who owes a duty of support to another, that wronged dependant is entitled to compensation for pecuniary loss suffered in consequence of the breadwinner's death^{35a}. Staniland³⁶ contends that it is arguable that the broad terms in which the maritime claim in s 1(1)(f) for loss of life or injury is couched could be construed as extending the maritime lien under s 1(1)(e) to claims for loss of life. The argument, such as it is, is bolstered by policy considerations in favour of treating such claims in the same way as claims for personal injury and damage to property.

There is, furthermore, uncertainty as to whether the damage maritime lien would extend to pollution damage resulting from a collision at sea. Whether this is so depends, in the first instance, on whether the ship-owner is considered to be responsible for both direct and consequential damage arising out of the accident, and, in the second instance, if the ship-owner is to be considered to be responsible for consequential damages, whether pollution constitutes such consequential damage.

35 *Ibid* at 302-4.

35a *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A).

36 *Ibid* at 304.

Pollution damage is regulated in South African law by a mass of unconnected statutes relating to marine pollution³⁷. But Staniland has argued that no maritime lien has been created by implication under any of this legislation. Staniland does, however, suggest that if one were to regard the maritime lien in respect of damage as covering consequential damage, pollution would fall within the ambit of that lien and, of course, the advantage of that view would be that it would serve the policy goal of environmental protection³⁸.

At English law it seems that the maritime lien extends to consequential damage. Tetley³⁹ argues that the maritime lien for damage done by a ship does encompass both direct and consequential damages and on that basis would consider that liability which a damage ship would incur due to resulting pollution would be covered by the traditional maritime lien. Other authors⁴⁰, however, are silent on whether the traditional lien extends to pollution damage.

In English law there appears to be a maritime lien for consequential damage but the question remains as to whether pollution is to be considered consequential damage. In the case of *The Eschersheim*⁴¹, Brandon J held that pollution could be a loss consequential on damage done by a ship, and though the case went on appeal⁴² the learned Judge was not overruled on this point. It would seem probable that a maritime lien attaches to a claim for liability for pollution, at least, in so far as the pollution damage is consequential on damage done by a ship. Certainly where the damage is direct, for example where the vessel negligently discharges cargo or fuel that causes pollution, there would appear to be no reason in principle why there should be no maritime lien, provided patrimonial loss is suffered.

37 For an overview of the relevant legislation see Rabie & Lusher 'South African Marine Pollution Control Legislation' 1986 *Acta Juridica* 161.

38 Staniland 'Towards a New Remedy for Pollution of the Sea' (1989) 1 *Marine Policy Reports* 151.

39 *Maritime Liens and Claims* (1985) at 72.

40 Price *The Law of Maritime Liens* (1940); Thomas *op cit*, and Jackson *Enforcement of Maritime Claims* (1985).

41 [1974] 2 Lloyd's Rep 188.

42 [1976] 2 Lloyd's Rep 1 at 9; [1976] 1 AllER 920.

The maritime lien for damage is restricted in the amount of the charge it represents against the vessel to the extent of the owner's liability⁴³ and in this regard it is important to bear in mind that the owner may limit liability in terms of the Merchant Shipping Act. Section 261 of that Act provides, *inter alia*, for instances in which the owner of maritime property will not be liable for the whole of the damage⁴⁴. To the extent then that the ship-owner is entitled to limit liability for the damage, the maritime lien is restricted in the amount of the charge it represents on the arrested property.

The Merchant Shipping Act⁴⁵ provides furthermore that where loss is caused by the fault of two or more ships, liability to make good any damage or loss shall be in proportion to the degree in which each ship was at fault: if it is not possible to establish different degrees of fault, the liability shall be apportioned equally. This enacts the English rule of apportionment. The Merchant Shipping Act further provides for joint liability for damages for personal injuries⁴⁶. This position is expressly preserved by South African legislation⁴⁷.

43 Thomas *op cit* at 134.

44 261(1) -

'The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity'.

45 51 of 1957, s 255

- (1) Whenever by the fault of two or more ships damage or loss is caused to one or more of them or to the cargo or freight of one or more of them or to any property on board one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was at fault: Provided that -
- (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
 - (b) nothing in this section shall operate so as to render any ship liable for any loss or damage to which her fault has not contributed; and
 - (c) nothing in this section shall affect the liability of any person under any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.
- (2) For the purposes of this chapter, references to damage or loss caused by the fault of a ship shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages.

46 Section 256

Damages for personal injury -

- (1) Whenever loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and of any other ship or ships, the liability of the owners of the ships concerned shall be joint and several.
- (2) Nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured, or any person entitled to sue in respect of such loss of life, or shall affect

With regard to the property that can be encumbered by a damage maritime lien, under English law, as at the relevant date, the position was that it was available over the ship, its tackle, apparel, furniture⁴⁸ and the freight, subject only to the qualification in respect of the freight that the ship must have been engaged in a commercial enterprise⁴⁹. The maritime lien was for the value of those items at time of accrual of action and not subsequent accretions of value. That would then also be the position under South African law.

In English law the lien does not attach to the cargo carried on board and this would presumably exclude containers housing that cargo as well, nor to the luggage or personal effects of passengers or members of the crew⁵⁰.

the right of any person to limit his liability in cases to which this section relates in the manner provided by law.

47 Section 4(2) of the Apportionment of Damages Act 1956 provides that '[N]othing in this Act contained shall derogate in any manner from the provisions of any law relating to collisions or accidents at sea, ...'.

48 *The Alexander* (1812) 1 Dods 278.

49 *The Orphans* (1871) LR 3 A & E 308.

50 Thomas *op cit* at 135.

2.2 Wages lien both for seamen and masters

The Supreme Court's admiralty jurisdiction for each of these maritime claims is established by section 1(1)(s) of the Act⁵¹, and, as regards the law applicable to such claims, the courts' admiralty jurisdiction under the Colonial Court of Admiralty Act of 1890 included both claims for a seaman's and a master's wage⁵². Therefore, in terms of s 6(1) of the Act, English admiralty law as at 1 November 1983 is to be applied, in so far as it can, to these claims. The provisions of s 6(2) of the Admiralty Jurisdiction Regulation Act read with the phrase 'in so far as it can' in s 6(1) must be interpreted to mean that pertinent South African legislation in conflict with English law must be taken to have superseded it. So to determine the extent of the seamen's wages maritime lien one has, in the first instance, to have recourse to South African statutes and thereafter to English law as at the relevant date.

It is, however, perhaps more convenient, for reasons which will become apparent, to begin with a consideration of the relevant English law. Under English law the maritime lien for seaman's wages was one of the earliest maritime liens recognised. The basis of this maritime lien was a service rendered to the ship other than in terms of a 'contract' of employment. The lien arose from the fact of service rendered to a ship and was independent of agreement and of personal liability on the part of the ship-owner⁵³. As early as 1704 it was held to have been 'usage time out of mind' that the liability of the ship was distinct from the liability of the owner⁵⁴ and to the present day the source of the maritime lien for seaman's wages, in particular, remains unchanged for it has never been incorporated into legislation.

- 51 Section 1(1) '... any claim for, arising out of or relating to -
(s) 'the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman;'
Compare this with the original section under the 1983 Act, 1(1)(r) which read 'any claim by a master or member of the crew of a ship arising out of his employment;'
- 52 Section 10 of the Admiralty Court Act of 1861 (24 & 25 Vict c 10).
- 53 *The Castlegate* [1893] AC 38 at 52.
- 54 *Wells v Osman* (1704) 2 Ld Raym 1044 at 1045 quoted in Thomas *op cit* at 170 at footnote 15.

Statutes enlarging the jurisdiction of the English admiralty court, as distinct from those conferring new jurisdiction on the court, to entertain claims for wages have been construed by the English courts as impliedly extending the ambit of the lien⁵⁵. It is probably accurate to state therefore, that to the extent that the court has admiralty jurisdiction over claims for seaman's wages there exists to an equal extent a maritime lien: the jurisdiction and the existence of the maritime lien are co-terminous⁵⁶.

Originally under English law there were a number of restrictions on wage claims, but over time these have been removed. It was, for instance, originally a requirement in English law that freight must have been earned before wages could be claimed but this requirement was abrogated by s 183 of the United Kingdom Merchant Shipping Act of 1854 and under South African legislation⁵⁷ it is specifically provided that the,

'right to wages shall not depend on the earning of freight, and every seaman and apprentice-officer of a South African ship who would be entitled to demand and recover wages if the ship in which he has served had earned freight shall subject to all other laws and conditions applicable to the case, be entitled to recover the same notwithstanding that freight has not been earned.'

It was furthermore, originally a requirement for the wage claim in English law that the wages had to have been earned on board the vessel. That requirement was liberally construed under English law which recognised such claim even where the seaman was away from the ship⁵⁸. There is no reference made in South African legislation to such a requirement and the definition of the maritime claim for seaman's wages in the Act is cast in extremely wide terms as a claim for wages 'arising out of employment'⁵⁹ which would point in the direction of the wide construction under English law.

55 *The Mary Anne* (1865) LR 1 A & E 8; *The Henrich Björn* (1886) 11 App Cas 270; *The Sara* (1889) 14 App Cas 209, and *The Halcyon Skies* [1977] 1 QB 14 at 28F-30F.

56 *The Halcyon Skies* [1977] 1 QB 14 at 31E.

57 Merchant Shipping Act 57 of 1951, s 138.

58 *The Halcyon Skies* (*op cit* at 22D).

59 See the definition section quoted *supra* at 24 footnote 51.

Originally, too, in English law a distinction was drawn between 'ordinary' and 'special' employment contracts, the difference being that an ordinary contract was consistently perceived as 'a hiring on the usual terms made by word and writing only and not by deed'⁶⁰ - the essence of the distinction going to both substance and form. But this distinction was abolished by s 10 of the Admiralty Court Act of 1861⁶¹. Since that was the jurisdiction conferred on the South African courts under the Colonial Courts of Admiralty Act, the distinction does not apply in South Africa. It is evident that, under English law, the jurisdiction of the court over the claim and the maritime lien are co-extensive. In South Africa the maritime lien would appear to have been modified by certain statutes but these have perhaps served to reinforce, rather than alter, the position that existed at English law.

The language of the South African Admiralty Jurisdiction Act, before the 1992 amendment, with the inclusion of the phrase 'member of crew' rather than simply 'seamen' might have appeared to restrict the wages jurisdiction. The term 'seaman', used in English law, had always been liberally construed to include everyone on board the ship with the exception of the master. So the term 'seaman' has been held to include a surgeon, cook, carpenter and bar steward⁶².

It seems unlikely that it was intended, by the selection of the phrase 'member of the crew' to alter the jurisdiction. Section 2 of the South African Merchant Shipping Act⁶³ defines 'seaman' as meaning 'any person (except a master, pilot or apprentice-officer) employed or engaged in any capacity as a member of the crew of a ship'. This illustrates the point that the South African statute, the Admiralty Jurisdiction Regulation Act, which would appear to have modified the position at English law, has simply reinforced that position. It is also significant that the draftsman has reverted to the term 'seaman' in the 1992 amendments,

60 *Howe v Napier* (1766) 4 Burr 1944 quoted in Thomas *op cit* at 171 footnote 28.

61 The section reads, '[T]he High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise ...'.

62 Staniland 'Should a Seaman Sue as a Favoured Litigant?' *Industrial Law Journal* 451 at 465 and the authorities cited therein.

63 Act 57 of 1951, as amended.

and this must be construed as indicating an intention to return to, if indeed there had ever been a departure from, the position in English law. It certainly indicates an intention to remove any ambiguity that might have arisen and possible constriction of the claim.

The general approach of the admiralty judges from the earliest times has been to view the concept of wages broadly so as to include virtually any benefits which could fairly be said to have been earned by the seaman's services, and in considering what items may or may not properly fall 'within the rubric of a wage to look to the totality of the employment relationship'⁶⁵. The concept of wages has been construed liberally not only to include wages in the narrow sense but also benefits which are incidental to the seaman's employment and claims arising from wrongful dismissal or other breaches of contract⁶⁶.

This expanded view of wages which could be said to encompass any amount received by the person concerned which could fairly be said to have been earned by his services⁶⁷, has been accompanied by a corresponding expansion of the maritime lien.

The Merchant Shipping Act 57 of 1951⁶⁸ defines 'wages' to include 'any emoluments' and this, considered with the phrase 'arising out of employment' in definitions section of the Act, must be taken to have been intended to give rein to the broadest interpretation. It would seem therefore that the English precedents⁶⁹ which have extended so liberally the meaning of the terms 'wages' to include emoluments and compensation in the nature of damages for wrongful dismissal, are then also to be considered to be a part of South African law⁷⁰. To the extent that a maritime claim is in the nature of a wage it is accompanied by a maritime lien⁷¹.

65 Thomas *op cit* at 182; *The Halcyon Skies* [1977] 1 QB 14 at 22-3.

66 Thomas *op cit* at 178.

67 *The British Trade* [1924] P 104 at 108-9.

68 Section 2.

69 Thomas *op cit* at para 321 for a list of examples of claims recognised under this heading.

70 Staniland *op cit* at 472.

71 *The Halcyon Skies* [1977] 1 QB 14 at 31G.

As far as some specific examples are concerned, repatriation expenses under s 114(2) of the Merchant Shipping Act are recoverable as wages due to seamen, and since wages attract a maritime lien it would seem that these expenses would likewise attract a maritime lien.

Where a voyage for which a seaman has been engaged is discontinued, the seaman is, in terms of s 116(3) of the Merchant Shipping Act, entitled to the wages to which he would have been entitled if his service had been wrongfully terminated by the ship-owner⁷².

Again, since the entitlement falls with the definition of the claim for wages, it could be argued that such claim attracts a maritime lien.

In terms of s 142 of the Merchant Shipping Act, if a seaman is discharged otherwise than in accordance with the terms of that seaman's engagement before the commencement of the voyage or before one month's wages have been earned, and that discharge is without fault on the part of the seaman concerned or consent by that seaman, the seaman will be entitled to compensation not exceeding one month's wages for any damage caused by the discharge. Again, since that compensation relates to earnings that are due, it is arguable that a maritime lien would attach in respect of that claim.

As an illustration of the liberal construction of the term 'wages', the South African case of *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund*⁷³ involved a pension fund suing the ship-owner for the employer's contribution due by it in respect of seamen employed on its vessel. The Court examined the history of the claim and considered that the phrase 'seaman's wages' was wide enough to include contributions a seaman's employer, by virtue of a contract of employment, was statutorily obliged to pay in respect of a seaman and for the benefit of that seaman to a pension fund⁷⁴.

+ penalties
x

72 Section 117.

73 1989 (2) SA 514 (D).

74 *Ibid* at 533B-F.

In the case of a claim by a crew member for damages arising out of an assault by, for example, the master, it is probably true to say that in so far as that claim covers the injuries sustained it would not attract a maritime lien but to the extent that it seeks to compensate the seaman for wages not earned as a result of those injuries, because the seaman was unable to work while recuperating, the claim for compensatory damages might well be considered to attract a maritime lien, the claim being for loss of earnings arising out of an injury caused by the assault in the course and scope of the seaman's employment.

The maritime lien is protected by s 134(1) of the Merchant Shipping Act which provides that a seaman shall not by agreement forfeit the maritime lien on the ship for wages or be deprived of any remedy for the recovery of wages to which, in the absence of the agreement, the seaman would have been entitled or abandon any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement with the crew in consistent with the provisions of this section shall be void.

The basis of the maritime lien was a service rendered to the ship other than in terms of a 'contract' of employment. The lien therefore arose from the fact of service rendered to a ship and was independent of agreement and of personal liability on the part of the ship-owner⁷⁵. Personal liability on the part of the ship-owner is not required because the jurisprudential basis of the claim is the service to the ship which has been rendered irrespective of whether the seaman was employed by a person with no or defective title: such would not be a bar to the existence of a maritime lien.

The potential for hardship in this principle is evident if one considers two possible scenarios. The first is where the vessel is chartered by demise and the demise charterer is responsible for hiring the crew. Where the charterer then defaults in respect of the obligation to pay the crew wages, they would enjoy a maritime lien over the vessel for their wages. The second scenario would be where the vessel is stolen and the thief employs a

75 *The Castlegate* [1893] AC 38 at 52.

crew. If that crew were not to receive remuneration, they would have a maritime lien against the vessel.

A further point worth mentioning, perhaps, is that English courts have exhibited a reluctance to entertain wage claims which entail the arrest of foreign vessels. Traditionally, they have exercised their discretion to decline to exercise jurisdiction in such circumstances, not on the grounds of *forum non conveniens*, but arising out of a reluctance to meddle in the affairs of foreign States. Remnants of this are to be found in the Admiralty Rules which require that in the case of such a wage claim the foreign consular representative be advised of any such proceedings before their institution⁷⁶. Whether this is to be taken to be indicative of a general reluctance to entertain the claims of foreign seamen is not altogether clear.

The property capable of being encumbered by the maritime lien for wages, seen as essentially recompense for a service to the ship, logically includes the ship, its tackle, furniture, and to every part or fragment thereof, even when such part or fragment is separated from the vessel by accident or storm⁷⁷. Improvements and accretions effected subsequent to the creation of the lien are also so charged⁷⁸.

The lien extends to the freight, including that payable by sub-charterers. The ship represents the first charge and if the proceeds are insufficient the freight may be called into court⁷⁹. There is no lien for wages on the cargo because it is the service to the ship that forms the basis of the claim⁸⁰.

As regards specifically the master's wages, the master was not viewed, initially anyway, with the same favour, in English admiralty law, as the seaman and it was only as a result of statutory intervention in the nineteenth century⁸¹ that the master came to enjoy a similar

76 Rule 3(4).

77 Thomas *op cit* at 318.

78 *The Aline* (1839) 1 W Rob 111.

79 *The Castlegate* [1893] AC 38.

80 *The Rigby Grove* (1843) 2 W Rob 52.

81 Merchant Shipping Act 1844 (7 & 8 Vict c 112), s 16.

privilege and security in relation to wages. Before this time the employment of the master had been regarded as a personal engagement with the ship-owner and not as a service to the ship. The section conferred on the master 'all Rights, Liens, Privileges and Remedies ... which ... belong to any Seaman or Mariner'.

This parallel with seamen's wages set the pattern that has been followed ever since in English admiralty law. The current position in England is governed by s 18 of the 1970 Merchant Shipping Act which reads, '[t]he master of a ship shall have the same lien for his remuneration ... as a seaman for his wages'. It must necessarily follow from the equation of the master's rights with those of the seaman that a master's lien enjoys the same ambit and scope as a seaman's wages lien and also that it arises independently of agreement and any personal liability on the part of the ship-owner. In the case of *The Edwin*⁸², the fact that the master was hired by one who had fraudulently obtained possession of the ship was held not to have prevented the master from having a maritime lien upon the ship for wages, provided the master was ignorant of the fraud.

Unlike a seaman's lien, however, it would appear that, at least in English law, a master's lien is not subject to the protection of the English Merchant Shipping Act 1970, s 16(1), by which a seaman's lien is made incapable of being renounced by agreement⁸³. Section 143(1) of the South African Merchant Shipping Act 57 of 1951 provides that the master of a South African ship has the same rights, liens and remedies for the recovery of his wages as a seaman under the Act⁸⁴. Whether this means that the master enjoys the same protection as the seaman does under the Act⁸⁵ against renunciation of the protection afforded by such lien is not clear, but the issue is certainly arguable.

Sir Francis Jeune in *The Emville (No 2)*⁸⁶ considered that the master's wages included 'not only what a master gets as a wages but what he obtains in the course of his service as

82 (1864) B & L 281 at 285.

83 *The William Tell* [1892] P 337.

84 *Havelock v Davidson* (1919) 40 NLR 290.

85 Section 134(1).

86 [1904] P 422 at 428.

recompense for the execution of his duty'. This provides confirmation, if any was needed, that the concept of wages in relation to the master is to be as broadly construed as it has been in relation to seamen.

Furthermore, in terms of the South African Merchant Shipping Act, s 144, the master is entitled to damages for unreasonable delay in payment of wages. It is doubtful whether the maritime lien would extend to such claim on the grounds that such damages could not be regarded as recompense for services.

2.3 Master's disbursements

The admiralty jurisdiction of the South African courts over claims for a master's disbursements is established by s 1(1)(o)⁸⁷ of the Act. Since the claim was one in respect of which the court had jurisdiction in terms of the Colonial Courts of Admiralty Act, before the enactment of the 1983 Admiralty Jurisdiction Regulation Act, the law applicable in respect of such claim, in terms of s 6(1) of the Act, is English law as at 1 November 1983.

The English Admiralty Court had no original jurisdiction in respect of a master's disbursements. The jurisdiction was acquired in terms of the 1861 Admiralty Court Act, s 10. The question arose as to whether and, if so, to what extent, the maritime claim gave rise to a maritime lien and being a statutory creation, the answer was to be found in the construction of that statute. In the case of *The Mary Anne*⁸⁸, Dr Lushington considered that since the court had previously acquired limited jurisdiction under the Merchant Shipping Act of 1854⁸⁹, specifically in relation to master's disbursement claims, the effect of s 10 of the 1861 was to extend an existing jurisdiction. The learned judge therefore adopted the presumption that the Legislature intended the creation of a maritime lien.

The decision in the *Mary Anne* was overturned in *The Sara*⁹⁰. As a result of this

87 Section 1(1) '... claim for, arising out of or relating to -
(o) 'payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of or on account of a ship or the owner or charterer of a ship'.

88 (1865) LR 1 A & E 8.

89 Section 191.

90 (1889) 14 App Cas 209.

uncertainty in regard to the existence of such a maritime lien, the Legislature intervened to confer on the master an express statutory maritime lien for disbursements. This lien was first created by the Merchant Shipping Act 1889, s 1, the terms of which were reproduced in the Merchant Shipping Act of 1894, s 167(2)⁹¹.

This statutory conferment of a maritime lien for disbursements on the master is effected in South Africa by the provisions of the Merchant Shipping Act⁹² which reads:

‘The master of a South African ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.’

Since the master enjoys a maritime lien for the recovery of wages, so too, is there a maritime lien for the recovery of disbursements.

The maritime lien for disbursements is a privilege which enures to the benefit of a ship’s master only and does not extend to seamen or, for that matter, any other persons. The maritime claim for disbursements, in South Africa has been extended in two directions by the amendments effected by the 1992 Admiralty Jurisdiction Regulation Amendment Act: firstly, by extending the claim to embrace those for disbursements made by the shipper or its agent, and secondly, to cover disbursements made on the account of the ship-owner or the charterer. The jurisdiction over disbursement claims is furthermore extended by paragraph (p) of the definition section of the Act to include,

‘... disbursements made by, or the acts or omissions of, any person appointed to act or who acted or failed to act -

- (i) as an agent, whether as a ship’s, clearing, forwarding or other kind of agent, in respect of any ship or any goods carried or to be carried or which were or ought to have been carried in a ship; or
- (ii) as a broker in respect of any charter, sale or any other agreement relating to a ship or in connection with the carriage of goods in a ship or in connection with any insurance of a ship or any portion or part thereof or of any other property referred to in section 3(5); or

91 For the provisions of the subsection refer to footnote 57 in Thomas *op cit* at 201.

92 Section 143(2).

- (iii) as attorney or adviser in respect of any matter mentioned in subparagraphs (i) and (ii);

It is clear that the maritime lien for disbursements is, however, restricted to the master alone.

Comprehended by the notion of 'disbursement', which has not been defined by statute nor by any attempt at an all-embracing judicial determination, is an expense or liability incurred by the master in the performance of his duties as such and which is immediately necessary in the interests of the vessel⁹³. In *The Feronia*⁹⁴ it was held, in relation to the issue of the ambit of the court's jurisdiction over such claims, that disbursement claims included those for,

'all proper expenditure, made by the master upon the ship, whether the particular articles, the subject of this expenditure, were obtained by immediate or promised payment'.

Although not specified, there are certain requirements, implicit in the reference to 'proper', that, it seems, are generally regarded as being necessary for a valid claim to arise. In the first instance, the expense or liability must have been made or incurred by a master in his capacity as such, and, secondly, the expense or liability must have been incurred on account of the ship in the sense of being for its operational benefit.

Thirdly, the expense or liability must have been the product of a transaction entered into by the master. It seems that it is of the essence of the disbursement that the master himself have assumed a personal liability in respect of which it is intended to seek indemnity from the ship-owner: if the master's intention was simply to pledge the owner's credit, no disbursement claim arises. In the fourth instance, the expense must relate to an item of service which was immediately necessary. In *The Ripon City*⁹⁵ it was held that the disbursement must have been 'necessary for the purpose of navigation of the vessel in the service on which ship was engaged'.

93 Thomas *op cit* at 193-4.

94 (1868) LR 2 A & E 65 at 75.

95 *Op cit* at 234.

Fifthly, the expense or disbursement must have been incurred by the master in the course of his employment. In *The Castlegate*⁹⁶ it was held that the transaction in relation to which payment was made or promised had to have been one within the general authority incidental to the master's employment as such. Finally, there can be no disbursement if the master thereby avoids the consequences of his own wrongdoing, so that the liability of the master responsible for damage to an innocent ship as a result of his negligent navigation cannot be cloaked in the guise of a disbursement⁹⁷.

There is the further issue of whether the disbursement maritime lien is dependent on personal liability of the owner. Being a creature of statute, the maritime lien's nature and scope fell to be determined by reference to the terms of that statute. On the wording of the relevant statutory provisions, it might have appeared that the objective of the Legislature was to create a maritime lien to the same effect as that for seaman's wages but this has not been the approach. The relevant section⁹⁸ came under scrutiny in the case of *The Castlegate*⁹⁹ in which the court came to the conclusion that the intention of the Legislature was to restore the position to that existing before the case of *The Sara*¹. Lord Watson summarised the early law:

'These cases establish the principle that there could be no lien upon [a] ship in respect of disbursements for which the master had no authority to bind the owner, or, in other words, that no maritime lien could attach to the *res* for any sum which was not a personal debt of its owner.'²

96 [1893] AC 38.

97 *The Limerick* (1876) 1 PD 411 at 413.

98 Merchant Shipping Act of 1889, s 1.

99 [1893] AC 38.

1 (1889) 14 App Cas 209.

2 *The Castlegate* (*op cit* at 51).

The maritime lien is therefore dependent on the personal liability of owner which remains a requirement. The basis would appear to be an implied authorisation of master by the ship-owner or a representation by the ship-owner that the master had the requisite authority to incur liability on behalf of the ship-owner³.

The significance of this would be, for instance, that in the case of a charter-party by demise, the master, who would be the agent of the charterer would have no maritime lien for disbursements. These would have been made on behalf of the charterer and the ship-owner would therefore not be personally liable. There is an exception to the principle enunciated in *The Castlegate* and it is one which Thomas⁴ suggests is founded on estoppel though the reasoning is not couched in precisely those terms. In the *The Ripon City*⁵, Gorell Barnes J said:

‘I consider that it is also right and reasonable that persons who have rendered services to a vessel under circumstances which entitle them to treat her as owned by the persons in possession should have the same rights against the vessel as if her real owners had been in possession.’

The facts of *The Ripon City* are distinguishable from those of *The Castlegate*. In *The Castlegate* the master was unaware of the arrangement between the owners and the other party whereas in *The Ripon City* the master knew of the terms of the charter-party. In the latter the master was at fault whereas in the former case he was not.

The property capable of being encumbered by a maritime lien for master's disbursements is the same as that for wages, namely over the ship, its apparel and the freight, but not the cargo on the same reasoning as would apply with regard to the lien for wages.

3 Thomas *op cit* at 357.

4 *Ibid* at 203.

5 [1897] P 226.

2.4 The salvage maritime lien

In South African admiralty law, s 1(1)(k) of the amended Act confers jurisdiction on the Supreme Court in the exercise of its admiralty jurisdiction to hear and determine salvage claims⁶. The wording of the amended section is sufficiently close to that of the previous section⁷ to permit the inference that the only significant change intended by the Legislature was to extend the jurisdiction to cover salvage of aircraft.

As with the maritime liens discussed, to determine whether and, if so, to what extent a salvage claimant enjoyed a maritime lien, the South African Courts must, in terms of s 6(1) of the Act, apply the law which the High Court of Justice in the United Kingdom in the exercise of its admiralty jurisdiction would have applied as at 1 November 1983, the date of commencement of the South African Act⁸.

In English law the salvage maritime lien which arose under the general maritime law was co-terminous with the geographical ambit of the original jurisdiction and accordingly confined to salvage on the high seas⁹. Section 6 of the 1840 Act extended the salvage jurisdiction to include salvage within the body of a county, a formulation that has been followed in subsequent legislative enactments.

It was assumed in *The Veritas*¹⁰ that the maritime lien had likewise been extended, a conclusion consistent with the statutory cannon of construction adopted by the courts when construing a statute which extended the jurisdiction in relation to a claim which was established as a maritime lien under the original admiralty jurisdiction.

6 (1) '... any claim for, arising out of or relating to - ...
(k) salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salvaged or which would, but for the negligence or default of the salvor or a person who attempted to salvage it, have been salvaged;'

7 Section, 1(1)(j),
'any claim for or in the nature of salvage, including any claim relating to the sharing or apportionment of salvage and any claim by any person having a right in respect of property salvaged or which would but for the negligence or default of the salvor or would be salvor have been salvaged;'

8 *Transol Bunker BV v MV Andrico Unity and Others* 1989 (4) 325 (A) at 333C-D.

9 Thomas *op cit* at 152.

10 [1901] P 304 Gorell Barnes J at 314.

Since the jurisdiction and lien are co-extensive, to establish a maritime lien it simply has to be established that there is a valid claim for salvage: the pre-requisites for the lien are those for the claim conferring jurisdiction.

The first requirement for any salvage claim is that the property saved must have been in danger in the sense of being at peril or in distress¹¹. Furthermore, salvage services in the form of an intentional act on the part of the salvor performed with the objective of rendering assistance, the dominant motive being of acting in the interest of the *res* or life at risk, must have been rendered¹². Those services must have been voluntary in the sense of not being in consequence of any pre-existing contractual or statutory duty¹³ or any interest of self preservation¹⁴.

The services rendered must, furthermore, have led to the saving of property¹⁵ since the salvor's compensation depends on saving of property which forms the fund from which the award is payable¹⁶. Finally, the property saved must have been property that is the proper subject of salvage. By this is meant the ship, the freight, the cargo, and property associated with the maritime adventure, namely derelict, flotsam, jetsam, lagan and wreck¹⁷.

As far as precisely what is comprehended by the term 'ship', it seems that, in English law, the statutory definition is not regarded as conclusive of the issue. The term, it seems, has a far wider connotation than the term would suggest. That the South African courts would adopt a liberally approach in this regard would appear to be reinforced by the wide terms of the definition of 'ship' in the 1983 Act, which reads,

'any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft power boat, yacht, fishing boat, submarine vessel, barge, crane barge,

11 *'Georgetta Lawrence' v 'Calcutta'* (1878) 8 Buch 102 at 105; *The Charlotte* (1848) 3 W Rob 68.

12 *'Georgetta Lawrence' v 'Calcutta'* (1878) 8 Buch 102 at 105; *The Annapolis* (1861) Lush 295 at 355; *The Magdalen* (1861) LJ Adm 22.

13 *Maytom v 'Harry Escombe'* 1920 AD 187 at 194; *The Zephyr* (1827) 2 Hag Adm 43; *The Cayo Bonito* [1904] P 310; *The Lomonosoff* [1921] P 97.

14 *'JW Sauer', Master etc of v 'Sellasia', Owners of SS* 1926 CPD 437 at 440.

15 *Maytom v 'Harry Escombe'* 1920 AD 187 at 192.

16 *The Melanie (Owners) v The San Onofre (Owners)* [1925] AC 246; *The Tojo Maru* [1972] AC 242 (HL).

17 *The Gas Float Whitton No 2* [1896] P 42 (CA) at 63 affirmed *sub nomine Wells v Owners of the Gas Float Whitton No 2* [1897] AC 337 per Lord Herschel at 345.

floating crane, floating dock, oil or other floatinf rig, floating mooring installation or similar floating installation, whether self-propelled or not'.

The term 'apparel' would encompass property associated with ship other than its hull, machinery, provisions and cargo so it would include equipment, tackle, furnishings, boats, navigational instruments and other similar property. 'Cargo' in this context is a broad expression relating to all property carried on board a ship and, it seems, would include goods transported in tow.

The terms 'flotsam', 'jetsam' and 'lagan' are terms of antiquity and comprehend goods found at sea which were formerly part of ship's cargo. The terms are distinguished according to the circumstances of their being cast into the sea. All three categories relate to cargo which was initially conveyed in a ship which has foundered and which cargo has been swept to sea as a direct consequence of the foundering or has been intentionally cast into the sea in an unsuccessful attempt to avoid the loss of the vessel¹⁸. Derelict is property which has been voluntarily abandoned at sea without hope of recovery and without an intention of returning to it. Wreck is probably a residual class of property which extends the classes already enumerated and as such would include an part or fragment of a ship, her apparel or cargo¹⁹.

As far as the freight is concerned, where the salvage service results in a ship-owner earning freight which would otherwise have been lost or at risk of being lost, the freight earned is charged with the salvor's maritime lien²⁰.

18 *Constable v Gamble* (1601) 5 Co Rep Pt V 106a, 1066 quoted in Thomas *op cit* at 157. 'Flotsam is when a ship is sunk, or otherwise perished, and the goods float on the sea; jetsam is when the ship is in danger of being sunk and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perish. Lagan (*vel potius ligan*) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie them to a buoy or cork, or such other thing that will not sink, so that they may find them again, & dicitur lig a ligando; and none of these goods which are called flotsam, jetsam, or ligan, are called wreck so long as they remain in or upon the sea; but if any of them by the sea be put on the land, then they shall be said wreck.'

19 Thomas *op cit* at 160.

20 *The Westminster* (1841) 1 W Rob 229.

Once these criteria are satisfied, a legitimate claim for salvage arises. The quantification of the salvor's claim is matter for judicial discretion or arbitration. Where the salvor has contributed in part only to the saving of the property in question, the award of salvage will be in proportion to the contribution of that salvor's service to the success of the salvage.

The salvor who renders beneficial services to a ship and associated property undoubtedly enjoys a maritime lien over the salvaged property to the extent of the salvor's claim²¹. The lien accrues from the moment the service is rendered and encumbrances the benefited *res* until it is discharged lawfully²². Conferring a benefit on the salvaged property is not only the foundation of the salvage maritime lien, but it is also the quantitative measure of the maritime lien: the lien accrues only to the extent of the benefit conferred.

Personal liability on the part of the ship-owner is not a pre-requisite for the existence of the claim for salvage. The salvage maritime lien accrues independently of any voluntarily assumed obligation on the part of the owner to pay an award²³ and, in this regard, it is analogous to bottomry²⁴ and wages²⁵. The foundation of the lien is, quite simply, the beneficial service rendered to an imperilled *res*. Consequently, the salvage lien accrues notwithstanding that the benefited *res* is in the possession or control of a party other than the owner. The maritime lien accrues when the salvage service is rendered even in the absence and without the knowledge of the *res* owner and, furthermore, even where the services are justifiably performed against the wishes of the salvaged vessel or accepted under protest²⁶.

Under the general maritime law of England there was no salvage claimable for the saving of life at sea. This was so despite the very strong policy considerations militating in favour both of the recognition of such a salvage claim and maritime lien. The position was

21 *The Two Friends* (1799) 1 C Rob 271; *The Veritas* [1901] P 304.

22 *The Mary Anne* (1865) LR 1 A & E 8.

23 *Five Steel Barges* (1890) 15 PD 142.

24 *Infra* at 43.

25 *Supra* at 24.

26 *The Kangaroo* [1918] P 327; *The Pretoria* (1920) 5 Lloyd's Rep 112.

remedied, under English law, by the Merchant Shipping Act²⁷ which created a statutory right to life salvage. The effect of the section was to entitle the salvor to claim a salvage award from any property that had also been saved whether or not the salvor had made a contribution to the saving of the property²⁸. It was uncertain in English law whether a maritime lien existed²⁹.

The position in South African law is governed predominantly by the provisions of the Merchant Shipping Act³⁰ which confer a right to salvage for the saving of life from any ship on persons rendering salvage services within the territorial waters of the Republic or elsewhere in saving life from any South African ship. The salvage is payable by the owner of the ship and the owner of any wreck that may have been saved. The effect of the section is to entitle the salvor to claim life salvage from property which is also saved, even if the salvor made no contribution to the saving of that property.

There is express reference in the section to the fact that the salvor is granted a lien upon the ship or wreck for the amount of the salvage due. It is submitted that this is a reference to the common law possessory lien and not to a maritime lien. But the intention of the Legislature, as evidenced by ss (2), is clearly to elevate the claim in priority and salvage in respect of the preservation of life, when payable by the owner of a ship, is payable in priority to all other claims for salvage. Not to have so elevated the claim would have

27 Act 1894, s 544.

26 Thomas 'Life Salvage in Anglo American Law' 10 Journal of Maritime Law and Commerce 79.

27 Thomas Maritime Liens British Shipping Laws vol 14.

30 Section 300 - Salvage payable for life

- (1) When services are rendered within the territorial waters of the Republic in saving life from any ship, or elsewhere in saving life from any South African ship, there shall be payable to the salvor by the owner of the ship and the owner of any wreck that may have been saved, a reasonable amount of salvage, and the salvor shall have a lien upon the ship or wreck for the amount of the salvage due to him.
- (2) Salvage in respect of the preservation of life, when payable by the owner of a ship, shall be payable in priority to all other claims for salvage.
- (3) When the ship or wreck is lost or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister may, in his discretion, awards to the salvor, out of moneys made available by Parliament for the purpose, such sum as he thinks fit, in whole or part satisfaction of any amount of salvage so left unpaid.

exhibited a perverse ranking of values, assigning a lesser remedy in the case of the saving of life than for the saving of property.

The section is of limited application in that it deals with salvage of life within South African territorial waters and saving of life on South African ships whether they be within South African territorial waters or not. As regards the position in the case of a non-South African ship outside the territorial waters of South Africa there is considerable uncertainty as to whether such salvage claim would give rise to a maritime lien. This uncertainty arises out of the fact that there is no clarity about the extent of the salvage maritime lien in relation to life salvage in English law³¹. Without salvaged property there can presumably be no question of a maritime lien³².

2.5 Bottomry and *respondentia* maritime liens

The South African courts' admiralty jurisdiction over bottomry and *respondentia* bonds is established by s 1(1)(d)³³ of the Act. These were maritime claims before the enactment of the 1983 Act and therefore in terms of s 6(1) English law is applicable.

Bottomry has been defined as,

'a contract in the nature of a mortgage on a ship, a ship and her freight, or a ship and her freight and cargo, whereby the master, in case of necessity and in the absence of other credit, borrows money at interest on the security of the property hypothecated in order to enable the ship to continue her voyage, repayment depending on her safe arrival'.³⁴

A more comprehensive definition is provided by Lord Merrivale in *The St George*³⁵ where he defined bottomry as an,

'agreement where under a representative of a ship, in most instances the master, in circumstances of distress and necessity, and in the absence of any other source of finance or credit, hypothecates the ship (or cargo in the case of *respondentia*) with a

31 Thomas *op cit* at 294.

32 *Infra* at 50.

33 (1) '...any claim for, arising out of or relating to -

(d) 'any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or *respondentia* bond;'

34 *The Atlas* (1827) 2 Hagg 48 at 53.

35 [1926] P 217 at 226.

view to meeting the necessary expenditure or obtaining credit and so facilitating the safe continuation or completion of the voyage’.

These were among the earliest maritime liens to be recognised and their origin and development were precipitated and fuelled by considerations of public policy and the notion of the service they represented to the ship.

Bottomry and *respondentia* bonds were important commercial instruments enabling a master, during a voyage, to procure a loan or advance of credit against the security of the ship or cargo, in order to secure the continuation of the voyage in question. Apart from the difference in subject matter the concepts of bottomry and *respondentia* are synonymous.

This hypothecation on bottomry was historically a primary source of shipping finance when the ship was distant from her home port. But in a world of improved communications and improved credit facilities the bottomry bond has inevitably declined in importance and is to all intents and purposes obsolete³⁶. Price³⁷, writing in 1940, commented that ‘[b]ottomry bonds have passed out of favour during the past hundred years’. Despite the fact that the concept is something of an anachronism, its study is useful for the insights it yields into the nature of the maritime lien.

The effect of executing a bottomry or *respondentia* bond is to hypothecate expressly the *res* specified in the bond. This property thereafter stands as security for the loan, the repayment of which is enforceable by a proceeding *in rem*. The hypothecation gives the lender no title in, or possession of, the ship or cargo, but merely a claim against the *res* which is carried into effect by admiralty process. The nature of the hypothecation was considered in *The Tobago*³⁸:

‘The person advancing the money on bonds of this nature, acquires by that act no property in the vessel: he acquires the *ius in rem*, but not the *ius in re*, until it has been converted and appropriated by the final process by a court of justice. The

36 Thomas *op cit* at 207 states that the last recorded decision relating to bottomry was the case of *The St George* (*op cit* at 222) in which Lord Merrivale observed in relation to bottomry that it was ‘a mode of raising money out of common use at the present day and unfamiliar in current practice’.

37 *The Law of Maritime Liens* *op cit* at 29.

38 (1804) 5 C Rob 218 at 222-3.

property of the vessel continues in the former proprietor, who has given the right against it, but nothing more.'

A person who advanced money or credit on bottomry or *respondentia* enjoyed a maritime lien on the *res* charged in respect of both the principal debt and interest³⁹. The lien arose at the moment of the agreement and to the extent of the value of the property charged but was only enforceable on the safe completion of the voyage for which the loan or credit was at risk, or upon such date thereafter as might be specified in the bond, or upon the occurrence of some act or incident which caused the lien to accrue earlier. The lien endured for as long as the *res* charged survived; with the destruction of the *res* the lien was expunged⁴⁰.

The jurisdiction and maritime lien are co-extensive so that the pre-requisites for jurisdiction had only to be established to determine the existence and scope of the maritime lien. As regards the pre-requisites for valid bottomry and *respondentia* bonds, the core of the validity such bonds is founded upon the presence both of an immediate necessity affecting the ship or cargo and the assumption of a maritime risk on the part of the lender of money.

As regards the element of necessity, Lord Stowell in the case of *The Nelson*⁴¹ stated:

'It is the state of unprovided necessity that alone supports these bonds - the absence of that necessity is their undoing.'

Furthermore, as was pointed out by Dr Lushington the case of *The Royal Arch*⁴², the necessity relates both to the circumstances of the ship and the availability of finance or credit. The ship, cargo or adventure must be in a state of distress in the sense that circumstances must exist which represent a threat to the safety or good management of the ship or her cargo or to the successful completion of the enterprise on which the ship is embarked or to the continued use of the ship as a commercial instrument: it is the necessity

39 *The Atlas* (*op cit* at 53); *The Tobago* (1804) 5 C Rob 218.

40 *Thompson v Royal Exchange Ass Co* (1813) 1 M & SS 30 quoted in *Thomas op cit* at 211; *The Emancipation* (1840) 1 W Robb 124; *Mackie, Dunn & Co v South British Insurance Co* (1885) 3 SC 405.

41 (1823) 1 Hag Adm 169 at 175.

42 (1857) Swab 269 at 282 quoted at *Thomas op cit* at 211.

to incur expenditure that, in part, justifies the hypothecation. The necessity also relates to the finance; in particular, there must be no feasible alternative source of finance or credit other than the bond. It will be valid only when, in the circumstances of the particular case, a necessary expenditure can only be met by hypothecating the ship⁴³. It must be an instrument of last resort.

The second pre-requisite for a valid bond was that the lender on bottomry had, expressly or impliedly, to accept the risk of the voyage which the advance had facilitated. The entitlement to repayment depended on the safe completion of the specified voyage. In the event of the ship being lost the bond was defeated and the loss had to be borne by the lender⁴⁴.

If these pre-requisites could be established, the courts had admiralty jurisdiction over the claim and the maritime creditor enjoyed a maritime lien over the vessel to the value of the principal debt and the interest owed. It was considered contrary to common usage that bottomry liens should be left in abeyance long after termination of the bottomried voyage. The creditor was required to pursue remedy with diligence with the emphasis being aimed at preventing prejudice to others arising from purchase or accrual of subsequent liens⁴⁵.

The maritime lien existed independently of personal liability of the property owner. The lender had no personal remedy against the ship-owner, only a right *in rem* against the hypothecated property⁴⁶.

43 Thomas *op cit* at 219.

44 *Ibid* at 220.

45 *Ibid* at 213.

46 *The Royal Arch (op cit* at 269).

The one feature that distinguishes the maritime lien on bottomry from other maritime liens is that it was clearly regarded as being transferable, with the transferee enjoying the same rights and privileges as the original bondholder⁴⁷. The question of whether maritime liens are generally transferable, however, is a vexed one.

Categories of property capable of being charged with a hypothecary lien are the ship, its freight and cargo⁴⁸. When all three categories of property were hypothecated, the ship and freight were the first charge and only if they were inadequate to satisfy the claim could the lien on the cargo be invoked⁴⁹. Particularly in the case of bottomry, and arising from the fact of the bond as an instance of express hypothecation, the precise categories of property charged are under the discretion of the parties to the agreement. The qualification that has to be added to that statement is that the cargo may only be hypothecated in this way if it also stands to benefit. In this regard, it is to be understood that, in hypothecating the cargo, the master acts primarily as the representative of the ship-owner and in the event of the lien over the cargo being enforced, the cargo owner apparently has a right of indemnity against the ship-owner⁵⁰.

47 *The Eugenie* (1873) LR 4 A & E 123 quoted at Thomas *op cit* at 213.

47 Thomas *op cit* at 213.

49 *The Dowthorpe* (1843) 2 W Rob 73.

50 Thomas *op cit* at 224.

3 Recognition of other categories of claims as giving rise to maritime liens

Having dealt with the 'established' liens, it remains to examine two further areas in which maritime liens may be recognised: the first is the group of maritime liens about whose existence there exists some doubt but which, according to Staniland¹, were imported into South African admiralty law by virtue of the all-encompassing nature of s 6(1) of the Act. The second group is maritime liens recognised by foreign jurisdictions.

3.1 'Uncertain' maritime liens

As far as appears from the South African case law, the issue of whether to accord recognition to these 'uncertain' maritime liens has not arisen for determination by our courts. Staniland² identifies a number of these maritime liens as including those for pilotage, loss of life, personal injury, and damage done by a ship in the form of pollution. Some of these have been dealt with in relation to the 'established' liens discussed. Hofmeyr³ identifies the following 'implied' maritime liens in English law: life salvage⁴; fees and expenses of the receiver of wrecks⁵, and damage sustained by the owner or occupier of land used to facilitate the rendering of assistance to wreck⁶; and would, presumably, argue that these would be recognised by South African courts.

Price⁷ suggests that the claims of pilotage, towage on the high seas, and necessities supplied on the high seas, which were claims which the Admiralty court had inherent jurisdiction to determine, were claims which may have attracted maritime liens. Thomas⁸,

1 'Should foreign maritime liens be recognised?' (1991) 108 *SALJ* 293.

2 *Ibid* at 299-300.

3 'South African Admiralty Jurisdiction' 1982 *Acta Juridica* 30 at 40.

4 Section 55 of the United Kingdom Merchant Shipping Act which re-enacted ss 458 and 459 of the United Kingdom Merchant Shipping Act of 1854 as extended by s 9 of the Admiralty Court Act of 1861.

5 Section 567 of the United Kingdom Merchant Shipping Act of 1894 which re-enacted s 455 of the United Kingdom Merchant Shipping Act of 1854 and provided that the receiver should, in respect of his fees and expenses, have the same rights and remedies as a salvor.

6 Section 513 of the United Kingdom Merchant Shipping Act of 1854 provided that such damage should be a charge on the maritime *res* and would be recoverable in the same manner as salvage.

7 *The Law of Maritime Liens* (1940).

8 *Op cit* at 16.

rather more equivocally, comments that there existed doubt as to whether the claims of towage and pilotage attracted maritime liens. He suggests that this doubt stems primarily from the decision in *The La Constancia*⁹ in which the learned judge treated such claims as charges on the fund formed by the sale of the vessel in question, ranking equally with the wages maritime lien. Mansfield¹⁰ refers to a maritime lien in the case of towage and quotes as authority the case of *The La Constancia*.

The common law relating to towage was reviewed in the case of *Westrup v Great Yarmouth Steam Carrying Co*¹¹ and it was concluded that a maritime lien did not exist in the case of towage. This was followed in *The Ambatielos; The Cephalonia*¹² which considered the *The La Constancia* to have been erroneous on this point. Thomas¹³ suggests that there is probably no maritime lien, only a statutory right *in rem*, and points as support for this proposition to *The Henrich Björn*¹⁴. Price¹⁵ is emphatic in his view that the *Westrup* decision did not recognise a maritime lien in the case of towage. If these authors are correct in their contention, then South African admiralty law did not inherit such a maritime lien under the provisions of s 6(1) of the Act.

The issue of whether pilotage claims are underpinned by the security of a maritime lien has not been conclusively determined. Thomas¹⁶ points to some early authorities which he says might reasonably be construed as furnishing support for the existence of such a maritime lien. The question was left open in *The Ambatielos; The Cephalonia*. Thomas¹⁷ suggests the likelihood of a parallel between pilotage and towage and, on the basis then that he would argue that there is no maritime lien in the case of towage, would conclude that there is no maritime lien in the case of pilotage. Since the lien has not been unambiguously

9 (1846) 2 W Rob 404.

10 'Maritime Lien' (1888) LQR 381.

11 (1889) 43 ChD 241.

12 [1923] P 68.

13 *Op cit* at 17.

14 (1885) 10 PD 44 (CA); (1886) 11 App Cas 270.

15 *Op cit* at 54.

16 *Op cit* at 17 footnote 3.

17 *Op cit* at 17.

established it is unlikely, in the light of the reluctance in English law to extend the range of claims recognised as giving rise to maritime liens, that such a maritime lien will be added, and it is furthermore unlikely that such a maritime lien would be recognised in South African law.

Opinion appeared to waiver on the issue of whether a claim for necessities supplied attracted a maritime lien. Dr Lushington in the case of *The Alexander Larsen*¹⁸, decided that there was no maritime lien in such instances, but in *The Ella A Clarke*¹⁹ he adopted the contrary view that there was such a maritime lien. Eventually, in a series of cases²⁰, the issue was put beyond doubt and it is accepted that there is no maritime lien for necessities supplied²¹.

These then were the so-called 'doubtful' maritime liens, but, in addition, there were those maritime liens which, it was said, arose by implication from certain statutory enactments under English law.

The first of these maritime liens is the lien in respect of life salvage. A claim for life salvage was recognised in terms of the United Kingdom Merchant Shipping Act of 1894²², and although the point has not been decided specifically, it would seem by implication that a maritime lien may arise in respect of such claim. The practical relevance of this issue may be diminished considerably in South African law because s 300(1) of the South African Merchant Shipping Act expressly provides that where a salvor saves life from any ship within South African territorial waters or elsewhere from any South African ship the salvor shall have a lien over the ship. It is submitted that the lien referred to in this context is the common law possessory lien.

18 (1841) 1 W Rob 288.

19 (1863) B & L 32.

20 *The Pacific* (1864) B & L 243 and *The Troubadour* (1866) LR 1 A & E 302 both affirmed in *The Two Ellens* (1871) LR 3 A & E 345, and *The Henrich Bjöm* (1885) 10 PD 44, (1886) 11 App Cases 270.

21 Price *op cit* at 54-5.

22 Section 55 which was a re-enactment of ss 458 and 459 of the 1854 United Kingdom Merchant Shipping Act as extended by s 9 of the 1861 Admiralty Act.

The issue of whether such a maritime lien exists in English law would not be entirely irrelevant. Where the salvor, for some reason, had lost possession of the property salvaged, or where, because the limitations on the lien recognised in South African law, a lien were to be asserted in respect of life salvage outside South African territorial waters and not involving a South African vessel, the courts would be called upon to determine whether under English law as at 1 November 1983, such a lien for life salvage was recognised²³.

The second instance of such an implied maritime lien is that in respect of fees and expenses of a receiver of wreck. The United Kingdom Merchant Shipping Act²⁴ confers on a receiver of wreck, on returning a wreck, or proceeds from the sale of the wreck to its lawful owner or other lawful claimant, the right to recompense for fees and expenses incurred in so doing. And, in respect of such claim that Act²⁵ provided that the receiver should have, in addition to all other rights and remedies for the recovery of those fees and expenses, the same rights and remedies as a salvor had in respect of salvage due. This would, given the right of a salvor to a maritime lien, have given rise, by implication, to a maritime lien in respect of such fees²⁶.

In similar vein, s 568(1) of the 1894 Merchant Shipping Act provided in respect of remuneration for services rendered by coastguards that officers and men of the coastguard were entitled to claim remuneration from the owners of shipwrecked property, according to a prescribed tariff, and further, that the such remuneration 'shall be recoverable by the same means ... as fees received by receivers under this provisions of the part of the Act'. If then, as it would appear, the receiver has a lien, so too would the coastguard.

In English law, a maritime lien would also appear to be recognised by implication in respect of a claim for damage sustained by the owner or occupier of land used to facilitate the rendering of assistance to wreck. The United Kingdom Merchant Shipping Act of

23 *Supra* at 41.

24 1894, ss 521; 523-5; 567(1).

25 1894, ss 567(2) which re-enacted s 455 of the 1854 United Kingdom Merchant Shipping Act.

26 *Price op cit* at 2.

1894²⁷ provided that such damage should be a charge on the maritime property and be recoverable in the same manner as salvage. On the same reasoning as applied in the case of the receiver of wreck, this would appear to give such owner a maritime lien²⁸. The position in South African law is dealt with under the Merchant Shipping Act in terms of s 295 which confers the power to pass over adjoining lands to assist a ship which is wrecked, stranded or in distress.

In South Africa the position is governed by the provisions of the Merchant Shipping Act of 1951²⁹. In broad terms the relevant provisions confer similar rights as those contained in the various English enactments to which reference has been made.

Persons rendering assistance in the case of salvage or the recovery of wreck are entitled, in addition to reward for their salvage services, to recover expenses incurred and the provisions of the Act relating to the payment of salvage awards is to apply in the case of payment of such expenses³⁰. The Minister is furthermore empowered to detain the vessel involved and in some instances to sell it in order to recover the expenses relating to the recovery of wreck. Given the extensive powers of the Minister in this regard it is difficult to envisage a situation that would not fall to be dealt with under the provisions of the Act, and in which, therefore, the issue of whether a maritime lien existed would arise. Nevertheless, it would seem that since such maritime liens existed in English law by the time of the enactment of the Colonial Courts of Admiralty Act, 1890, they must be considered as having been incorporated in South African admiralty law by the provisions of s 6(1).

3.2 Foreign maritime liens

There remains for consideration the issue of whether recognition is to be accorded to foreign maritime liens. Recognition of such liens would expand the number of classes maritime liens recognised under South African admiralty law. It has implications both for

27 Section 513 which re-enacted s 446 of the 1854 United Kingdom Merchant Shipping Act.

28 Thomas *op cit* at 20, *The Meriel* [1963] P 247 at 254.

29 Sections 301-4.

30 Section 302.

the instances in which the action *in rem* is available to maritime creditors and for the ranking of claims among competing creditors.

The problem of whether or not to accord recognition to foreign maritime liens has come before the courts on a number of occasions³¹. The question, succinctly put, is should the South African courts recognise foreign maritime liens in those instances in which the events giving rise to the foreign lien would not, if they had occurred within the South African court's jurisdiction be recognised as having given rise to a maritime lien?

The answer to this question is not as elementary as it might seem at first glance. It is not resolved by reference to the principles of South African private international law which come into play where there is a foreign element in the dispute before a court, in particular where the domestic rules of the forum (*lex fori*) and the relevant rules of the foreign country (*lex causa*) conflict.

Since maritime liens were a head of jurisdiction under the Colonial Courts of Admiralty Act, 1890, and therefore, in terms of s 6(1), English law as at 1 November 1983 would be applicable, the question falls to be resolved by reference to English law. In other words, the South African courts have, in order to decide whether to grant recognition to a foreign maritime lien, to apply principles of English law, including the principles of English private international rules, that are applied in deciding whether to recognise a foreign maritime liens.

While the relevant principles of English conflict rules are clear, namely that where the rights involved in the dispute are procedural in nature the *lex fori* applies. Where the rights are substantive the *lex causa* applies, the question of whether foreign maritime liens are to be recognised by the English courts is far from clear. The position in English law is to be gleaned from two decisions each of which, for differing reasons, is problematical. The first

31 *Oriental Commercial and Shipping Co Ltd v MV Fidias* (op cit); *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C); *Brady-Hamilton Stevedore Co and Others v MV Kalantiao* (op cit), and *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A).

is the decision of the Court of Appeal in *The Colorado*³². The position seems to be that the decision of the Court of Appeal in *The Colorado*, if in point, would be binding on the South African courts, constituting, as it would, the highest authoritative statement as to the position in English law as at the relevant date, being 1 November 1983, the date of enactment of the Admiralty Jurisdiction Regulation Act. The Court of Appeal would then be the highest court to have pronounced on the issue in English law and therefore its view would be regarded as reflecting the English law on the point at the relevant time. This would then be authoritatively binding on a South African court in the exercise of its admiralty jurisdiction confronted with the same point.

If it could be distinguished or was not conclusive of the issue, recourse would have to be had to the second decision which is a decision of the Privy Council in *The Halcyon Isle*³³ in which the judges were split three to two in their decision. The decision in *The Halcyon Isle*, because it is a decision of the Privy Council, which stands outside the hierarchy of the English Court structure, is of persuasive value only. Its authority would then depend on its status as a court and the cogency of its reasoning. Its status is beyond issue but the cogency of the reasoning of the court, particularly one split three to two is open to question.

The South African courts have on a number of occasions been forced to grapple with the problems raised by this question but the reasoning of those decisions and the debate which they have generated is now rather of academic interest only because the Appellate Division has resolved the issue, for the time being anyway³⁴.

The Appellate Division has authoritatively and unanimously decided that a claim is not to be recognised as giving rise to a maritime lien where the claim would not be classified as attracting a maritime lien if it had arisen within the territorial jurisdiction of the court. In other words, the *lex fori* must be applied to the recognition of foreign maritime liens. The effect of the decision is that where a cause of action arising in a foreign jurisdiction is

32 [1923] P 102.

33 *Bankers Trust International Ltd v Todd Shipyard Corporation: The Halcyon Isle* [1980] 3 AllER 197.

34 *Transol Bunker BV v MV Andrico Unity, Grecian Mar SRL v MV Andrico Unity* 1989 (4) SA 325 (A).

recognised as giving rise to a maritime lien in that jurisdiction, a South African court in the exercise of its admiralty jurisdiction will not, in accordance with the approach in English law, recognise that maritime lien if that cause of action, had it occurred within the jurisdiction of a South African court, would not have been recognised as having given rise to a maritime lien.

The significance of the decisions on this point lies in the light they shed on the courts attitude to the nature of the maritime lien. But what is also of importance, in this regard, is that the range of maritime liens recognised by the South African courts in the exercise of their admiralty jurisdiction will not include any recognised by foreign jurisdictions where those maritime liens are not familiar to the South African courts and this despite the compelling arguments against this somewhat parochial approach³⁵. This approach of the South African courts is also in stark contrast to that increasingly adopted in other jurisdictions which is to regard the maritime lien as a substantive right and therefore governed by the proper law of the lien, in other words, determined by the law applicable to the facts giving rise to the lien.

4 Recognition extended to other classes of maritime liens

The maritime lien has been described as one of the 'most striking peculiarities of admiralty law, constituting a charge upon ships of a nature unknown alike to common law and equity'¹. The importance of the maritime lien lies in the singular advantages it affords the maritime creditor whose claim is underpinned by the security of a maritime lien.

Primarily, its advantage lies in the fact that it constitutes a basis for the enforcement of rights by an action *in rem* and the value of that remedy in maritime law cannot be underestimated. Given the often considerable difficulties encountered in identifying the

35 See generally Staniland 'Should foreign maritime liens be recognised?' (1991) 108 South African Law Journal 293; Staniland 'The Admiralty Jurisdiction Regulation Act and the Maritime Claim of a Saudi Arabian Necessaries Man' (1986) 103 South African Law Journal 350; Staniland 'The Halcyon Isle revisited: a South African perspective' 1989 (2) Lloyd's Maritime and Commercial Law Quarterly 174.
1 Marsden 'Two Points of Admiralty Law' (1886) LQR 357 referred to in Price Law of Maritime Liens (1940).

owner of the vessel in respect of which any maritime claim arises; locating the whereabouts of that owner; serving the necessary notice of proceedings to be instituted for the adjudication of the claim, and all this in the short duration of the vessel's sojourn in harbour, the option of proceeding against the vessel in the absence of the owner offers advantages which are all too evident. This option is one of the particular advantages afforded by a maritime lien².

The further important advantage of the security afforded by the maritime lien is that of the preference the lienee enjoys in the ranking of claims against a limited fund formed by the proceeds of the sale of the vessel³.

Given the fundamental importance and value of maritime liens, the parochial approach adopted by the Legislature and courts in restricting the maritime lien to the classes of maritime claims recognised as giving rise to maritime liens appears at odds with trends in other jurisdictions which have been inclined to extend the range of maritime liens recognised. Although it might be considered tempting to extend the number of maritime liens recognised, there are obstacles in the way of so doing. These may be considered as difficulties of principle and those of policy.

When the established classes of maritime liens are scrutinised in an attempt to isolate general principles common to all, they are seen to arise and prevail in circumstances which, in some instances, are common to all, and, in others, common to groups of, maritime liens.

All maritime liens are supported by considerations of policy. The mariners' wages lien is supported by policy considerations aimed at protecting what were perceived to be a particularly vulnerable group from exploitation; salvage by a concern to promote and encourage efforts directed at saving property and life at sea; bottomry by a concern to

2 Section 3(4)(a) of the Act.

3 Section 11(4)(e).

furnish support for commercial ventures, and the damage lien by consideration for the encouragement of safe navigation⁴.

All maritime liens may arise in circumstances in which the party who bears personal liability may not be readily accessible to the claimant⁵.

All, with the exception of the damage maritime lien, possess the common element of necessity; each arising from a service which may be essential to the successful completion of the maritime adventure. The maritime liens for damage, salvage and bottomry have in common the feature of emergency in that each arises in circumstances which were unforeseen and which place the maritime venture at hazard.

The extent to which the circumstances represented, in the emergence and the development of the law, underlying principles on which the existence of each of the maritime liens was dependent, is uncertain⁶. Each of the circumstances received different emphasis at different stages of the development of the law and it seems unlikely, the process of development of areas of the law by court decisions, that the linking circumstances in themselves possessed sufficient force to produce extensions of the categories of maritime liens, and that they now possess sufficient force to extend the presently established classes of maritime claim.

While these common elements may be identified in an attempt to elicit some generally applicable principles that might be applied in extending the classes of maritime liens, there are equally elements which serve to distinguish the existing categories of maritime liens. Staniland⁷ identifies the following differences: each maritime lien developed historically on its own; each serves its own policy concerns; the requisites for the creation of the liens differs; the maritime liens are ranked differently; they are not equally transferable; they encumber different property, and they are extinguished in different ways. These

4 See generally the discussion in Thomas *op cit* at 237-9.

5 *The Parlement Belge* (1880) 5 PD 197 at 218.

6 Mansfield *op cit* at 392.

7 'Should foreign maritime liens be recognised?' (1991) 108 SALJ 293 at 294.

differences make it extremely difficult to make any generalisations about the origins and recognition of classes of maritime liens.

With regard to the issue of whether personal liability on the part of the property owner was required to establish a maritime lien, Thomas⁸ has commented that in English law it has been observed that a proper maritime lien must have its root in the personal liability of the owner. That statement, the author says, has partial accuracy but it is more doubtful whether it represents a general premise underpinning the entire law relating to maritime liens. It is indubitably so in English law that in relation to damage and disbursement liens the personal liability of the property owner is a pre-requisite to the availability of the maritime lien but this is not the case with all the maritime liens. The issue as to the relationship between a maritime lien and the personal liability of the property owner is one which falls to be answered differently as between the individual maritime liens. The fact that there exists this disparity may in turn be a symptom of the absence of any clearly defined theoretical framework in the development of the law relating to maritime liens⁹.

A comparison of the existing liens suggests that the claims giving rise to those liens have few common characteristics and this may suggest that the admiralty courts adopted a pragmatic approach in recognising maritime liens, extending recognition to new categories of claim on an *ad hoc* basis prompted by necessity rather than a regard for a sound theoretical basis for the principle of so doing.

In the way of any Legislative effort to extend the classes of maritime liens is, in addition to, the absence of any clear and consistent principles as to the basis on which recognition was extended to new categories of maritime lien in the past, a general reluctance, as a matter of policy, evident in the case law¹⁰, to extend recognition to new maritime liens.

8 *Op cit* at 15.

9 Price *Maritime Liens* (1940).

10 *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C); *Brady-Hamilton Stevedore Co and Others v MV Kalantiao (op cit)*, and *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A).

This reluctance is expressed by Marais J in the following terms:

'While much is said about the nature and characteristics of maritime liens and the rights they confer, no consideration at all appears to have been given to what seems to me to be fundamental, namely that liens have direct and profound repercussions upon the claims of others who have had no part or say in their creation, that contemporary legal policy is chary of allowing parties to a transaction to create invisible and secret charges over property to secure payment of a debt, that where such charges are permitted to arise, it is because the particular legal system considers it to be consistent with its own notions of sound public policy, and that the predominating purpose and object of conferring a lien is to enhance the particular creditor's prospect of being paid when there is competition to be paid.'¹¹

In the face of such reluctance, it seems unlikely in the extreme, that either the courts or the Legislature will be persuaded to extend the classes of maritime lien recognised in South African admiralty law.

11 *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 820G-H.