MODERN SHIPPING LAW IN SOUTH AFRICA – CAN SECTION 6 OF THE ADMIRALTY JURISDICTION REGULATION ACT BE DISCARDED WITH IMPUNITY? – A COMPARATIVE STUDY

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I hereby declare that I have read and understood the Regulations governing the submission of Master of Laws' dissertations, including those relating to length and plagiarism, as contained in the Rules of this University, and that this dissertation conforms to those regulations..

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1. INTRODUCTION

> ***There is no area of the law which cannot be improved by being re-thought from its first principles. Admiralty jurisdiction and procedure are no exceptions to this general rule; the antiquity of parts of English admiralty jurisdiction and procedure are such that re-thinking both by admiralty and non-admiralty lawyers (to say nothing of non-lawyers) might produce some particularly beneficial results.*** [1]

In terms of the Admiralty Jurisdiction Regulation Act [2] ("the AJRA") each provincial and local division of the High Court is clothed with jurisdiction [3] to hear and determine various maritime claims defined in a comprehensive list.

Section 6 regulates the law and the rules of evidence to be applied in the exercise of the court's admiralty jurisdiction. It provides that with regard to any matter in respect of which a court of admiralty created by the Colonial Courts of Admiralty Act, 1890 [4] had jurisdiction 'immediately prior to the commencement of this Act' (1 November 1983), the governing law is to be that of the United Kingdom.[5] For other maritime claims as defined in the Act over which the colonial courts of admiralty had no jurisdiction, for instance, charterparties in general, 'Roman-Dutch law applicable in the Republic' is to be applied. Section 6(2) subjects all claims to relevant statute law.

Section 6 creates four obvious difficulties:

- with regard to a significant number of maritime claims it defers to the law of another sovereign estate.
- it freezes a living, constantly developing discipline (law) in a moment of time, namely, 1 November 1983.
- it creates the problem of establishing the range of English admiralty jurisdiction on 1 July 1891 (the date of commencement of the Act) and;
- it creates an arbitrary division between maritime claims, some to be governed by English law others to be governed by 'Roman-Dutch law'.[6]

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[1] BJ Davenport *QC 'Proposed reforms of admiralty jurisdiction in Australia' (1987) Lloyds Maritime and Commercial Law Quarterly 317 at 324*

[2] Act 105 of 1983

[3] referred to as 'admiralty jurisdiction'

[4] 53 and 54 Vict c 27

[5] The exact formula enjoined by section 6 is to '... apply the law which the High Court Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement, insofar as that law can be applied'.

[6] the use of this last-mentioned expression is problematic and will be dealt with later.

The AJRA as a whole was praised after its inception:-

> The Act, in my view, is an outstanding piece of legislation; it is bold, innovative and comprehensive and as I have already had occasion in a judgment to state, it contains a number of sections with novel, unusual and at times far-reaching provisions with which our courts will be required, at some time in the future, to deal.[7]

Section 6, however, was singled out for criticism:

> To limit only certain areas of the law to English sources is to ignore the wealth of court made law with which shipping law is being continuously developed in jurisdictions with similar modern colonial roots such as the United States, Canada and Australia. As will be seen in relation to many heads of jurisdiction in South Africa today, s 6 stultifies South African admiralty law. It conflicts with the freedom given to judges by our common law system to shape the law and it often introduces the very uncertainty it sought to avoid. In certain cases, it leads to unsound and absurd results. It is as potentially inequitable as it is ubiquitous. The legislature should waste no time in amending it, allowing South African Admiralty law to come of age by standing on the considerable foundations of its rich legal history.[8]

A pilotage claim determined in a recent South African decision [9]illustrates the tortuous workings of section 6. The court of first instance found that pilotage is one of the matters over which a colonial court of admiralty would have had jurisdiction in 1890 and that English law as it was in 1983 would, accordingly, apply in the absence of an over-riding South African statute. The United Kingdom Pilotage Act 1983 was in force when the ARJA came into effect. To decide the questions of the liability of the port authority employing the compulsory pilot and the owners of a ship navigated by the compulsory pilot which caused damage to the plaintiff's ship, the court had to pick its way between South African Statute law, English Statute law and English Common law. Finding that the compulsory pilot was guilty of gross negligence, the court held that the South African statutory provision [10] exempting the port authority from liability for the negligence of its servants was not applicable and consequently ordered damages against the port authority. Finding that the operation of the United Kingdom Pilotage Act of 1983 was limited to the territorial waters of the United Kingdom, the court held that by the common law of England a master or ship owner was not liable for the negligent acts of a compulsory pilot and consequently dismissed the claim against the owners of the ship. [11]

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[7] D B Friedman 'Maritime law in practice and in the courts' (1985) 102 *SALJ* 45 referring in part to his decision in *The Paz* 1984 (3) SA 261 (N)

[8] Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 24

[9] *The Stella Tingas,* 2002 (1) SA 647 (D)

[10] section 10(7) of schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989

[11] The court's finding on the question of gross negligence was overturned on appeal and the exemption of liability contained in the Legal Succession to the South African Transport Services Act found operable in *The Stella Tingas* 2003 (2) SA 473 (SCA).

The aim of this study is to discover the appropriate manner in which to deal with the problems created by section 6. The law applied to shipping matters should be South African law not English law; shipping law must be allowed to develop in its South African habitat providing uniform as opposed to arbitrary solutions without the need for a microscopic examination of 19th century English law as a first step to the solution of every problem. Section 6 must be either modified or scrapped. To take away or add on to the superstructure of a building its foundations must be known and understood. The wording of section 6 makes a study of English law and its foundations imperative.

2. ENGLISH COMMON LAW

'Jurisdiction' can mean merely the right or power to administer justice and to apply laws or the actual exercise or extent of such right or power.[12] In legal writings, 'jurisdiction' often encompasses both meanings and the author's intention must be taken from the context:

> The rules which govern the jurisdiction and the procedure of the courts are the substantive part of early bodies of law. As these courts increase in power and enlarge their jurisdictions, the law which they apply gradually becomes more important than the courts which administer it and the procedure by which it is administered. The law becomes the substantive part of the system; the procedure becomes merely adjective but the body of law which has thus grown up bears upon it many marks of its origins. Its leading divisions, and the contents of many of its most characteristic doctrines, can often be explained only by a reference to events in the history of the courts and their procedure ... legal history therefore must always begin with the history of the courts. [13]

Courts of common law, Courts of Equity, the Court of Admiralty, Ecclesiastical courts, the Council, Star Chamber and many others all contributed something to the general body of English law[14]. While the modern tendency has been towards fusion and uniformity of principle, old divisions continue to be a source of caprice and uncertainty.

At the time of the Norman Conquest[15], England contained a number of competing courts and conflicting jurisdictions.[16] The king, the church and feudal lords of the ancient communities all vied for power. Fragmentary rules and customs were moulded into what became known as the "common law" with the French Normans adding canon law and Roman law to the mixture. [17]

Under Henry I, a strong central court, the *Curia Regis,* began to form. This court eventually branched out into two sections, the court of Common Pleas and the King's

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[12] Collin's Shorter English dictionary
[13] W S Holdsworth *History of English Law* 7th edition, vol I, 1
[14] Holdsworth *op cit* vol I introduction
[15] 1066
[16] Holdsworth *op cit* vol I 4
[17] Holdsworth *op cit* vol I 4

Bench. The court of Common Pleas was there to do justice between the subjects and the King's Bench was there to protect the interests of the king. Original jurisdiction over civil actions belonged to the court of Common Pleas. It alone had original jurisdiction over most of the real actions and over the older forms of personal action. The King's Bench, in certain matters exercised concurrent jurisdiction. [18] By the beginning of the 17th century, the King's Bench had assumed to itself much of the jurisdiction of the court of Common Pleas.

The fiction by which the King's Bench later attained ascendancy over the court of Common Pleas illustrates the idiosyncratic nature of English law in its beginnings. The fiction was invented that defendant was in the custody of the Marshal of the Marshalsea of the King, the functionary who kept the prison at the court. If a person was in the custody of the marshal, the court had general jurisdiction over him. It was therefore possible to bring any sort of action against him except real actions. [19]

A prominent feature of the common law system was the jury. The origins of the jury are described by *Benedictus Abbas* saying of Henry I that he '... selected five men only, two clerks and three laymen, who were all of his own household. And he ordained that those five should hear all the suits of the realm, and adjudicate upon them, and that they should not depart from the *Curia Regis*, but remain there to hear men's suits'.[20]

It was this system of law which contended with and eventually, swallowed up, as will shown, an initially distinct and independent system of law administered by the court of the Lord High Admiral.

3. THE GENESIS OF THE ENGLISH COURT OF ADMIRALTY

The etymology of the word 'admiral' provides some clue to the nature and origin of the admiralty court in England. The word derives from the Arabic 'emir', commander. This adoption of the Arabic is evidence of the cross-pollination of ideas between east and west which occurred during the crusades. One of the most important ancient codes of maritime law, The Roles of Oleron, was variously said to have been imported into England by Richard the Lion Heart, its first crusader king or his French mother, Eleanor of Aquitaine. The earliest use of the title 'admiral' in England [21], is that of the appointment of Gervase Alard as admiral of the Cinque Ports in 1300 [22].

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[18] Holdsworth *op cit* vol I 219
[19] Holdsworth *op cit* vol I 219
[20] Holdsworth *op cit* vol I 51
[21] there is an earlier mention in Gascony, France
[22] Holdsworth *op cit* vol I 544

After the battle of Sluys, in which the English defeated the French, Edward III, in 1339, extended jurisdiction to the admirals in piracy and other maritime cases. Until then he had only disciplinary jurisdiction over the fleet under his command and no more. [23]

In the fourteenth century there were several admirals and several courts with wide and vague jurisdiction. These admiralty courts encroached upon the rights of those seaport towns which possessed admiralty jurisdiction and as a result, these courts aroused parliamentary opposition to the courts of admiralty. The result of this opposition was seen in two statutes in the reign of Richard II which defined the jurisdiction of admiralty courts. A statute of 1389 records that

> a great and common clamour and complaint hath been often times made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, encroaching to them greater authority than belongeth to their office ... the admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of King Edward, grandfather of our Lord, the King that now is [24]

A statute of 1391 enacted specifically, 'that all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of counties, as well by land, water, and also wreck of the sea, the Admiral's court shall have no manner of cognizance, power nor jurisdiction.'[25] Many towns, jealous of their ancient rights obtained by royal charter exemption from the jurisdiction of the admiralty court.[26] The Cinque ports - Dover, Sandwich, Romney, Hastings and Hythe have admiralty jurisdiction to this day. [27]

In the fifteenth century, local admiralty courts were superseded by the High Court of Admiralty but its jurisdiction remained limited by the statutes of Richard II. Until the Tudor period the admiralty court was relatively inactive. In the reign of Henry VIII a revival occurred with the increased naval and commercial activity. Henry VIII appointed his young son, the Duke of Richmond, as Lord High Admiral for life. [28] A statute of 1540 gave to the admiral jurisdiction in matters of freight and damaged cargo and the outline of the main heads of the modern jurisdiction of that court began to appear.[29]

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[23] Holdsworth *op cit* vol I 545
[24] Holdsworth *op cit* vol I 548
[25] Holdsworth *op cit* vol I 548
[26] Holdsworth *op cit* vol I 531
[27] The jurisdiction of their combined court is not used and is of historical interest only - Meeson *Admiralty* Jurisdiction & Practice 2nd ed 5
[28] Cumming 'The English High Court of Admiralty' (1993) *Tulane Maritime Law Journal* 17 209 at 225
[29] Holdsworth *op cit* vol I 549

4. THE MEDIEVAL CODES

The maritime laws of the middle ages were contained in bodies of local customs taking their names from the ports where they operated. The Roles [30]of Oleron was adopted by the seaport towns of Normandy and Brittany from where it was transplanted to Damme, Bruges and to England. Such was the repute of Oleron that it attracted foreign litigants to its court. [31] The early medieval codes followed the Greco-Roman pattern of compiling, editing and publishing pre-existing practice. [32]

The Roles of Oleron was drawn up on the *il d' oleron* an island on the Atlantic Coast of France and the centre of a flourishing wine trade during 10th and 11th centuries. It appears to have been the product of the court of Eleanor of Aquitaine, Duchess of Guienne, the wife of Henry II and mother Richard I.[33] The code continues to have relevance and was cited as recently as 1991 in the USA.[34]

The Hanseatic towns had a code of their own which borrowed heavily from the Roles of Oleron.[35] The body of customary sea laws enforced in the Mediterranean was known as the *Consolato del Mare*. It was probably drawn up in the 15th century for the use of the consuls of the sea at Barcelona from older collections of the customs of seaport towns within the Kingdom of Aragon. The *Consolato* spread from Barcelona to Valencia and then to Sicily and Italy. It was translated into Castillian, Italian, French, Latin, Dutch and German.[36]

Two codes originated in the Baltic, the Van Lubeck and Wisby codes[37], the latter being more important. Wisby was the centre of Baltic trade and was situated on the Island of Gotland in the Baltic Sea. A major portion of the 'Waterechte of Wisbuy' appears to be a direct translation of the Roles of Oleron into Swedish. [38] The laws of *Oleron*, the *Consolato del Mare* and the maritime laws of Wisby became the leading maritime codes of Europe.

[30] Roles, French for catalogue
[31] Holdsworth *op cit* vol I 527
[32] Cumming *op cit*
[33] Cumming *op cit*
[34] Bach v Trident Steamship Co 920 F.2 d 322 at 328
[35] Cumming *op cit*
[36] Cumming *op cit*
[37] also spelled "Wisbuy" and "Visby"
[38] Cumming *op cit*

The early medieval codes followed the Greco-Roman pattern of compiling, editing and publishing pre-existing practice.[39] The European tradition of codification was continued in English admiralty. Its earliest records were collected in a Black Book similar to the Red and Black Books of the Exchequer and other books compiled by the clerical staff of the governing authorities of the larger boroughs. The Black Book of the admiralty was printed in the Rolls series under the editorship of Sir Travers Twiss.[40] It was probably compiled by an official of the admiralty at some period in the reign of Henry VI and it contains a copy of the Roles of Oleron.[41] It contains an unfinished tract on the '*ordo judiciorum*' the author of which 'was evidently a civilian of the school of Bologna'.[42] This insertion in the Black Book illustrates the fact that the new court of admiralty from first looked for its models not to the common law, but to the civil law.

5. THE COMMERCIAL COURTS

The law merchant in the England of primitive times comprised of both maritime and commercial law and an intimate relationship existed between the two branches. Both applied peculiarly to the merchants who formed, in the middle ages, a class distinct from the rest of the community. Both laws differed from the common law and both had in the middle ages an international character.[43] 'The maritime law is not the law of a particular country, but the general law of nations'.[44] ' The law of merchants is *jus gentium* and the judges are bound to take notice of it.[45] These early statements would later be qualified as English law took on its own distinctive character.

The Black Book of admiralty has been used as a source for the proposition that in addition to maritime codes, the centres of Oleron, Barcelona and Wisby all possessed codes dealing with commercial law.[46] In England similar bodies of commercial law are contained in the White Book of London, the Red Book of Bristol and Domesday Book of Ipswich.[47] The maritime and commercial law of the middle ages developed in similar surroundings and governed the relations of persons engaged in trade. It was enforced by similar tribunals and the relationship between commercial law and maritime law in the continental countries was so close that fusion occurred. In France, maritime and commercial law together form one *code de' commerce*. In England, however, the

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[39] Cumming *op cit*
[40] Holdsworth *op cit* vol v 125
[41] Holdsworth *op cit* vol v 125
[42] Holdsworth *op cit* vol v 126
[43] Holdsworth *op cit* vol I 526
[44] per Lord Mansfield, *Luke v Lyde* (1759) Burr. 887 (cited in Holdsworth *op cit* vol I 526
[45] *Mogadara* v *Holt* (1691), Shower *318* -cited in Holdsworth *op cit* vol I 526
[46] Holdsworth *op cit* vol I 529
[47] Holdsworth *op cit* vol I 529

jealously of the common law courts confined the court of admiralty to maritime causes. At the same time, the common law courts appropriated to themselves jurisdiction over commercial causes. 'In the end they assimilated what they had succeeded in appropriating and constructed our modern system of commercial law'.[48]

The commercial courts in England were either the courts of Fairs and Boroughs or the courts of the Staple. In the Anglo-Saxon period commerce had been practically confined to Fairs held in 'Burhs', strong places protected by the king's peace. In return for this protection the kings took a toll. Later the right to hold a fair and to take its tolls became a franchise disposed of by the King to his nobles. As in the case of other franchises the right to hold a court was an incident. [49] With a view to the better organization of foreign trade and the more convenient collection of customs, certain towns, known as the 'Staple' towns became identified. It was only in those towns that dealings could take place in the more important articles of commerce such as wool, leather, lead and tin (thus 'Staples').[50] These administered and by administering helped create the law merchant. They provide a further illustration of the fragmentary and haphazard development of the English law.

The local market courts in the Staple towns employed the jury system. The juries consisted of six men; two Englishmen, two representatives of the Hanse Merchants and two representatives of the importers (usually Flanders or Lombardy). The law applied in these courts was a mixture of English common law and continental (usually Hanseatic) law. [51] Because of the element of foreign trade, the law merchant necessarily had a cosmopolitan character. It was acknowledged to be different from the common law and of its nature and operation the common law courts knew very little. [52] To illustrate: in Edward II's reign a dispute on a question of law arising at the fair of St. Ives was brought to the court of the King's Bench: twelve merchants from London, Winchester, Lincoln and Northampton were summoned to give evidence as to the law. [53]

6. THE ATTACK ON ADMIRALTY BY COMMON LAW COURTS

During the reign of Elizabeth I, daughter of Henry VIII, the common law courts began the attack upon the Chancery, Court of Equity and the Council, the Star Chamber. Having

[48] Holdsworth *op cit* vol I 530

[49] Holdsworth *op cit* vol I 536

[50] Holdsworth *op cit* vol I 542

[51] Cumming *op cit* 222

[52] Holdsworth *op cit* vol I 548

[53] Holdsworth *op cit* vol I 543 citing Select Pleas in Manorial Courts – Selden Society

done so it was not to be expected that they would allow growth of the jurisdiction of the admiralty. [54]

To combat the jurisdiction of the admiralty court, common law courts had recourse to writs of *supersedeas, certiorari* and of prohibition. A writ of *supersedeas* was a writ directed to an officer, commanding that officer to desist from enforcing the execution of another writ which was about to be executed. The procedure involved was similar to that of a modern stay of proceedings designed to suspend the enforcement of a judgment. [55] A writ of *certiorari* was a writ issued by a superior to an inferior court requiring the latter to produce a record of a particular case. The writ was issued to allow the issuing court to examine the proceedings of the lower court to determine any irregularities. It was filed for the purpose of removing a suit pending in an inferior court to the Court of Chancery on account of some alleged irregularity.[56] A writ of prohibition was simply a written order to refrain from performing a specified act. Writs of prohibition were the most effective instruments of attack which the common law courts possessed.[57]

Earlier prohibitions were all founded upon the exercise by the admiralty of jurisdiction within the body of a county. The common law had not in the past claimed jurisdiction over contracts made abroad but this jurisdiction came to be coveted by the common law courts. Pretending that foreign contracts or offences were made or committed in England, the common law courts assumed jurisdiction and thus by a 'new and strange poetical fiction' and by the help of 'imaginary sign posts in Cheapside', they endeavoured to capture jurisdiction over the growing commercial business of the country.[58] Despite the fact that the admiralty process was more speedy; its laws more suitable for dealing with the cases of merchants and mariners; its judges being civilians, more capable of understanding contracts made abroad with reference to the civil law and preferred by the merchants, the encroachment of the common law courts continued unabated.[59] By the end of the great rebellion [60] the common law had gained supremacy. In 1669 to 1670 a bill was introduced into the House of Lords proposing to extend admiralty jurisdiction to charterparties, necessaries and navigation of navigable rivers below the bridges. In spite of support from the merchants of London and a convincing argument by Sir Leoline Jenkins, the bill failed to pass.[61] This victory was prejudicial both to the litigant and the development of the commercial law: 'many points of maritime law that were afterwards

[54] Holdsworth *op cit* vol I 553
[55] Cumming *op cit* 255
[56] Cumming *op cit* 252
[57] Holdsworth *op cit* vol I 553
[58] Holdsworth *op cit* vol I 554
[59] Holdsworth *op cit* vol I 555
[60] *circa* 1649
[61] Holdsworth *op cit* vol I 557

painfully elaborated by the common lawyers had for at least a century been familiar to the civilians'. [62]

By the late 19th Century the law applied in Admiralty had lost its distinct international character:

> The first question is, what is the law which is to be administered in the English Court of Admiralty; and whether it is English law, or as it is called common maritime law - that is, the law of all maritime nations. There is no doubt as to that question. The English court of admiralty is authorized to act according to English law and the law administered in that court is English Maritime law. The law administered in another country is the law of that particular country. With regard to many propositions the maritime law is the same, and in that sense is common maritime law. But the law administered in the admiralty court in England is not the ordinary municipal law, but it is law which that court, either by Act of Parliament, or by reiterated decisions of principles has adopted as the English Maritime law. There is no doubt as to that, and it is what has been promulgated in the Admiralty Court ever since the time of Lord Stowell and Dr Lushington. [63]

In another leading case, this point was made even more emphatically:

> The first point raised is, whence is the original or common law jurisdiction of the high court of admiralty of England to be ascertained? The answer is, From the continuous practice and the judgments of the great judges who have presided in the admiralty court and from the judgments of the court at Westminster ... Neither the laws of the Rhodians nor Oleron, nor Wisby, nor the Hansa towns are of themselves any part of the admiralty law of England. It was attempted by one of the counsel for respondents to say that the laws of Oleron were to be considered as part of the law of England. To anyone who reads some of their strange enactments - as for instance in the laws of Oleron: 'if a pilot through ignorance causes a ship to miscarry, he shall make full satisfaction or lose his head'; and "if the master or one of the mariners or one of the merchants cut off his head they shall not be bound to answer for it'; 'If the Lord of any place be so barbarous as to maintain (wreckers) he shall be fastened to a post or stake in the midst of his own mansion house which being fired at the four corners thereof, all shall be burnt together' - it must be ridiculous to suggest that they are part of English law. I admit they contain many valuable principles and statements of marine practice which together with the principles found in the Digest and in the French and other ordinances which were used by judges of the English court of admiralty when they were moulding and reducing to form the principles and practice of their court. ... the chief source from which the jurisdiction of the admiralty court is to be ascertained, the decisions of the English courts.[64]

7. PRACTICE IN THE COURTS OF ADMIRALTY

By the end of the 13th century, civil and canon law were taught separately from common law. The system which grew up around the Inns of Court [65] obviated the need for university education. However, civil and canon law continued to be taught at Oxford and Cambridge as they had been since the 12th century. Although Henry VIII abolished the teaching of canon law in England as a result of his quarrel with Rome he established

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[62] Select Pleas of the Admiralty [Selden Society] cited by Holdsworth *op cit* vol I 558
[63] per Brett L.J. *The Gaetano é Maria* (1882) Law Journal Reports 67 at 70
[64] Per Lord Esher M.R in the *Gas Float Whitton No. 2* (1896) Law Journal Reports 17 at 25 - 27
[65] chambers of the common lawyers

chairs in civil law at both Oxford and Cambridge. In 1547 a commission was established to encourage the study of civil law.[66]

During the 16th and 17th centuries the civil law practitioners (civilians) developed areas of law of which common law practitioners knew very little. Insurance, bills of exchange, banking, shipping and documentation of trade were all products of the civilians.[67] The civilians formed a rival group similar to the Inns of Court called the Court of Arches. Property and buildings were acquired and by 1565 the complex was known as the Doctors' Commons. Unlike the Inns of Court, an academic education at Oxford or Cambridge was a prerequisite for the practice in the Doctors' Commons.

By the time of the English civil war during the 17th century, there was a well organized and highly trained bench and bar in the admiralty courts. The practitioners were proficient in maritime and as well as commercial law. A single judge sat as the high court of admiralty, dispensing with what was regarded as the jewel of the common law system, the jury. The proceedings and records of the court were in Latin, following the practice of the Ecclesiastical Courts. The common law courts used a 'barbarous' form of French until the time of the Tudors.[68]

Lord Coke, considered by some to be greatest common lawyer of England during his lifetime and the prosecutor of Guy Fawkes, leader of the Catholic inspired Gunpowder Plot was the champion of the common law courts in their struggle against the admiralty court. In addition to the venal motives of the common lawyers the admiralty court was considered tainted by Romanism and the Court of Arches aroused hostility for its 'popish' origins and practices. [69]

8. THE SUPREME COURT OF JUDICATURE ACT 1873

The Supreme Court of Judicature Act 1873 was the watershed between ancient and modern admiralty:

> 3. From and after the time appointed for the commencement of this Act [2 November 1874], the Several courts hereinafter mentioned, (that is to say), the High Court of Chancery of England, the court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

[66] Cumming *op cit* 226
[67] Cumming *op cit* 227
[68] Cumming *op cit* 231
[69] Cumming citing Blackstone *op cit* 240

The Act was preceded by the Judicature Commission which in 1869 recommended the amalgamation of admiralty and common law courts to 'eliminate non-suits and take advantage of the more attractive remedies of admiralty. [70]

The Supreme Court of Judicature Act 1873, contained provisions to resolve conflicts in substantive law between the various courts fused into 'one Supreme Court of Judicature in England'. One of these, section 25 (9) read as follows:

> in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Another, section 25 (11) read:

> generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

It is significant that in the 1873 Act as well as in the Supreme Court Act of 1981, currently regulating admiralty jurisdiction in the United Kingdom, there is no general supremacy clause *vis a vis* admiralty jurisdiction and common law jurisdiction. It may be assumed that the framers of the 1873 Act perceived no material differences other than in the area of collisions of two ships with both at fault and intended the two branches to form one unified whole. This was the view of Brett LJ when he held, the question of collision raised in the suit in this country must be tried according to the maritime law of this country, which is part of the common law as administered in England.'[71] With regard to the rules of equity, on the other hand section 49 of the Supreme Court Act 1981 provides that wherever there is a conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.[72]

[70] First Report of the Commission on the Judicature, British Parliamentary Papers, 1868 - 1874, 7, 9; O'Hare (1979) 108 – 109 cited in the Report on Civil Admiralty Jurisdiction by the Australian Law Reform Commission (ALRC 33) §2 ft 29

[71] *Chartered Mercantile Bank of India v Netherlands Steam Navigation Company Limited*) (1883) 52 Law Journal Reports 220. Today, collisions at sea are governed by the Collision Regulations promulgated under the Merchant Shipping Act of 1894 and amended from time to time.

[72] a mirror provision of section 25(11) of the 1873 Act

9. THE SUBSTANTIVE NATURE OF MODERN ENGLISH ADMIRALTY

The significance of Admiralty Jurisdiction in England has become mainly procedural. Already in 1925, the following was said 'What distinguished the admiralty jurisdiction from the other civil jurisdiction of the High Court was that it was excercisable in proceedings *in rem'*. [73]

With regard to the rules of substantive law, perhaps the two most significant distinguishing features of admiralty jurisdiction as it was before the watershed of 1875 were the related doctrines of the personification of the ship and the maritime lien. In England, the first has been jettisoned and the second neatly divided into its substantive and procedural constituent parts.

The doctrine of a maritime lien originated in the civil law and was first clearly enunciated in the *Bold Buccleugh.*[74] This was a case decided by the Privy Council at a time when the English Court of Admiralty regarded itself as applying not so much English law as the 'general law of sea of the whole of Europe'. [75] In the *Halcyon Isle*, the majority divided the maritime lien into its procedural and substantive law aspects. The substantive law component ie. the principle that a maritime lien survives a transfer of ownership and can be enforced against third parties was held not to affect its procedural component affecting its ranking with competing claims. Referring to *The Tervaete,*[76] Lord Diplock stated as follows: 'the reasoning ... is consistent only with the characterization of a maritime lien in English law as involving rights that are procedural or remedial only and accordingly a question whether a particular class of claim gives rise to a maritime lien or not as being one to be determined by English law as the *lex fori*'.[77] (The fact that the same conflicts of law rules were held to apply traditional maritime claims and other 'common law' matters is a further illustration of the seamless integration of admiralty jurisdiction and the common law).

The personification theory which attributed fictitious personality to a ship was denied by the President of the new (after 1875) Probate, Divorce and Admiralty Division, Sir

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[73] The Jade, Eschersheim [1976] All ER 920 at 924

[74] [1851] 7 Moore P.C. 267

[75] per Lord Diplock in the *Halcyon Isle* [1980] 2 Lloyd's Law Rep 325 at 328

[76] [1922] P 259

[77] at 331

Francis Jeune, a common lawyer. [78] The suit *in rem* was said to be merely a device used by the Admiralty Courts to escape prohibition. The Common law courts, possessing no jurisdiction *in rem* were powerless to issue writs of prohibition in cases where inanimate objects were cited as defendants.

> Judges, steeped in admiralty history with its civilian roots, tended to be more sympathetic to the personification theory than judges trained in the common law. At appellate level, common law judges tended to take the robust view that a ship is an inanimate thing, incapable of making contracts and committing torts, and devoid of legal personality. In authorative judgments, common law judges eschewed the mystique of the personification theory. [79]

Despite a clear trend towards the fusion of principles between admiralty and common law, some obscurity remains as may be seen in the conflicting opinions in the *Tojo Maru* among the eminent judges in both the Court of Appeal and the House of Lords. [80] *Quot homines tot sententiae.* Lord Reid stated: 'the maritime of England has a long history. It differed in many respects from the common law; statutory amendment of the common law has removed some of these differences but by no means all.'[81] In the Court of Appeal in the same matter Lord Denning MR stated, 'But this case is not to be determined by the common law of England. It is to be determined by the maritime law of the world which the English court of admiralty has done so much to form'. [82] Criticizing certain old decisions against the proposition he was contending for, Denning MR stated: ' I cannot accept those *obiter dicta.* The Court of Appeal had their eyes too firmly fixed on the English common law; whereas they should have had regard to the English maritime law, which is quite different'.[83] Salomon LJ's view was: 'I agree with the Master of the Rolls that maritime law differs in many striking respects from the common law and that we must not allow ourselves to be influenced by the latter'.[84] Lord Diplock, on the other hand, in his customary lucid expression stated:

> Outside the special field 'prize' in times of hostilities there is no 'maritime law of the world'. As distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject-matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different States relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens on land. But the fact that the consequences of applying to the same facts the internal municipal laws of different Sovereign States would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular Sovereign State. The reference by Lord Denning MR to the 'maritime law of the world' cannot, I think, have been intended to do more than to point

[78] The Dictator [1892] P. 304

[79] per Lord Steyn in The *Indian Grace* [1998] 1 Lloyd's Law Rep 1 at 7

[80] The *Tojo Maru* [1969] 2 Lloyd's Law Rep 193; [1971] 1 All ER 1110

[81] at 1114

[82] at 198

[83] at 201

[84] at 205

> in vivid fashion to the distinction between the law which before 1875 had been administered in the Court of Admiralty and that which had been administered in the courts of common law (and equity)... It is this supposed continuing dichotomy between two rival systems of law said to be still applicable in the Supreme Court of Judicature which underlines the ratio *decidendi* of all the judgments in the Court of Appeal. It has, in my view led to error. It is well to remind ourselves in this, as in any other branch of law, that prior to the Supreme Court of Judicature Act 1875, a development of what then became a comprehensive system of English law administered by one High Court of general jurisdiction, had been accomplished by separate courts of common law, of Chancery, of Admiralty, and Ecclesiastical Courts. But it would be wrong to suppose that, even while the regime of separate jurisdictions continued, the developments in the separate branches of English law were unrelated to one another. Particularly after the Admiralty Court Act 1840, there were many causes of action in which the Court of Admiralty and courts of common law had concurrent jurisdiction. Even when the Court of Admiralty continued until 1875 to have exclusive jurisdiction, as in salvage claims, one finds developments in common concepts in parallel with those taking place in courts of common law. No court is an island in itself. A cross-fertilisation of ideas between the Court of Admiralty and the courts of common law may have been slower than between the courts of common law and chancery, because the practitioners in the Court of Admiralty were civilians and had not necessarily shared the common training of members of the Bar; but it is hardly to be supposed that Lord Stowell, a fellow member of the Middle Temple with his brother Lord Eldon, was insulated from the contemporaneous developments in equity and in the common law. To mention Lord Stowell is in itself sufficient to remind oneself that the law of the sea administered by the Court of Admiralty underwent a transformation between his appointment to it in 1798 and the merger of the court in the High Court of Justice in 1875. The development of English law relating to what happens on the sea did not stop then. It has not remained alone immune to the gradual changes in concepts in the general law relating to consensual obligations and to man's duty towards his neighbour which has taken place in the last hundred years. ... The proper approach to this question in the year 1971, as it seems to me, is to consider what would be the salvage contractor's liability under the general English law of contract, and then examine what, if any, differences flow, either in principle or on the authority of previous decisions, from the special characteristics of salvage services. [85]

Lord Diplock's views may be regarded as authorative and have been referred to as the correct statement of the law in *Halsbury's Laws of England.* [86]

Some small differences in substantive law continue to be troublesome. The House of Lords recognized the difference between salvage and volunteer rescue on dry land in *The Goring.*[87] The court of first instance found that including salvage under the list of maritime claims in section 20 of the Supreme Court Act 1981 without qualification, the legislature had intended to do away with the ancient restriction of salvage to tidal waters. The facts were that salvage occurred on the inland waters of the Thames above Reading Bridge. In the Court of Appeal, one member agreed with the court of first instance. Pointing to the difference between the common law applying to volunteer rescue and the law of salvage, the two remaining members of the Court of Appeal held that to extend admiralty jurisdiction to inland waters would be tantamount to reducing the field of operation of common law a drastic step which required express statutory language. A unanimous House of Lords confirmed the finding of the Court of Appeal. The outcome is

[85] at 1133 - 1134

[86] Fourth Edition, re-issue, (Butterworths 1989) vol I (1) § 303

[87] [1987] 2 Lloyds Law Rep 15, [1988] 1 Lloyds Law Rep 397

unsatisfactory and the problem lies in the irrational difference in approach to rescue work at sea and dry land. Why should volunteers at sea be encouraged but not on land?

The scheme of admiralty jurisdiction in Supreme Court Act, 1981 is the provision of a number of defined claims to which 'admiralty jurisdiction' applies. These claims are supplemented by a catch-all provision adding 'any other admiralty jurisdiction which it (the High Court) had immediately prior to the commencement of this Act'.[88] The purpose of the list is simply to specify those claims amenable to *in rem* procedures and it may be safely asserted that the statutory provisions of the Supreme Court Act, 1981, are by and large, of procedural significance only.

The fact that *in rem* procedures are only available to certain defined claims has inevitably given rise to disputes as to the exact parameters of those claims. Litigants have attempted, as is their wont, to stretch the limits to avail themselves of the advantages of *in rem* procedures. [89]

Modern English admiralty jurisdiction includes claims relating to aircraft and any other hypothecated property.[90] This innovation continues the trend towards uniformity of principle. The mystique of the sea is giving way to a recognition that the underlying principle of *in rem* procedures is to provide effective remedies against defendants scattered all over the globe by attaching mobile and elusive assets.

10. EARLY AMERICAN ADMIRALTY LAW

American law provides an interesting contrast with English law. Freed from the complication of a rival system (in the case of South Africa, Roman-Dutch law), 18th century English law was transplanted unhindered into American soil. Because of the transplantation perhaps it has lacked the freedom of English law to evolve entirely naturally and many of the ancient and fortuitous divisions which once existed in England remain or have shown a greater resistance to the forces of change.

Again, the foundations or to use the agricultural metaphor, the roots, will be examined.

In 1620, the Mayflower carrying English pilgrims arrived in North Virginia which they renamed, significantly, 'New England'. They established a colony at Plymouth,

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[88] Section 20 (1)(c)

[89] see the *Jade, the Eschersheim* [1976] 1 All ER 920 and *Gatoil International Inc. v Arkwright-Boston Manufacturers Mutual Insurance Co. & Others* [1985] 1 All ER 129

[90] Supreme Court Act, 1981, sections 20(7), 21(3) and 21(5)

Massachusetts. Under the King's commission, Colonial Vice-Admiralty courts were created. The letters patent granted to the governors of the colonies were 'very full, granting in language so clear that it cannot be misunderstood, admiralty jurisdiction as wide and beneficial as the most zealous supporters of the English admiralty ever claimed for it'. [91]

The origin of admiralty jurisdiction in America has been described as follows:

> While nothing of much consequence to its commercial jurisdiction happened to the High Court of Admiralty (in England) in the 1700's, it was in 1776 that a loosely stuck-together collection of part of the British North American Provinces declared themselves to be independent of the King. ... Since they (the States) had commenced a major naval war that kept enlarging, the new American States had to have maritime law at once, together with a system of courts to apply it. What was available for model? In America, there was a collection of quite different systems of courts, all of which enforced English law more than any other kind. The Spanish law was out of the question. The French law, in the sense of the Codes, was not yet invented. The English law? Well it would have to do for the time being ... And the English admiralty jurisdiction? One wonders what was known of it in 1776 in America. Admiralty reports were not yet published and no systematic treatise on admiralty jurisdiction would appear until the turn of the 1800's'.[92]

Apart from the absence of the Roman-Dutch complication, the American constitutional model was, from the outset, significantly different to that of South Africa. The Constitution of the United States provides that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction' (US Constitution article III §2). In section 9 of the Judiciary Act of 1789, Congress implemented the constitutional grant as follows: '... the district courts ... shall also have exclusive, original cognizance of all civil cases of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent'. [93]

The phrase, 'all cases of admiralty and maritime jurisdiction' found in both the constitution and the Judiciary Act of 1789 is obscure. Material on the genesis of this clause in the deliberations of the convention is sparse. [94]

> The constitutional referents (if understood then) were soon forgotten; and the draftsmen of the Judiciary Act employed the same phrase and left the same doubts. On reflection, it would have been silly for the United States to adopt exactly the same commercial jurisdiction (virtually none) as the High Court of Admiralty (in England); The framers must have intended no less than the vice admiralty courts had [95]

[91] Friedell Benedict on Admiralty 7th Edition §65

[92] Healy and Sharpe *Cases and Materials on Admiralty* 7

[93] cited in Gilmore and Black *The Law of Admiralty* Second Edition 19

[94] Putnam 'How the Federal Courts were given Admiralty Jurisdiction 10 Cornell Law Quarterly 460. - cited by Gilmore and Black, *op cit* 18 '

[95] Healy and Sharpe *op cit* 8

There was never any doubt that the meaning of the phrase had to be interpreted with reference to the law of England. In an early judgment on the interpretation of the constitutional grant, the following was said:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'. But by what criterion are we to ascertain the precise limits of the law thus adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treaties, or only the limited and restricted system which was received in England, or lastly such modification of both these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity when it speaks of 'cases in law and equity' or of 'suits at common law without defining those terms, assuming them to be known and understood.[96]

From the beginning, it was clearly felt by American courts that although the system had been adopted from England, what it had become was American law. The following quotations by Bradley J in *The Lottawanna* bear this out:

> But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the State laws; but it is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes into contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed – as, in justice, it should be. No one doubts that every nation adopts its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial word, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and ground work of all their maritime regulations. But no nation regards itself precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general

[96] *The Lottawanna* 88 US (21 Wall) 558 cited in Healy and Sharpe op cit *21*.

> maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people in each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit ... To ascertain, therefore what the maritime law of this country is, it is not enough to read the French, German, Italian and other works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us we must resort to the principles by which they have been governed. But we must always remember that the court cannot make the law, it can only declare it. [97]

Because of the supremacy of the Constitution in the United States, Congress can only legislate within its four corners. Admiralty jurisdiction was recognized as having a defined content (although its exact limits were always unclear) and it was always understood that Congress would be limited in its law making to confine itself within the bounds of 'admiralty and maritime jurisdiction:

> Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to a Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered without being able to fix with precision its definite boundaries; but certainly no State law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government.[98]

While it was held in the *St. Lawrence* that the power of Congress to legislate in respect of admiralty and maritime jurisdiction was bounded by the nature and extent of such jurisdiction as judicially defined, Congress retained the residual power to modify and adjust the rules or laws applying to such jurisdiction.

In 1854 the Supreme Court held that a mortgage on a ship was not a maritime contract and therefore not within the admiralty jurisdiction.[99] The effect of this decision was that the mortgagees were preceded in preference by all maritime liens thereby reducing the value of their security. To encourage investment in shipping, Congress passed the Ship Mortgage Act in 1920 conferring lien status and preferential ranking to ships'

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[97] Healy and Sharpe *op cit* 19 to 22

[98] per Chief Justice Taney in The *St. Lawrence* 66 US 526

[99] *Bogart v The John Jay* 58 US (17 How 399) cited in Gilmore and Black op cit 688

mortgages.[100] The materialmen whose liens were subordinated to a properly recorded prior mortgage opposed the Act and several cases in the lower courts attacked the constitutionality of the Ship Mortgage Act as falling outside admiralty and maritime jurisdiction. The matter was finally decided by the Supreme Court in 1934. Chief Justice Hughes wrote what has been referred to as a 'classical exposition of the roles of Court and Congress in the admiralty field':

> 'The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States. When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in congress to modify or supplement it as experience or changing conditions might require'. The congress thus has paramount power to determine maritime law which shall prevail throughout the country ... But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.[101]

The most famous attempt to define admiralty and maritime jurisdiction is by Story J in *De Lovio v Boit et al.*[102] His analysis of the state of English admiralty was as follows:

> 1.That the jurisdiction of the admiralty, until the statutes of Richard II, extended to all maritime contracts whether executed at home or abroad and to all torts, injuries, and offences, on the high seas, and in ports and havens, as far as the ebb and flow of the tide. 2.That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea. 3.That this interpretation is indefensible, upon principle, and the decisions founded upon it are inconsistent and contradictory. 4.That the interpretation of the same statutes by the admiralty does not abridge any of its ancient jurisdiction, but leaves it to cognizance of all maritime contracts, and all torts, injuries and offences, upon the high seas and in ports as far as the tide ebbs and flows. 5.That this is the true limit, which upon principle would seem to belong to the admiralty; that it is consistent with the language and intent of the statute; and is supported by analogous reasoning and public convenience and a very considerable weight of authority. [103]

In a landmark judgment, encompassing a vast number of reported decisions emanating from the King's bench and the court of Common Pleas as well as many other ancient sources, he asked

> Are we to be governed by the doctrines of the Common law, or of Admiralty? I am not aware of any superior sanctity in the decisions at Common law upon the subject of the jurisdiction of other courts (to which at least they bore no goodwill), which should entitle them to outweigh the very able and the learned decisions of the great civilians of the Admiralty ... it is a very material consideration that, at the immigration of our ancestors, the contest between the courts of common law and the admiralty was at its height.[104]

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[100] Gilmore and Black *op cit* 692

[101] *Detroit Trust Co v The Thomas Barlum* 293 US 21 cited in Gilmore and Black op cit 693, 694

[102] 7 Fed.cas.418

[103] at 441

[104] at 442

Having decided what English admiralty jurisdiction should have been and not what it was in fact, Story J reached the following conclusion:

> The language of the Constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish with slight local differences, over all Europe; that jurisdiction, which, under the names of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato Del Mare* and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind .... Of this great system of maritime law it may truly be said, *'non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex, et sempiterna et immortalis, continebit*[105]

The division and uncertainty of the judiciary in both England and the United States regarding the definition of a separate maritime jurisdiction is perhaps inevitable given it was founded upon the historical accident of the existence of a separate admiralty court in England, rather than principle. The complexity and inter-relatedness of the different levels of human existence, particularly commercial activity, make it impossible to isolate a separate sphere of law as has been attempted with admiralty and maritime jurisdiction.

11. MODERN AMERICAN ADMIRALTY

As has been suggested, the separate admiralty jurisdiction in England has generally become submerged and has all but disappeared from sight. Not so in America:

> With admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. Drawn from State and Federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. This court has developed a body of maritime tort principles, and is now asked to incorporate products liability concepts, long a part of the common law torts, into the general maritime law.[106]

Historically, legislatures of individual States have passed competing legislation encroaching on the exclusive jurisdiction. Given the uncertain content of maritime jurisdiction, a jumble of statutes and decisions have come into being: 'American admiralty jurisdiction has historically been such a confusing patchwork that anyone seeking to make sense from it has been advised to treat it as one would list of irregular verbs. It is to be memorized but not to be understood on any principled basis.' [107] Just a few of the modern paradoxes are the following: contracts to build or sell a vessel are

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[105] at 443

[106] *East River SS v Delaval Turbine* 1986 AMC 2027 at 2032 – 2033 references omitted

[107] Parè 'Admiralty Jurisdiction at the Millennium' *24 Tulane Maritime Law Journal 187*

outside admiralty jurisdiction but products-liability claims involving the construction of vessels are within.[108] Deriving their procedural powers from the Court of the Lord High Admiral, Federal Courts have been held to have no power to issue certain forms of equitable relief such as injunctions.[109]

Complex factual situations have led to strained and artificial conclusions and recent decisions illustrate the perennial difficulty of categorizing sets of facts either within or outside of admiralty jurisdiction.

In 1866 it was held that 'every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance'[110] In 1972, arguing that location was the determinative factor, the court was asked to find that property damage to a jet aircraft that struck a flock of seagulls upon takeoff and sank in the navigable waters of Lake Erie was within the admiralty jurisdiction of the district court.[111] The Supreme Court held that a mechanical application of the locality rule as laid down in the *Plymouth* was incorrect. It could have decided the matter on the simple point that no vessel was involved but instead a general test was laid down. The touchstone was: 'a significant relationship to traditional maritime activity'[112]. On this test the claim was held not to fall within admiralty jurisdiction.

In *Foremost Ins. Co v Richardson*[113] the court was called upon to decide whether a tort involving a collision between two pleasure craft on navigable waters fell within admiralty jurisdiction. On the traditional locality test it clearly did. On the new test laid down in *Executive Jet* it did not. In true Procrustean fashion[114] the Supreme Court held that the collision between the pleasure craft did indeed fall within the 'significant relationship to traditional maritime activity' test.

Pointing out that the primary focus of admiralty jurisdiction was the protection of maritime commerce, the court held that the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction was restricted to those individuals actually engaged in commercial maritime activity. The United States had an interest in regulating the rules of marine traffic and this was the connecting factor between the collision of the pleasure craft and maritime commerce.

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[108] Parè '*ibid*
[109] Parè *ibid*
[110] *The Plymouth* 70 US 20 at 26
[111] *Executive Jet Aviation Inc. v the City of Cleveland,* 409 US 249
[112] at 268
[113] *1982 AMC 2253*
[114] Procrustes was a mythical innkeeper who either stretched or severed the limbs of his guests to make them fit his beds

Four members of the court of nine dissented. 'In my view there is no substantial federal interest that justifies a rule extending admiralty jurisdiction to the edge of absurdity'.[115]

The majority in *Foremost* departed from an earlier Supreme Court decision in *Crosson v Vance* where the following had been held:

> The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in competition with foreign shipping and to provide a uniform body of law for the governance of domestic and foreign shipping engaged in the movement of commercial vehicles from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relationship to that kind of concern than the operation of the same kind of craft on artificial inland lakes which are not navigable waters.[116]

Following upon the trend set in *Foremost*, the court held in *Sisson v Ruby*[117] that the claim against a pleasure yacht docked at a marina on Lake Michigan, a navigable waterway, which caused a fire to neighbouring vessels and the marina was subject to admiralty jurisdiction. Because the fire had a potentially disruptive impact on maritime commerce in that it could spread to nearby commercial vessels or make the marina inaccessible to such vessels it was held that the necessary 'significant relationship with maritime commerce' existed.[118] Again, there was strong dissent. The value of the dissenting judgment is in its striving for a workable principle which could achieve consistent results. The majority referred to this quest has a 'demand for tidy rules'. [119]

> What today's opinion achieves for admiralty torts is reminiscent of the state of the law with respect to admiralty contracts. A general test of course must be whether the contract 'touches rights and duties appertaining to commerce and navigation' (reference omitted). But instead of adopting, for contracts as we had (until today) for torts, a general rule that matters directly related to vessels were covered, we sought to draw the line more finely, case by case. That body of law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself 'maritime' has brought ridicule upon the enterprise ... and the results obtained therefrom, are so humorous that they deserve insertion in the laws of Gerolstein'[120]

On the narrow location test an injury had to be wholly sustained on navigable waters and if for instance a ship collided with a pier which was regarded as an extension of the land, no admiralty jurisdiction existed.[121] In 1948 Congress enacted the Extension of Admiralty Jurisdiction Act.[122] By virtue of that Act, admiralty and maritime jurisdiction was

[115] per Justice Powell at 2261

[116] 1973 AMC 1895 at 1896

[117] 1990 AMC 1801

[118] The test formulated in *Executive Jet* was refined in *Foremost* to require a significant relationship to maritime commerce

[119] *Sisson v Ruby supra* 1811

[120] per Justice Scalia, Sisson v Ruby supra at 1812

[121] T*he Plymouth* 70 US 20

[122] 62 stat. 496.

extended to include all cases of damage or injury caused by a vessel on navigable waters, 'notwithstanding that such damage or injury (was) done or consummated on land'.

In 1995, the Great Lakes Dredge and Dock Company used a crane, sitting on a barge fastened to the river bottom to drive piles into the river bed above a freight tunnel running under the river into the basements of buildings in downtown Chicago Loop. The piles damaged the tunnel allowing for the ingress of water and extensive flooding of the buildings. The advantage for the defendants in invoking admiralty jurisdiction was that they could limit the substantial claims to the value of the tug and two barges involved in the operation.

The majority of the Supreme Court found that the 'significant relationship' test was satisfied.[123] If the piles had been driven from a crane stationed not on a barge fastened to the river bed but on the shore immediately adjacent, there would have been no admiralty jurisdiction and no right of limitation available to the defendants. That such a vast difference of outcome could depend on an arbitrary turn of events must raise serious doubt about the fairness of a separate admiralty jurisdiction.

The difficulty of the questions involved is reflected in the varied responses of the nine judges on the bench. Three judges took no part in the decision while two delivered a joint separate concurring judgment; another delivered a separate concurring judgment. The contrived rationale of the majority was

> As it actually turned out in this case, damaging a structure beneath the river bed could lead to a disruption in the water course itself (and) to restrictions on the navigational use of the water way during required repairs.[124]

In his separate concurring judgment (with Justice Scalia), Justice Thomas once again lamented the 'wasteful litigation over threshold jurisdictional questions'.[125]

A negative lesson for South African legislators in American maritime law is the uncertainty created by the grant of an undefined maritime jurisdiction. A positive lesson is the determination Americans have displayed to shape their own national law. Even before the framing of the American Constitution the following was said,

> There was a time when we listened to the language of her (England's) sovereign and her courts, with a partiality of veneration, as to oracle. It is past – we have assumed our

[123] *Jerome B. Grubart Inc. v Great Lakes Dredge and Dock Company et al* 1995 AMC 913.
[124] at 922
[125] at 935

station among the powers of the earth, and must attend to the voice of nations – the sentiments of society into which we have entered [126]

12. AUSTRALIAN ADMIRALTY LAW

Today, admiralty law in Australia is regulated mainly by the Admiralty Act 1988 (Cth) which came into force on 1 April 1989. The purpose of the Act was to modernize Australian Admiralty Jurisdiction which had up to then been regulated by the Colonial Courts of Admiralty Act ,1890. Although that Act extended an invitation to 'British possessions' to develop their own law, the invitation was not taken up by Australia and the maritime law stagnated. The state of admiralty jurisdiction in Australia prior to 1988 was described as 'antique, unsatisfactory and uncertain in its effect'.[127]

For whatever reason, Australian maritime lawyers (like their South African counterparts) seemed unable to summon the boldness to develop their own admiralty law. Whereas admiralty law in England continued to develop as a living system its 'possessions' remained content with what was given to them in 1890. It was held in *the Yuri Maru, the Woron* [128] that developments in England after the Act were not to apply to the 'possessions'.

Australia is a constitutional monarchy.[129] It has the identical constitutional formula for admiralty jurisdiction as the United States. Parliament may make laws conferring original jurisdiction on the High Court in any matter of 'admiralty and maritime jurisdiction'.[130] Whereas in the United States this constitutional grant was interpreted to give Congress the power to modify and extend the substantive law, Australian judges were more timorous: 'The interpretation and enforcement of admiralty and maritime law, as it is found to exist, is one thing; the alteration of that law is quite another' [131] and in similar vein, 'whatever might be the force of the reasoning of those cases, if Australia were in the same position as the United States at the time of the making of their Constitution - namely, that of a separate nation of independent sovereignty in its relation to the United Kingdom – the reasoning has no force here where the implication from imperative necessity cannot be

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[126] per Dickenson, President, *Talbot v Commanders & Owners of Three Brigs* 1US (1 Dall.) *95* cited in Friedell *op* cit §104

[127] BJ Davenport Q.C. op cit 317. Elsewhere it was described, as 'archaic and inadequate' Crawford 'The Australian Admiralty Act: project and practice' (1997) *Lloyds Maritime and Commercial Law Quarterly* 519

[128] [1927] AC 906, 915

[129] Section 61 of the Commonwealth of Australia Constitution Act provides that the executive power of the commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative

[130] section 76(iii)

[131] per Isaacs in *The SS Kalibia* [1910] HCA 77

drawn'. [132] As will be seen later, Canada's titular allegiance to the Queen did not impede the assertion of judicial or legislative independence. [133]

The Australian Law Reform Commission ("the ALRC") was set up in 1973 to advise the Australian Federal Government and Parliament on legal policy. The reform of admiralty jurisdiction was high on the commission's agenda and the Challis Professor of International law at the University of Sydney, Professor J R Crawford, was chosen as its chairman. 'The Report is not only a model of what such a report should be, but ought to be compulsory reading for anyone concerned with the jurisdiction of a court hearing maritime claims. It is based upon immaculate scholarship and sound common sense.'[134] A criticism was, however, ' ... the Report's failure to grapple fully with the fundamental questions involved in the continuation of any traditional admiralty jurisdiction'.[135]

The commission produced a number of cogent arguments to support the scrapping of a separate jurisdiction dealing only with ships:

> As exercised in comparable overseas countries, modern admiralty jurisdiction appears both overinclusive and underinclusive. For example, a local resident drives a truck down to a local fishing port, goes fishing for a day in a trawler, returns, loads the catch into the truck and drives to market. If the trawler collides with someone or something, the very plaintiff-orientated remedy of proceedings *in rem* will be available. If it is the truck which is involved in the collision, the only remedy will be to proceed *in personam.* It is difficult to defend this on rational grounds. Why should locally-owned ships and their owners not be subject to the same jurisdictional principles as other locally-owned forms of transport? Equally, admiralty can be underinclusive because it provides remedies in respect of maritime claims. The local resident who deals with foreign-owned aircraft, or, indeed with any foreign party who is only temporarily within the jurisdiction, is denied the ability to proceed *in rem* or by way of pre-judgment attachment (subject to the possible availability of a Mareva injunction) .... it might be more appropriate to select as a focus foreign defendants, or, perhaps more precisely, foreign defendants whose assets are potentially elusive.[136]

In addition, the ALRC mentions such factors as the esoteric nature of admiralty jurisdiction; that many civil law jurisdictions in Western Europe have no counterpart to separate admiralty and the unique remedy of the action *in rem.* It points out further that it is uncertain how long admiralty jurisdiction in England will retain its distinct characteristics as the United Kingdom moves closer to Europe.

Against the advantages of abolishing admiralty jurisdiction, the ALRC weighed only three factors: firstly, that admiralty jurisdiction provides a convenient and acceptable basis for cases to be brought before Australian courts in the area of maritime claims; secondly that

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[132] per Barton J *The SS Kalibia supra*
[133] Both countries are based on the Westminster model of Government with the British Sovereign as executive head
[134] BJ Davenport QC "*op cit* 317
[135] B J Davenport QC " *op cit* 320
[136] ALRC 33 chapter 6 §84

the commission's terms of reference pre-supposed the continued existence of a distinct jurisdiction (surely begging the question) and thirdly that the Constitution itself presupposed a separate jurisdiction.[137] As shown above, the Constitutional grant was a dead letter. The only factor with some weight is the first and even this open to doubt. Why should something continue merely because it has existed for so long?

Perhaps not surprisingly, the ALRC put forward draft legislation in almost identical terms to the United Kingdom's Supreme Court Act, 1981. The draft Bill was passed into law virtually unchanged. The Act contains a list of subjects roughly corresponding to those appearing in the 1952 Arrest Convention to which the procedures laid down in the Act apply. Significantly it does not contain the novel extension to aircraft and hypothecated goods contained in the United Kingdom Act.

That the purpose of the Act was to be procedural only can be seen from an express provision that the Act did not create any new maritime liens or other charges or any cause of action which would not have existed if the Act had not been passed. [138]

The question of admiralty jurisdiction being a separate body of laws different from the common law has hardly arisen in Australia:

> Admiralty is not (except in very limited areas such as non-contractual salvage) an exclusive jurisdiction. In each case there is a common law cause of action, with admiralty providing a procedure for the enforcement of that cause of action. .... In many cases shipping or maritime disputes are commenced in the commercial list of the relevant Supreme Court rather than in admiralty, whether for tactical reasons or simply because it does not matter whether the case is heard in admiralty or outside. Indeed the 1988 Act extended the process of assimilation between admiralty and non-admiralty actions, for example in the context of time limits for bringing proceedings.[139]

The commission had found that Australian judges needed no specific mandate in order to give due regard to international trends and to the decisions of admiralty judges in overseas jurisdictions and this recommendation was followed. It was pointed out that legislation in comparable overseas jurisdictions did not contain any equivalent provision and the opinion was expressed that there was no need for such a provision in the proposed Australian legislation.[140]

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[137] ALRC 33 Chapter 6 §85
[138] section 6, Admiralty Act, 1988
[139] Crawford *op cit* at 521
[140] ALRC 33 Chapter 13 §278

13. CANADIAN ADMIRALTY LAW

'I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from a molar to molecular motions'.[141] In the early years of English admiralty, perhaps more than in any other area of the law, judges actively shaped the law. If Australian judges have been timid in this regard, the same cannot be said of the Canadian Supreme Court.

The Canadian model is especially useful for those South African lawyers concerned with the frozen state of South African admiralty. Whereas section 6 directs South African admiralty to be concerned with two moments of time in English Law: July 1891 [142] and November 1983,[143] Canadian admiralty law is autonomous and is developing.

As in South Africa, an important step in the development of Canadian admiralty was promulgation of the Colonial Courts of Admiralty Act, 1890. Section 4 of the Canadian Admiralty Act of 1891 took up the invitation contained in section 1 of the Colonial Courts of Admiralty Act to declare the Exchequer Court of Canada as a Colonial Court of Admiralty, widening traditional admiralty jurisdiction to include non-tidal waters.[144]. *The Admiralty Act* 1891 was replaced by the *Admiralty Act* 1934. In a comprehensive adoption of English law similar to that carried out by section 6 of the AJRA, section 18(1) of the 1934 Act provided as follows:

> the jurisdiction of the court on its admiralty side shall extend to and be exercised in respect of all navigable waters, tidal and non-tidal, whether the natural navigable or artificially made so, and although such waters be within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the court in like manner and to as full an extent as such High Court.[145]

Admiralty law in Canada is today governed by the Federal Court Act [146] Section 22 (2) has a list of claims roughly corresponding with those in the Arrest Convention of 1952, preceded by a general catch-all provision to include all claims contained in Canadian Maritime Law as defined in section 2 of the Act.

'Canadian Maritime Law' is defined in section 2 of the Federal Court Act as the

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[141] per Mr Justice Holmes *Southern Pacific Co v Jensen* 244 US 205
[142] the coming into operation of the Colonial Courts of Admiralty Act 1890
[143] the coming into operation of the AJRA
[144] reproduced in Giaschi 'The expanding definition of Canadian Maritime Law' http://www.admiraltylaw.com
[145]Giaschi *op cit*
[146] R.S. 1985, c.F-7

> law that was administered by the Exchequer Court of Canada on its admiralty side by virtue of the Admiralty Act, Chapter A-1 of the revised statutes of Canada, 1970, or any other statute, or would have been so administered if that court had had, on its admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

As in the USA and Australia, the source of maritime jurisdiction is constitutional. Section 91 of The Constitution Act, 1867 provides '... It is hereby declared that ... the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects annexed hereinafter enumerated; (10) navigation and shipping'. Section 92 provides, on the other hand, that in each province, the legislature may exclusively make laws in relation to matters enumerated including 'property and civil rights in the province'. [147]

The essential legal framework is therefore as follows:- The highest court is the Supreme Court of Canada sitting with seven or nine judges. The Federal Court which has a trial and an appellate division is a creature of statute and has concurrent jurisdiction in federal matters with the superior courts of the provinces; while the superior courts of the provinces have concurrent jurisdiction with the federal courts in regard to federal matters the same does not hold for the legislatures: the Parliament of Canada has exclusive legislative power in Federal matters. As may be imagined and as will be demonstrated, this elaborate framework is a rich source of threshold litigation.

McIntyre J, delivering the judgment of the court in *ITO. v Miida Electronics* [148] provided the following analysis of Canadian Admiralty:

> I would agree that the historical jurisdiction of the admiralty courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian Maritime law in section 2 of the Federal Court Act. I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. A historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the section 2 definition of Canadian Maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes a statutory recognition of Canadian Maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by the Admiralty Act, 1934 (the Act expressly importing English law). On the contrary, the words 'maritime' and admiralty ' should be interpreted within the modern context of commerce and shipping. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers and the Constitution Act, 1867. I am aware at arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in 'pith and substance' a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under section 92 of the Constitution Act 1867. It is important, therefore to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian Maritime law within federal legislative competence. [149]

[147] Section 92 (13)
[148] [1986] 1 SCR 752
[149] at 774

Substantive admiralty law was defined as:

> that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date.[150]

In a separate concurring judgment in *QNS. Paper Co v Chartwell Shipping Limited*,[151] L'Heureux-Dubé stated:

> It bears repeating that 'the specialized rules and principles of admiralty' derive largely from civil law and that civil law principles, like common law principles have been and continue to be modified and expanded in Canadian judisprudence. Nor is there anything about its composite character which precludes the uniform application of Canadian Maritime law. What is required is a broad comparative approach worthy of the English civilians who sat in the High Court of Admiralty. Courts should seek to eliminate those problems lacking specific statutory resolution by canvassing the wide range of common law and civil law sources ... if either the common law or the civil law offers a more coherent and certain basis for resolving the matter at issue, the best solution should be chosen. As its application through the history of maritime law reveals, the comparative method aims at a harmony short of homogeneity. It aims to shed light on legal problems common to both traditions by exploiting differences in doctrine and approach. Above all, it seeks to multiply the range of sources for legal enquiry on the faith that clarity of judicial reasoning is served, not hindered, by viewing the same problems for many vantage points. If the comparative method renders the lawyer's task somewhat more difficult, it repays those efforts with greater breadth of analysis. [152]

The approach of L'Heureux-Dubé, is orientated towards the civil law influenced as it is by the natural law theories expounded by Grotius. The civil law mindset is discerned in the following passage:

> A continental lawyer will not hesitate to say that some rules, which may have been applied by the courts, are 'bad law', if they run against the 'true law' which is an ideal of justice, - so that it is the duty of all good citizens, and more particularly of all jurists, to engage a fight against such rules in order to see the law ie. a better law is triumphant. Our conception of the law bears in itself the germ of a permanent criticism of what is decided by the parliament and by the courts. We are deeply shocked on the continent when we hear of the English dichotomy between law and equity. It is inconceivable for us that an opposition might be drawn between the two things. It is unthinkable that the deficiencies of the law should have to be remedied by an appeal to equity since what is contrary to equity cannot be properly described as being the law'. [153]

Somewhat extravagantly L'Heureux-Dube found: 'As at 1934, which marks the last statutory reception into Canada of English Admiralty law, English courts were still drawing upon, and indeed developing, the civilian tradition in maritime law'.[154] It is doubtful whether the cases referred to by him support this statement. On the contrary, the leading cases, *The Gas-float Whitton 2* and the *Gaetano e'Maria* (both supra) show that comparatively early on the English court began to rely principally upon its own decisions.

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[150] at 771

[151] [1989] 2 SCR 683

[152] at 725 - 726

[153] David *English Law and French Law* 7

[154] at 722

The decision of the *Monk Corporation v Island Fertilizers Limited* [155] provides an illustration of the Canadian difficulty with competing jurisdictions in a federal system of government. The court was asked to decide whether a contract for the supply of urea fertilizer in which damages were claimed for excess delivery, demurrage and the cost of hiring shore cranes to discharge a ship were within federal jurisdiction. The majority held that these claims were indeed 'integrally connected to maritime matters as to be legitimate Canadian Maritime law within federal competence'. L'Heureux-Dubé, J dissented, stating that the 'pith and substance' [156] of the dispute related to a matter exclusively within the provincial domain by virtue of section 92(13) of the Constitution ie. property and civil rights. Canada has the peculiar dispensation in its Constitution where exclusive jurisdiction is as signed in positive terms to two different areas: navigation and shipping are exclusively assigned to federal jurisdiction and property and civil rights are exclusively assigned to provincial jurisdiction. Conceptually these two fields will always intersect at some point and any division sought to be imposed on matters common to both will always be arbitrary.

Canada's lesson to South Africa is its willingness to develop the law and its refusal to be confined within the bounds of history. Negatively, it experiences the same proliferation of threshold litigation as in the USA stemming from its nebulous and question begging definition of maritime jurisdiction.

14. SOUTH AFRICAN LAW

It has often been said that the common law of South Africa is Roman-Dutch law. On close analysis, 'common law' and 'Roman-Dutch law' are mutually exclusive concepts. 'Common law', as understood in the legal traditions of the world is the common law of England. As any rudimentary study of English law will show, its common law developed from the customs of its peoples. At the time of the Norman conquest there was the Mercian law, the Dane law and West Saxon law. [157] English Common law is not qualified by reference to any of the earliest bodies of custom which forms part of the law, e.g. 'Mercian Common law' or 'Dane Common law'. All English dictionaries define 'common law' as customary English law.' [158] While the law in South Africa may have its roots in the law of its earliest Dutch settlers, the general body of law administered in South Africa has grown over the last three and half centuries to become something

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[155] [1991] 1 S.C.R. 779

[156] the 'pith and substance' test is set out in *General Motors of Canada v City National Leasing* [1989] 1 SCR 641 cited in *Laboucane v Brooks* 2003 BCSC 1247

[157] Holdsworth *op cit* vol at 3

[158] common law: in England the ancient customary law of the land – *Chambers 20th Century Dictionary*

entirely different from that law. It is, therefore, more appropriate to speak of South African law. [159]

A passage from a judgment of Holmes J (as he then was) illustrates this point:

> Our country has reached the stage in its national development when its existing law can better be described as South African than Roman-Dutch ... No doubt its roots are Roman-Dutch, and splendid roots they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law, such as procedure, and the law of evidence. The original sources of the Roman-Dutch law are important, but exclusive pre-occupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards. Lot's wife looked back. Our national jurisprudence moves forward where necessary, laying aside its swaddling clothes.[160]

And in the same vein:

> I consider the term 'Roman-Dutch law' is a confusing term, for in fact, the common law of the union or for that matter the Cape of Good Hope is not Roman-Dutch law. It is South African common law. It is true that Roman-Dutch law forms the basis of law and as such has supplied the more fundamental and elementary principles of our law. The law has been continuously developed and improved by the courts as well as by legislation. Other systems of law have had a marked influence, particularly English law. Much of our practice, procedure and mercantile law comes from the English law. Recently the Appellate Division decided that nothing less than the whole of the penalty-liquidated damages field of law was taken over and absorbed into our law.[161] In view of all these influences it seems to me that it is more correct to speak of South African common law rather than of Roman-Dutch law. That too, was the position, in my view, on the first day of January 1920. [162]

In view of the observations mentioned earlier, it is preferable to speak of 'South African law' without the epithet 'common'. It is probably not possible to expunge the term 'common law' from South African legal expression, but it must always be understood to be South African common law. The Constitution itself uses the term 'common law' with no reference to 'Roman-Dutch law'.[163] The Constitution expressly empowers the court to develop the common law in accordance with the Bill of Rights [164] and determines that the Constitution is 'the Supreme law of the Republic'.[165]

A post-constitution and unanimous decision of the Supreme Court of Appeal contains the following remark:

> the common law is not to be trapped within the limitations of its past. If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of

[159] see Hare *op cit* 4
[160] *Ex parte de Winnaar* 1959 (1) SA 837 (N) at 839
[161] Can the same not be said of Shipping law?
[162] per Claassen J P in *R v Goseb* 1956 (2) SA 696 SWA
[163] section 8 (3)(b) Constitution of the Republic of South Africa, Act 108 of 1996
[164] section 8 (3)(b)
[165] section 2

> justice amongst the citizens of the democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.[166]

In judicial law making, the principle of *stare decisis* otherwise known as the doctrine of precedent, it is a vital component. The doctrine itself was an importation from English law.[167] From the outset it was recognized that this doctrine was incompatible with the maintenance of a pure, historically rigid Roman-Dutch system: 'whereas the English law has been brought up on decided cases, the South African common law rests on principles annunciated by the old writers on Roman-Dutch law'. [168] Commenting on this passage, Hahlo and Kahn identify the constant problem before South African judges : '... to reconcile the demands of *stare decisis* with a call to administer the true Roman-Dutch law' [169] That the doctrine of precedent remains part of South African law has been confirmed by the Supreme Court of Appeal.[170]

The drafters of section 6 had in mind two separate and distinct bodies of law, namely, ancient Roman-Dutch law and modern English admiralty law. They failed to recognise that South African law, by natural development, had adopted the English law of admiralty and hence there was no call to provide for the operation of these two separate systems.

15. SOUTH AFRICAN ADMIRALTY

The milestones in South African Admiralty are conveniently set out in the Report on the Review of the Law of Admiralty of the South African Law Commission ('the Report') published on 15 September 1982 (Project 32) which preceded the AJRA.

Following the first British occupation of the Cape in 1795 and before the enactment of the Vice Admiralty Courts Act 1863, vice-admiralty courts were in existence, exercising a jurisdiction similar, but far from identical to the jurisdiction of admiralty court in England.[171]

Vice-admiralty courts in the Cape Colony and in Natal did not have exclusive jurisdiction over admiralty matters and it was possible for a litigant to bring his action either in a vice-admiralty court which administered the English admiralty law or the ordinary courts which administered the Roman-Dutch law.[172] To deal with potential conflict, Act 8 of

[166] *Amod and another v Multilateral Motor Vehicle Accidents Fund* [1999] 4 All SA 421 (SCA)at 429 §23 per Mahomed, CJ
[167] Hahlo and Kahn *The South African Legal System and its Background* 240
[168] *Fellner v The Minister of the Interior* 1954 (4) SA 523 AD at 529
[169] Hahlo and Kahn *op cit* 243
[170] *Wagener v Pharmacare Ltd* 2003 (4) SA 285 (SCA) at 294§17.
[171] Report page 4
[172] Report page 4

1879 [173] was passed in the Cape Colony to provide for the supremacy of English law in admiralty matters.[174]

In 1890, the United Kingdom Parliament enacted the Colonial Courts of Admiralty Act which came into operation on 1 July 1891 and abolished the vice-admiralty courts which existed at the time. Section 2 (1) had the effect of making the Supreme Courts of the Cape Colony, Natal and the Eastern Districts Court, colonial courts of Admiralty. Their jurisdiction was provided for in section 2(2) which read as follows:-

> The jurisdiction of the Colonial Courts of Admiralty shall, subject to the provisions of this Act be over like places, persons, matters and things as the admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise. The Colonial Courts of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

Section 1 of that Act read:

> Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with a jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction.

Section 3 granted the legislature of a British possession the power to provide for the exercise by such court of its jurisdiction and to limit territorially or otherwise, the extent of such jurisdiction, thereby providing the opportunity for independent development.

By abolishing the vice-admiralty courts and providing for the Colonial Courts of Admiralty to have the same powers as ordinary civil courts with unlimited jurisdiction, it seems clear that British Parliament sought to create the same fusion of jurisdictions in its colonies which it had achieved by the Supreme Court of Judicature Act, 1783.

Thirty years after the passing of the Colonial Courts of Admiralty Act of 1890, the question came to be asked in South Africa what substantive law was to be applied in the colonial courts of admiralty[175] The question was important because which law applied would determine the priority of competing interests, in this case necessariesmen and mortgagees. In the other jurisdictions which have been considered, Australia and Canada (the United States of America was no longer a British possession by 1890), the question could not arise because both had constitutions which vested admiralty jurisdiction in its courts. In South Africa, however, in 1922, the Appellate Division sought to find the

[173] repealed by Act 3 of 1977
[174] Report page 5
[175] *Crooks & Co. v Agricultural Cooperative Union Ltd* 1922 AD 423

power to apply the substantive law of English Admiralty in the Colonial Courts of Admiralty Act, 1890 itself. This was problematic because English courts had held that the imperial statutes extending admiralty jurisdiction beginning with the Admiralty Court Act 1840 were procedural only.[176] A further cogent argument in favour of interpreting the Colonial Courts of Admiralty Act, 1890 as providing for procedural matters only was the fact that the British Parliament must have legislated with the view in mind that the colonies were already applying English law. Obviously, this was not the case in South Africa.

The minority view of Mason AJA has much to commend itself:

> Thus effect can be given to the Act of 1980 as well as the prior Acts dealing with vice-admiralty courts, without the result of necessarily introducing a system which indirectly but very materially alters the substantive law of the British dominions, the control of which has been entrusted to their own legislators. It is for these reasons, and upon a consideration of the numerous difficulties and inconsistencies which must arise from the introduction of a different of law into so many legal relations, that notwithstanding a considerable amount of usage and many weighty arguments to the contrary, I still entertain doubts whether the establishment of the Colonial Courts of Admiralty involves in all matters within their jurisdiction an application of British Admiralty law.[177]

One of the arguments which swayed the majority to hold that the Colonial Courts of Admiralty Act, 1890 intended the application of substantive law was the power to exercise such jurisdiction in like manner and to as full an extent as the High Court in England and shall have the same regard as that Court to international law and comity of nations. This was probably no more than an invitation to develop existing law which had been the hallmark of British Admiralty Judges.

In 1975 the Appellate Division again passed up the opportunity to promote the establishment of South African Admiralty law.[178] The Republic of South Africa Constitution Act 32 of 1961 omitted to provide for the continuation of the colonial courts of admiralty. By judicial legerdemain the court held that the Republic of South Africa was a 'British possession' to ensure the continued operation of the Colonial Court of Admiralty Act 1890.

To find the will of the legislature, Botha JA, in whose judgment the other four members of the court concurred, looked to section 1 of the Admiralty Jurisdiction Regulation Act 5 of 1972 which was promulgated but never put into operation. Section 1 read as follows:-

> The powers and jurisdiction of the Courts of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 of the United Kingdom shall as from the

[176] *The Henrich Bjorn* (1886) 11 AC 270
[177] at 456
[178] *The Waikiwi Pioneer* 1975 (3) SA 423 (A)

> commencement of this Act and notwithstanding the repeal of that Act by this Act, vest in the provincial and local divisions of the Supreme Court of South Africa.

The correctness of *Crooks* and the *Waikiwi Pioneer* is academic in the light of the clear wording of section 6 of the AJRA. Nevertheless, these decisions illustrate the uncertainty and indecision which preceded the devising of section 6.

16. THE PASSAGE OF SECTION 6

A draft bill of the SA Law Commission was circulated in January 1980 to the judges president of the courts of the maritime divisions, to individual judges, practitioners and to the Maritime Law Association of South Africa; as a result of comments received, a second draft was prepared and circulated in October 1980; suggestions were received and changes made resulting in a third draft with an explanatory memorandum circulated in February 1981; in July 1981 the third draft was discussed at a seminar in Durban attended by Professor D Jackson, Southampton University and Professor Cadwallader, University of Cardiff; the bill was amended again and a fourth draft was published in the Government Gazette of 23 April 1982; further comments were received from interested parties and a fifth draft was annexed to the Commission's report. [179]

The draft bill contained a similar list of maritime claims and a provision that new claims would be governed by 'Roman-Dutch law'. The equivalent sections of the present sections 6 (1)(a)(b) read as follows:

> 7.(1)(a) Subject to the provisions of this Act and any other law an admiralty court shall apply the law as set forth in paragraphs (i) and (ii) namely –
> (i) with regard to matters in respect of which the courts of Admiralty in the Republic had jurisdiction immediately prior to the commencement of this Act, the law as applied in the said courts' and
> (ii) with regard to any other matter, the relevant rules of the Roman-Dutch law as applicable in the Republic.
>
> (b) 'An admiralty court shall take cognizance of any modification since the coming into force of the Colonial Courts of Admiralty Act, 1890 of the law applicable under the said Act, and may, to arrive at the decision, take account of and apply to such extent as appears expedient any of the following, namely:
> (i) any such modification with regard to any matter contemplated in subparagraph (a)(i);
> (ii) the laws, past or present, and decisions of courts of maritime states with regard to maritime matters and the views of writers with regard to such matters;
> (iii) the provisions of any international convention, whether or not the Republic is party to such a convention.[180]

The Report expressly acknowledged DJ Shaw QC as the author of the draft legislation. No official explanation has been given for the changes which occurred in section 6. However that may be, the draft section replaced by section 6 is hardly less problematic:

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[179] Report 16-17
[180] Report pages 31 – 32

two systems of law remained entrenched and there was, if anything, greater uncertainty as to the extent of the adoption of English law. There was no reason to justify granting judges hearing admiralty matters greater freedom to develop the law than in other areas of law, and, as seen above, the Australian law Commission decided against incorporating a directive to judges to develop the law in line with a formula expanded from the 'comity of nations' injunction found in the Colonial Courts of Admiralty Act, 1890.[181]

17. CONCLUSION

In addition to other criticisms leveled at section 6, a reasonable argument may be made that it unconstitutional. In the case of *Pharmaceutical Manufacturers Association of South Africa and another : in re Ex Parte President of the Republic of South Africa and others* [182] a unanimous constitutional court (per Chaskalson P) rejected an attempt to compartmentalise law in South Africa into common law, statutory and constitutional components:

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the constitution which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional control.[183]

By making the law applicable to maritime claims, the law as exercised by the High Court in the United Kingdom, section 6 may be construed to impermissibly remove maritime claims from constitutional control.

The exercise of maritime jurisdiction is not enshrined in South Africa's Constitution as it is in that of the United States, Australia and Canada. Historically, South Africa has had a separate court exercising admiralty jurisdiction separately and distinctly from other courts exercising their ordinary jurisdiction. Bearing these factors in mind, South Africa is closer in its history and development to the United Kingdom than to the other three countries under discussion.

The whole of the Colonial Courts of Admiralty Act, 1890 except in relation to prize matters was repealed by the AJRA. If section 6 were repealed, section 2 vesting the high court with "admiralty jurisdiction" would have to be taken to relate to procedural matters only. Obviously, the courts do not require to be given the power to administer South African law. Every dispute would then have to be decided by South African admiralty law as it has developed up to now.

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[181] ALRC 33 chapter 13 §278
[182] 2000 (2) SA 674 (CC)
[183] § 44

There will be tension generated by the different sources of South African Law, particularly ancient Roman Dutch authorities and English law in shipping matters as it has been received into South Africa. But, this tension will not be new to South African courts. One example among many can be found in *Daniels v Daniels* where Roman-Dutch principles relating to divorce had to give way to modern developments [184] Competing principles will have to be decided on merit:

> It has often been stated that our law is a living system capable of growth in harmony with its basic principles. I could not hope to describe how the law grows through judicial decision in language comparable with a famous statement of Mr Justice Holmes in *The Common Law* that ... '[t]he life of the law has not been logic: It has been experience. The felt necessities of the time, the prevelant moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men -, have had a good deal more to do than the syllogism in determining the rules by which men should be governed'... That was said of the English common law, but it must apply to any system where the law grows by judicial decision.[185]

Parallels exist between admiralty law and the law of banking :

> There is dearth of Roman-Dutch authority on the subject of banking. Nevertheless the approach to be adopted is quite clear. The subject is part of the law merchant. Its general principles are worldwide in their application, although there are, of course, many purely local variations in various parts of the world. For historical and also for practical reasons the principles of this topic as set out in the decisions of the English courts have found broad acceptance in this country, subject of course to peculiarities of English law that have no place in our own legal system.[186]

There is every reason to suppose that this casuistic approach, apart from codification, already completed in large areas of shipping eg. the carriage of good by sea, is preferable to the present workings of section 6.

Any attempt to achieve by express statutory provision the adoption of English shipping law into South Africa would always be met by the same two problems: when is the adoption to take place and what is the range of subject matter? If a point in time for the adoption was specified this would always be arbitrary; if no time for the adoption was specified this would lead to incurable uncertainty. The answer to the first question would affect the second and whether a time was fixed for the adoption or not, a needless and difficult examination of the history of English law would always be required.

Residual pockets of law unique to ancient English admiralty eg non-contractual salvage and the maritime lien will be re-evaluated in the market of ideas and their continued

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[184] 1958 (1) SA 513 (A)

[185] Per Schreiner JA at 522

[186] Per Stegmann J in *GS George Consultants and Investments (Pty) Limited and others v Datasys (Pty) Limited* 1988 (3) SA 726 (W) at 734 to 735

existence or modification challenged by modern principle. Naturally, how the excision of section 6 affects the rest of the AJRA would have to be carefully considered and appropriate consequential changes made.

> ***The law embodies the story of the nation's developments through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labour will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.***[187]

[187] Oliver Wendell Holmes Jr *The Common Law* 1-2

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