

The 1994 Ebsworth & Ebsworth Maritime Law Lecture International Commercial Law

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THE JURISDICTION AND PRACTICE OF THE ADMIRALTY COURT REVISITED

A comparison of developments in Australia, the United States and England
over the past quarter-century

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Twenty-five years ago this month, I finished writing the text of *The Development of Admiralty Jurisdiction and Practice since 1800*. I did not foresee the interest which the book eventually generated outside England and the United States, and the expectations which I had for it certainly did not include its use as a reference work in reformation of the jurisdiction and practice of the Admiralty Court in Australia, New Zealand, South Africa and elsewhere. It is not probable that there will be a second edition; ¹ but I have occasionally wished to comment upon some of the developments which have taken place since 1970. The invitation to give this lecture has provided the motive and the opportunity - elements necessary not only in criminal law.

I presume no-one's expectations will be shattered by my admission that it is impossible to review in the course of this lecture every significant development which has taken place in the past quarter-century with regard to the jurisdiction and practice of the Admiralty Court in England, the United States and Australia. ² I must necessarily pick out those developments which seem to have either the most obvious historical importance or which, to my mind, are most likely to lead in significant new directions. And in order to keep within a reasonable compass for this lecture, I have restrained myself to three developments in each jurisdiction.

In England the developments I propose to deal with are the Administration of Justice Act of 1970, the Supreme Court Act of 1981, and the *Mareva* Injunction; in the United States, the delayed overall effect of the 1966 merger of the Admiralty Rules into the Federal Rules of Civil Procedure, the 1985 amendments to Rules B, C and E of the Supplemental Rules for Admiralty and Maritime Claims, and the case of *Miles v Apex Marine*; in Australia, the Admiralty Act 1988, The "Golden Glory" case, and the "Shin Kobe Maru" case.

Of course the goal of this lecture is to point to something which hopefully is at present rather obscure and at the same time of great potential significance for the future of the Admiralty Court in Australia. Be reassured that I have not traveled such a distance from the remote coast of easternmost New England to bore you with unrelated developments in London and Washington - at least not to bore you intentionally. But in order to come to grips with what I think is significant for Australia, it is first necessary to look back in time and across the world.

In England and Wales since 1969 the first notable development has proven to be almost wholly historical - the ironically peaceful "capture" of the Admiralty Court by the foremost of the Courts of Common Law. By s2 of the Administration of Justice Act of 1970 the Probate, Divorce and Admiralty Division of the High Court - popularly known as "wills, wives and wrecks" - was reconstituted as the Family Division and the Admiralty Court transferred to the Queen's Bench Division with a status equal to that of the Commercial Court. Thus was swept away the last vestige of the formerly exclusive jurisdiction of the English civil lawyers - the "Doctors of Law,

exercercent in the Ecclesiastical and Admiralty Courts". 3 I will resist the temptation which always arises at this point to take us into the ghostly quadrangle of Doctors' Commons and say simply that, to all outward appearances and for all practical purposes, the 1970 change in the status of the Admiralty Court has created a distinction without a difference.

The second English development is more substantive, and has had some direct effect in Australia. The Supreme Court Act 1981 recast the admiralty jurisdiction of the High Court previously laid down in the Administration of Justice Act 1956, and without diverting into specific examples its overall effect is to remove any lingering common law restraints upon the exercise of maritime jurisdiction by the Admiralty Court. It might be saying too much to state that the Australian Admiralty Act 1988 was "modeled upon" the U.K. Supreme Court Act 1981; but the influence of the latter upon the former is both obvious and profound, and it is to be expected that any decisional law of the English Admiralty Court which further develops maritime remedies will encourage similar consideration by the Australian judiciary.

The third English development is the Mareva injunction.⁴ This equitable remedy is in its operation little more than the re-invention of a maritime remedy once frequently employed for the same purpose by the Admiralty Court, but which fell into disuse in the eighteenth century - attachment quasi in rem of the property of a defendant in order to secure appearance in an action in personam. ⁵ In America it was a common feature of the Vice-Admiralty practice, ⁶ and made the transition into the practice of the Admiralty Court in the Federal era. ⁷ Why it should not have had the same history in Australia is a question lying outside both the scope of this lecture and the competence of the lecturer, but whether the action in rem was always distinguished in English Admiralty from attachment to commence an action in personam (as it was in Roman civil law), ⁸ or whether there was always prior to the nineteenth century a single form of action (in rem) in the English Admiralty Court but with alternative procedures which included *capias* arrest of the owner, ⁹ it is clear that the majority of colonial Vice-Admiralty Courts consistently exercised their instance jurisdiction in civil causes from the seventeenth century onward by separate forms of action in rem and in personam, with all of the "classical" variants in Admiralty procedure. ¹⁰ Over the relevant time period, the historical freedom to employ either form of action in the Admiralty Court is established historical fact. In the United States the first development noted is the 1966 merger of the old General Admiralty Rules into the Federal Rules of Civil Procedure. Though several commentators made predictions concerning the effects of unification upon the substantive law of admiralty, ¹¹ it was not until the late 1970s that the Admiralty Court began to exercise with any measurable regularity the power to administer equitable remedies in admiralty cases. The delay may seem strange, especially in light of the quite rapid effects of the 1938 merger of the Equity Rules into the first Federal Rules of Civil Procedure. ¹² But the late depression era was one of great social activism on the part of the Federal government, and this faded seamlessly into wartime legislation which appropriated control of private property. The District Courts under the new FRCP were quickly forced by the volume of litigation into the wholesale application of equitable remedies in actions "at law".

The 1938 merger of law and equity rules left no loose ends; the procedure is entirely uniform regardless of the nature of the remedy prayed, though of course issuance of an injunction requires at least an *ex parte* hearing in chambers. The 1966 merger, however, leaves six special Supplemental Admiralty Rules appended to the body of the FRCP, and in order to apply those Supplemental Rules it is necessary that the complaint specifically invoke the jurisdiction of the "admiralty side" of the Court, so as to ensure that the action does not proceed on the "law side" if

the common law is competent to supply an in personam remedy in the particular case. 13 The effect of this has been to perpetuate an artificial distinction between the law and admiralty "sides" of the Court, whereas the distinction between the law and equity "sides" has long since disappeared. The equitable power of the American Admiralty Court had earlier been held to derive from the first Judiciary Act of 1789; in the words of the late and colourful Chief Judge John R. Brown of the U.S. Court of Appeals for the Fifth Judicial Circuit:

"The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his land-locked brother, that which equity and good conscience impels." 14

But the American Admiralty Court has been slow to begin to wield the equity power which it has always had, 15 and usage of which the 1966 merger was clearly intended to facilitate. 16

Unfortunately the remedial authority of the Admiralty Court has been complicated by the second American development - the 1985 amendments to the Supplemental Admiralty Rules with respect to the issuance of in rem and quasi in rem process. The problem arose because of a line of decision which emerged in the 1970s in cases of attachment of property under State law, where the defendants argued successfully that in having their property seized without a prior hearing they were deprived of property without the "due process of law" which is guaranteed by the 5th Amendment to the Constitution. It did not take long for challenges to be mounted to the constitutionality of maritime attachment under FRCP Supp. Rule B and arrest in rem under FRCP Supp. Rule C. A few Federal District Judges were swayed by the argument and declared Rule B attachment and/or Rule C arrest unconstitutional without a hearing prior to issuance of the warrant; the remaining District Judges confronted with the question and a majority in all of the Circuit Courts of Appeal found the traditional procedure constitutional, deftly grasping that the Constitution's grant of Admiralty jurisdiction carried with it the essentials of procedure as historically applied in maritime cases, and for a Federal District Court sitting in Admiralty that procedure constituted "due process of law". However, the consensus of opinion within the Maritime Law Association of the United States - which had filed briefs amicus curiae supporting the traditional procedure in several of the cases and was even granted oral argument in one pivotal case involving Rule C 17- was that the risk of a reversal by the U.S. Supreme Court should be insured against, and it proposed amendments to Supp. Rules B and C requiring judicial scrutiny prior to issuance of a warrant and to Supp. Rule E to provide for prompt post-seizure hearing. 18 The amendments were adopted by the Supreme Court and entered into effect in 1985.

Beyond doubt the 1985 amendments were wiser than playing "judicial roulette" - they have effectively ended the debate over the constitutionality of arrest and attachment proceedings in admiralty. But they have also added a new and quite different requirement in order to employ traditional process in the Admiralty Court. The price paid for security has not been entirely limited to the additional time and paperwork of the new procedures.

The third development in America centres upon the Supreme Court's recent decision in *Miles v Apex Marine*. 19 To approach *Miles* in the proper frame of mind, one must first accept that every admiralty case in the United States which touches upon jurisdiction or practice is fundamentally a case of constitutional law - the grant of jurisdiction to the American Admiralty Court in all such cases flows directly from the Constitution and not from any act of the legislature.

Legislation regarding admiralty and maritime jurisdiction cannot constitutionally restrict that jurisdiction, but can only ensure that other legal remedies, if applicable, remain available as well.

In the jurisprudence of the United States it is the exclusive prerogative of the Supreme Court to pronounce finally upon what does or does not lie within the admiralty and maritime jurisdiction. So over the history of the United States the Supreme Court has altered maritime remedies, for example first establishing, 20 and then later abrogating, 21 a rule of divided damages in collision cases; and it has determined maritime rights, for example first denying a right of action under the general maritime law for wrongful death, 22 then later establishing the right of action. 23 In *Miles* the Court upheld the right of action for wrongful death under the general maritime law ("GML"), but ruled that the remedy of damages for loss of society was not within the power of the GML to grant. This is an interesting contrast with the Court's view of over 175 years' standing that the GML empowers the award of punitive ("exemplary") damages, 24 which has been the basis for a considerable line of decision by highly respected Circuit Courts of Appeal upholding recovery of punitive damages in seamen's actions under the GML. 25 The basis for the Court's holding in *Miles* is in a nutshell that the Congress had excluded the recovery of "non-pecuniary" damages in actions brought under legislation which predated the Court's establishment of the right of action for wrongful death under the GML, 26 and the Court has an obligation to ensure uniformity in the maritime law of the United States. Congress has been repeatedly held by the Court to have the power to extend the admiralty and maritime jurisdiction by statute, 27 and Congress has repeatedly exercised that power; 28 however the Court has also repeatedly declared that there are constitutional limitations upon the power of Congress to legislate in this area. 29 As to the Supreme Court itself it is not to be doubted that, in the interest of uniformity, the Court has authority to fashion and to limit remedies in Admiralty and maritime cases. 30 What is troublesome about *Miles* is the reasoning of Justice O'Connor:

"In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions". 31

It is difficult to imagine a more patently incorrect statement of the relationship between the Admiralty Court and Congress in "all Cases of admiralty and maritime Jurisdiction." Nothing in the whole train of previous decisions of the Court on the point of the respective powers of the legislative and judicial branches over admiralty and maritime law gives support to this and similar statements in the majority opinion in *Miles*, 32 which are fortunately dicta - but dangerous dicta from which one may safely assume greater mischief will flow.

With some trepidation, I come now to the three developments in Australia. The first is of course the Admiralty Act 1988, which for our purposes is surely the most significant development since the adoption of the Australian Constitution. At this point I must confess that I was present when The Hon. Mr. Justice Zelling gave an address to the Maritime Law Association of Australia and New Zealand in this city in October of 1983, and I did not then appreciate that I was listening to the person most responsible for the movement toward what would become the Admiralty Act 1988. 33 If I have any excuse it is that I awoke early on that same morning to the honking of auto horns and the ringing of church bells, followed for hours by the popping of champagne corks -

Australia had just vanquished the United States on the sea off Newport, Rhode Island, and won the America's Cup. My first inclination is to compare the structure of the Admiralty Act 1988 with that of the American Judiciary Act, and it is clear that the form of each was governed more by preceding political history than by strictly legal reasoning. For over two hundred years, the exclusive original jurisdiction of the American Admiralty Court has been conferred within a half-dozen lines of legislative text which recite the substance of the constitutional grant. 34 The Judiciary Act of 1789 was a part of the first statute enacted by the first session of the first Congress, 35 and it was enacted by many of the same men who a short while earlier in Convention had framed the admiralty jurisdiction clause of the American Constitution. It would surely have seemed to them wholly redundant for the legislature to attempt any gloss upon what had just been reduced to elegant simplicity and agreed to run directly to the judicial branch.

In contrast, the concerted effort leading to the Admiralty Act 1988 followed adoption of the Australian Constitution by more than 80 years, and in the interim the scope and exercise of admiralty jurisdiction had been regulated by legislation similar in structure to the English Admiralty Court jurisdiction acts which preceded and followed it; 36 moreover, that Imperial Act of 1890 was considered as binding the hands of the Australian Parliament from conforming the jurisdiction of the Admiralty Court to the grant contained in s76(iii) of the Constitution until the Statute of Westminster was enacted by the U.K. Parliament in 1931. 37 Suffice it to say that the reasons for modernising the Australian jurisdiction by comprehensive legislation are ample and compelling, particularly when obvious care was taken that it should facilitate the application of the highly developed body of English judicial precedent. 38

The second Australian development is the case of *The "Golden Glory"*, 39 which is noted because it "sets the stage" for a yet more significant case. The issue before the Admiralty Court was whether an action in rem lies to compel specific performance of a contract for the sale of a ship, the ship in question having been arrested within the geographical jurisdiction of the Court and the owners having moved for release. 40 An action for specific performance is in its nature a suit in equity in personam and is not the same as the possessory or petitory suit in admiralty to which I have earlier referred, though if successful the practical effect of the outcome would be impossible to distinguish. Without discussing the equitable powers of the Admiralty Court or the source thereof, the Court held for the probability of jurisdiction and instead of issuing a decree for specific performance made the Solomonic decision to release the vessel from arrest conditional upon an undertaking by the defendant to execute and deliver a deed of sale in approved form. To coin a phrase, this was a "neat" way to confirm that the equitable jurisdiction of the Admiralty Court may be exercised in actions in rem.

Of greatest importance is the third Australian development, the case of *The "Shin Kobe Maru"*. 41 Here a contract for the transfer of title to a ship came before the same Court which had decided *The "Golden Glory"* a few months earlier. This time the contract was embedded in a joint venture agreement ("JVA"), and a writ in rem had been issued asserting a "proprietary maritime claim" under that section of the Admiralty Act 1988 which grants jurisdiction in possessory, petitory and partition suits. 42 An agreement subsidiary to the JVA provided that although the Japanese JVA partner was a nominal purchaser, the vessel continued in 50/50 ownership as under the JVA. The vessel was registered in and flying the flag of Japan with the Japanese JVA partner as the sole registered owner of the vessel, the plaintiff JVA partner and all other parties to the agreement were likewise foreign, and the JVA itself was made abroad and contained no Australian element; the vessel did however trade with some regularity to Australia,

where she was subject to arrest. The solicitors for the registered owner of the ship accepted service of the writ, which is a valid means of serving process in rem in Australian practice. 43 The defendant owner then moved to set aside the writ for want of jurisdiction. The most important question for decision was whether a claim asserting an equitable interest in the ship under the terms of the JVA was a claim properly cognizable by the Admiralty Court in an action in rem.

The Court pointed out the restraints which Parliament had placed in s6 of the Admiralty Act 1988 upon the creation of new maritime liens and new causes of action under the authority of the Act, and concluded that the Act's extension of the categories of claims cognisable in rem does not violate these restraints; put another way, the Act may create new remedies but it does not create new rights. The balance of the judgment, leading to a dismissal of the defendant's motion to set aside the writ in rem, examines in detail the character of the constitutional grant of admiralty and maritime jurisdiction in s76(iii) and concludes that the provisions of the Admiralty Act invoked by the plaintiff lie within the legislative power. 44

In the preparatory work which led to the Admiralty Act 1988, 45 and in *The "Shin Kobe Maru"* judgment, detailed consideration has been given to the significance of the words in s76(iii) of the Commonwealth Constitution 1900 which grant authority to Parliament to confer upon the High Court original jurisdiction "in any matter of admiralty and maritime jurisdiction." The addition of the words "and maritime" are clearly taken from the counterpart clause of the Constitution of the United States, 46 and commentators and jurists have quite uniformly accorded importance to the word "maritime". 47 In seeking out the import of that word, the Court in *The "Shin Kobe Maru"* followed most writers to the American judgment of Mr. Justice Joseph Story, sitting as Circuit Justice in the celebrated case of *De Lovio v. Boit*. 48 Little notice, however, has been taken by modern writers of the more detailed explanation given by Story in his greatest work, commonly known as *Commentaries on the Constitution*. 49 Here his exposition of the constitutional grant of jurisdiction draws additional distinctions between the words "admiralty" and "maritime", and in my reading he plainly declares that the purpose of the latter is not only to free the jurisdiction of the Admiralty Court from the shackles forged by centuries of writs of prohibition issuing from the courts of common law, but also (1) to enable the fullest development of sea-borne foreign commerce in accordance with principles of maritime international law, and (2) to enable the Admiralty Court to exercise its jurisdiction in rem beyond those causes which are founded upon maritime liens, notably in cases which "affect the commerce and navigation of foreign nations." 50 It is this second point made by Justice Story which most holds my interest.

In stating that the word "maritime" has special significance in relation to "foreign ships" and "foreign employment", so that when such are involved "the general maritime law 51 enables the courts of admiralty to administer a wholesome and prompt justice", Story observes that:

"[A]s the courts of admiralty entertain suits in rem ... as well as in personam, ... they are often the only courts, in which an effectual redress can be afforded, especially when it is desirable to enforce a specific maritime lien, or claim, in the nature of a pledge." 52

One example coming easily to mind of a "claim" not dependent upon any maritime lien is the claim of ownership which is the foundation for the jurisdiction to entertain suits for possession of a ship. 53 Indeed a contemporary of Justice Story's, Judge Betts, 54 wrote that petitory suits, 55 while not (then) entertained by the English Admiralty Court, 56 "are recognised in the United States as indubitable 57 and convenient modes of exercising the maritime jurisdiction." 58 Yet

Story had written extensively of possessory suits only a few years previously, 59 and if he had meant to limit himself to that sort of claim he would have done so in unmistakable terms. Interestingly, very recent scholarship has established that the English Admiralty Court in the sixteenth century - not subject at the time to restraint by prohibition - frequently proceeded in rem where no recognisable maritime lien was involved. 60 Justice Story would not have foreseen such developments as the statutory lien, 61 the statutory "right in rem", 62 or the statutory power of equitable decree in a maritime case, 63 all of which came about later in the 19th century; he would surely have foreseen changes in the rules of procedure in the courts, but it is to be doubted that he could have imagined the extent of collateral effects of those changes upon the Admiralty Court.

Taken on its own and without reference to the facts of the particular case, that portion of the instance judgment of Mr. Justice Gummow in *The "Shin Kobe Maru"* which examines the authority of parliament and the judiciary under the constitutional grant of admiralty and maritime jurisdiction could well be held by future legal historians to have had the same degree of impact upon the jurisdiction and practice of the Admiralty Court in Australia as *De Lovio v. Boit* had in the United States. Here are drawn together almost all of the known and accepted authorities on the scope of the Admiralty jurisdiction in England, the United States and Australia. To these I would add only the commentary by Mr. Justice Story to which I have just referred. Provided the judgment is ultimately upheld one should expect to see more application of equitable remedies by the Australian Admiralty Court, for it is also a corollary of the procedural theory of the action in rem that the appearance of the shipowner changes the character of the action into one in personam. 64 The natural expectation is that an Admiralty Court operating under the procedural theory would find little difficulty in exercising equitable powers in an action begun in rem and in which an appearance has been entered. 65 As I understand the position at the time of this writing, the instance judgment has now been the subject of an interlocutory appeal (prior to trial on the merits) and has been unanimously upheld en banc by the Federal Court; 66 on further appeal to the High Court of Australia the original plaintiff raised an additional ground of jurisdiction, and the case has been sent back to the Admiralty Court for consideration whether the pleadings should be amended accordingly. Therefore the "final word" may not have been spoken and it is not meet that I should make any more detailed comment about a matter which may still be sub judice.

Meanwhile I note that the instance judgment in *The "Shin Kobe Maru"* has been relied on in part in the case of *The "Bass Reefer"*, 67 in which the Admiralty Court was confronted with the question whether an action in rem can be founded upon a claim for moneys owed under a berthing agreement between a port authority and the operator of a scheduled freight service, or whether such a claim must be brought in personam. The Court upheld the issuance of the writ in rem, but in order to do so it was necessary to establish that what had taken place was a supply of services" to the ship in order to facilitate its "operation" - as opposed to a facility contracted to the operator in support of its freight service. The judgment in *The "Shin Kobe Maru"*, however, was relied upon only with regard to its holding on a point of procedure which I have not discussed. In *The "Bass Reefer"*, specific words of the Admiralty Act 1988 were matched to the facts of the case in order to bring it within the ambit of the Court's jurisdiction in rem, which the Court skillfully accomplished while at the same time noting that the Act did not sanction the conversion of an action in personam into one in rem. The Court considered English authority which construed similar provisions in the Supreme Court Act of 1981, as was anticipated by the

draftsmen of the Admiralty Act 1988, and the case illustrates very well the way in which the English Admiralty Court has over its modern history enlarged its jurisdiction "word-by-word". I do not criticize either the approach or the result, but do note that the judgment - unlike that in *The "Shin Kobe Maru"* - did not at any point refer to the constitutional grant of jurisdiction. It is obvious from what has gone before that I have not raised *The "Bass Reefer"* case because I believe it to be of great importance to the future development of Australian Admiralty jurisdiction; I have raised it because its significance is, in Sherlockian terms, similar to that of "the dog which did not bark in the night."

It is the word "maritime" in s76(iii) which lies at the heart of the rationale of Gummow J. in *The "Shin Kobe Maru"*. Australian commentators have of course previously considered whether all maritime cases are now in law cognizable by the Admiralty Court, but their focus seems to have been fixed on the possible consequences of some provision of the Admiralty Act 1988 exceeding the ambit of the constitutional grant of "any" matter of admiralty and maritime jurisdiction. 68 To one who is accustomed to think of every case of Admiralty Court jurisdiction as a constitutional case, that is a perspective through the looking glass.

Although the structure of the Admiralty Act 1988 was virtually handed down on a tablet of stone, one must be conscious of the pitfalls in setting forth the admiralty and maritime jurisdiction by detailed legislation - the maxim *expressio unius est exclusio alterius* comes easily to mind. The dangers did not wholly escape the Law Reform Commission prior to enactment, 69 nor have they escaped commentators since, 70 but I have seen no comment which contrasts the absolute necessity of proceeding by detailed legislation in a State having no fixed constitution as opposed to the option of so proceeding in a State with a separate written constitution which sets forth a broad grant "of any matter ... of admiralty and maritime jurisdiction". It is not an answer to say that the constitutional grant in America runs directly to the judiciary, whereas the grant in Australia runs to the legislature, because in both constitutions the power is given to the legislature to structure the court system which will exercise the admiralty and maritime jurisdiction at first instance. 71 To indulge for a moment in pure theory, I am unable to discern any constitutional inhibition in Australia to enactment by Parliament of a statute which simply remits the exercise of any and all admiralty and maritime jurisdiction to the judiciary - full stop - as opposed to a detailed enumeration. This theory, however, can have practical consequences: the framers of s76(iii) are widely acknowledged to have acted in full appreciation of the effect given to these words in the American Constitution; could it reasonably have been their intention that Parliament should confer upon the judiciary any lesser jurisdiction than that comprehended by the chosen words of s76(iii)? It would be better, I dare suggest, to ask what has been left out of the Admiralty Act 1988 than whether anything has been left out of s76(iii) of the Constitution - and this seems to me to raise in turn the "ultimate question" for Australian maritime jurisprudence. It is a question that must arise at some point, given the constitutional grant of jurisdiction on the one hand and the structure of the Admiralty Act 1988 on the other; it will arise when an action is brought on a jurisdictional issue more obscure than that in *The "Shin Kobe Maru"* and the Admiralty Court sees that the matter is within the "maritime" jurisdiction comprehended by s76(iii) but is not covered anywhere in the Act. That such a question may well arise is foreshadowed by the commentary which preceded the Admiralty Act 1988. 72

The ultimate question seems most likely to be presented in the context of an action against a foreign defendant whose maritime property lies within the jurisdiction of the Admiralty Court. In this regard I note the increasing use of the Mareva injunction in Australia, and I appreciate that

its scope of application is still being developed here as it is in England. 73 The chief difference between the Mareva injunction as employed in England and Australia and maritime attachment as employed in America lies in the use of the process: the former is used only after an action in personam has been commenced by service of a writ, whereas the latter may be so used but is most commonly the means of founding jurisdiction in personam. 74

Australia has adopted the basic principle of the 1952 Brussels Convention on Arrest of Sea-Going Ships, which allows the arrest of a surrogate ship being under the same ownership or control as the wrongdoing ship was at the time the cause of action arose. 75 Since the objective is to induce the ship owner to appear in the Admiralty Court, whereupon he becomes liable in personam, the similarity of surrogate ship arrest to maritime attachment is plain. Even with sensitivity toward the stated Australian antipathy to attachment ad fundandam jurisdictionem, 76 one may be permitted to observe that the failure to employ the full remedy of maritime attachment both in England and Australia is a vestige of the old myth that the Admiralty Court really exists to act only in rem. 77 This self-imposed limitation is made more odd with recognition that the Admiralty jurisdiction is wielded by the same court which is supposed to have all powers at common law and in equity, and that both England and Australia profess adherence to the procedural theory of the action in rem, which essentially views the ship as mere property of the defendant which may be arrested in order to found in personam jurisdiction upon appearance to defend the res. 78 It is readily apparent that maritime attachment lies within the historical scope of maritime law, but that the Admiralty Court in England and Australia presently forbears as a matter of "jurisprudential taste" to invoke it as a means of founding jurisdiction in personam. 79 This is a taste becoming increasingly difficult to reconcile with a world in which it has been necessary to establish an International Maritime Fraud Bureau to deal with persons whose enterprises are founded upon avoidance of legal responsibility. My final impression is that Australia now is poised on the threshold of an historic development of its admiralty jurisdiction and practice, which past experience demonstrates must be done by the Admiralty Court through its instance judgments and by the appellate courts in maritime cases. The growing awareness that this is a constitutional function of the judiciary under the broad grant of admiralty and maritime jurisdiction in s76(iii) of the Constitution augurs well for the outcome.

The necessity not only to interpret but to fill lacunae in the Admiralty Act 1988 and the Admiralty Rules will forge an application of maritime law by the Admiralty Court which will serve the best interests of Australia while at the same time maintaining that degree of uniformity which is vital to the operation of the world's most effective branch of international law. In this the Australian judiciary should bear well in mind what Mr. Justice Zelling wrote fourteen years ago in commenting upon the restrictive interpretation given to the jurisdiction granted by s76(iii) during a time when Australia was still subject to the Colonial Courts of Admiralty Act of 1890: "That of course is ... an Australia which is now long gone. ... Australia is a separate power on the world stage today. All the factors which were present in the case of the United States a century ago are present with equal force in the Australia of today." 80

The moment in history is here for Australia. Judgments rendered today will determine the scope of jurisdiction and the nature of practice of the Admiralty Court for a century and more to come. All too quickly the moment will pass, and the fetters of today's adjudication will bind.

For the United States the moment died many lifetimes past. I leave you with an echo from its passing in America - the words of Chief Justice Salmon P. Chase: "[I]t better becomes the

humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." 81

FOOTNOTES:

1. Although the book has been out of print for nearly fifteen years there seems to be a strong secondhand 'market' for it, and I know of at least one reprinting run done in Singapore.
2. It is to be understood that the "Admiralty Court" to which I refer throughout is frequently a "generic" Admiralty Court acting at first instance, whether the particular court is constituted in Australia by a Federal Court or the appropriate court of a State or Territory, or in the United States by a Federal District Court, or in England by the Admiralty Court of the Queen's Bench Division of the High Court or by a county court.
3. See F.L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press, 1970, Chapter 3
4. So called because first granted by the Court of Appeal in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509.
5. See Wiswall, *supra* note 3, at pp.164 - 167. Cf. the description in M.J. Prichard and D.E.C. Yale, eds., *Hale and Fleetwood on Admiralty Jurisdiction*, Selden Society, London, 1993, introduction pp. cxxxi - cxxxiii
6. See D.R. Owen and M.C. Tolley, *Courts of Admiralty in Colonial America: the Maryland Experience, 1634 - 1776*, Chapter 1. (To be published in 1995)
7. S.R. Betts, *A Summary of Practice ... in the Admiralty Courts of the United States*, New York, 1838, pp. 28-30. Here is drawn the clear distinction between maritime attachment ("attachment in personam") and the "foreign attachment" which probably originated in the Mayor's Court of the City of London. The former is an originating process which is most commonly used to commence an action in personam but may also be employed thereafter to provide security for satisfaction of judgment. The latter is an ancillary process said by other sources to "have derived from the custom of London" which is commonly used (1) after an action in personam has been commenced, and (2) only when the property in question is in the possession of a third party not under the jurisdiction of the Admiralty Court. Cf. Federal Rules of Civil Procedure (U.S.), Supplemental Admiralty Rule B.
8. See Wiswall, *supra* note 3, pp. 164 - 166
9. See Prichard and Yale, *supra*, note 5, introduction p. cxxxiv.
10. See Owen and Tolley, *op. cit.* *supra* note 6.
11. E.g., F. L. Wiswall, Jr., *Admiralty: Procedural Unification in Retrospect and Prospect*, 35 Brooklyn L.R. 36 (1968), 161 New York Law Journal Nos. 15 - 17 (January 1969). This contains a brief history of the old General Admiralty Rules as well as the 1966 merger.
12. Previously, actions at common law before the Federal District Courts proceeded according to the practice of the courts of the particular State in which the Federal Court sat; the result was progressive chaos, since every Federal statute with procedural implications preempted State practice. The procedure in suits in equity and Admiralty was originally governed by rules adopted independently by each of the Federal Courts, but in practice these were quite similar from District to District; sufficient differences crept in, however, that the Supreme

Court in 1822 adopted uniform Equity Rules. The first uniform Admiralty Rules were adopted in 1845.

13. See Federal Rules of Civil Procedure, Rule 9(h). It is generally (and wrongly) thought that this selection of procedure is required by the Judiciary Act's wording in T.28 U.S.C. §1333: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."
14. *Compania Anonima Venezolana De Navigacion v. A.J. Perez Export Co.* (1962) A.M.C. 1710, 1720, 303 F.2d 692, 699 (5 Cir. 1962), cert. denied, 371 U.S. 942. Judge Brown had been an active advocate at the Admiralty Bar in Houston, Texas, before his appointment to the Federal bench.
15. The power to grant equitable remedies has long been viewed as an inherent power of the Admiralty Court which was sometimes improperly restrained in its exercise by removal to Chancery under writ of certiorari. Certainly the English Admiralty Court exercised equitable power prior to unification of the courts in 1873; see Wiswall, *supra* note 3, pp. 71 -72.
16. See L. Colby, Admiralty Unification, 54 *Georgetown L.J.* 1258, 1268 - 69 (1966). (Leavenworth Colby was a scholar of admiralty and Chief of the Admiralty and Shipping Section of the Civil Division of the U.S. Department of Justice.) See also *Pino v. Protection Maritime Insurance Co.*, 1979 A.M.C. 2459, 2467, 599 F.2d 10, 16 (1 Cir. 1979), cert. denied, 444 U.S. 900.
17. *Merchants National Bank of Mobile v. The Dredge "General G.L. Gillespie"*, 1982 A.M.C. 1, 663 F.2d 1338 (5 Cir. 1981), cert. dismissed, 456 U.S. 966. Judge Brown chaired the panel and wrote the opinion of the Court.
18. The story is well told in D.G. Culp, *Charting a New Course: Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment*, 15 *Journal of Maritime Law & Commerce* 353 (1984). The leading figure in this battle to preserve the admiralty procedure was David R. Owen of Baltimore, President of the MLAUS 1976 - 78.
19. 1991 A.M.C. 1, 498 U.S. 19 (1990).
20. See *The Schooner "Catharine" v. Dickinson*, 58 U.S. (17 How.) 170, 177 - 78 (1855).
21. *The "Mary A. Whalen" [United States v. Reliable Transfer Co., Inc.]*, 1975 A.M.C. 541, 552, 421 U.S. 397, 411 (1975).
22. *The "Harrisburg"*, 119 U.S. 199 (1886).
23. *Moragne v. States Marine Lines, Inc.*, 1970 A.M.C. 967, 398 U.S. 375 (1970)
24. See *The "Amiable Nancy"*, 16 U.S. (3 Wheat.) 546 (1818).
25. See *In re. Merry Shipping, Inc.*, 1981 A.M.C. 2839, 650 F.2d 622 (5 Cir. 1981), and cases cited therein.
26. I.e., the Jones Act (T.46 U.S.C. §688) and the Death on the High Seas Act (T.46 U.S.C. §§761 - 768).
27. See e.g., *The "Lottawana"*, 88 U.S. 558 (1875); also *Panama Railroad v. Johnson*, 264 U.S. 375 (1924).

28. The most direct recent exercise was the Admiralty Jurisdiction Extension Act of 1948, T.46 U.S.C. §740, which gave the Admiralty Court cognisance in rem as well as in personam of torts caused by a vessel on navigable water "notwithstanding that such damage or injury be done or consummated on land."
29. A clear statement is found in *Panama Railroad*, supra note 27, 264 U.S. at pp. 386 - 87: "[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in these subjects and cannot be altered by legislation ...".
30. However, it is clear that neither the Congress nor the Court may constitutionally abrogate or restrict the rights which arise under the historical Admiralty and maritime jurisdiction granted to the Admiralty Court by Article III, section 2, clause 1.
31. 1991 A.M.C. 1, 6 - 7, 498 U.S. 19, 27 (1990). Emphasis supplied.
32. See the excellent analysis by J.D. Kimball, Miles: "This Much and No More ...", 25 *Journal of Maritime Law & Commerce* 319 (1994).
33. See C.A. Ying, *Colonial and Federal Admiralty Jurisdiction*, [1981] 12 *Federal Law Review* 236.
34. For the current text see note 13, supra
35. Stat. I, sess. I, c. XX.
36. *Colonial Courts of Admiralty Act, 1890 (U.K.)* (53 & 54 Vict. c. 27)
37. See *Civil Admiralty Jurisdiction*, Law Reform Commission Report No. 33, 1986, paras. 8 - 34, 81. Also J. Crawford, *The Basis of Admiralty Jurisdiction in Australia*, *Australian Digest* 34.4 (Admiralty), Ch. 2, Part A, §[5]. However, compare H. Zelling, *Of Admiralty and Maritime Jurisdiction*, 56 *Australian Law Journal* 101 (1982), at p. 103
38. See the Report, *Civil Admiralty Jurisdiction*, supra note 37, para. 95.
39. *Bakri Navigation Company Limited v. Ship "Golden Glory" and Glorious Shipping S.A.*, (unrep. Fed. Ct., Sydney Registry No.G199 of 1991, 2 May 1991).
40. This would be an equally interesting question if before an American Admiralty Court, where a long-standing misinterpretation of the personification theory at present has lent authority to the view that a contract for the sale of a ship is not a maritime contract. It seems likely that the jurisdiction over such contracts will be firmly established when the Supreme Court is squarely confronted with the issue.
41. *Empire Shipping Co. Inc. v. Owners of the Ship The "Shin Kobe Maru"*, (1991) 32 F.C.R. 78, 104 A.L.R. 489 (F.C.).
42. Sub-sections 4(2) (a) and (b).
43. See Rule 37 of the Admiralty Rules (1989). Contrast the American admiralty law, Wiswall, supra note 3, at pp. 203 - 207.
44. For a thorough exposition of the "Shin Kobe Maru" case and its implications, see D. Bell, "Before the High Court", [1994] 16 *Sydney Law Review* 97.
45. Act No. 34, 1988. I wish to acknowledge Stuart Hetherington, Esq., President of the MLAANZ, particularly for his work *Annotated Admiralty Legislation*, Sydney, 1989, and

for various other materials which have been of invaluable assistance in the preparation of this lecture.

46. Article III, section 2, clause 1. See H. Zelling, *Constitutional Problems of Admiralty Jurisdiction*, 58 *Australian Law Journal* 8 (1984), at p. 11; also Crawford, *supra* note 37, s[8].
47. See, e.g., Zelling *op. cit.*, *supra*. Also Zelling, *supra* note 37, at p. 103. I have found Mr. Justice Zelling's writings invaluable in the preparation of this lecture.
48. 7 Fed. Cas. 418 (No. 3,776)(C.C.D. Mass. 1815). When the Supreme Court was not in session the duties of the Justices (not excepting the Chief Justice of the United States - see note 81, *infra*) originally included sitting as judges of the old U.S. Circuit Courts, which until their abolition in 1911 sat for two terms each year in each Federal District within the Circuit. Story was Justice for the First Circuit, which comprises all but one of the coastal States of New England, and he travelled a thousand miles between Rhode Island and Maine during each term. Although each Justice is still Circuit Justice for one or more of the Federal Judicial Circuits, only a vestige of the former function now survives, with the assigned Justice having a special responsibility to entertain chambers motions to the Supreme Court originating in his geographical Circuit.
49. *A Familiar Exposition of the Constitution of the United States*, by Joseph Story, LL.D., Dane Professor of Law in Harvard University, New York, 1859 ed. (reprinted 1986). Written between 1829 and 1833 they were revised in 1840, just 25 years after his judgment in *De Lovio*. The Commentaries generally reflect Story's strongly Federalist and abolitionist views.
50. *Id.*, §§328-329
51. I.e., the non-statutory law accreted from judicial decisions - the maritime equivalent of the common law.
52. Section 329; emphasis supplied. Story used his words carefully; he could not have meant to equate a lien under the general maritime law - a *jus in re* - with the more general "claim". A quarter of a century after his meticulous judgment in *De Lovio v. Boit* he is speaking of alternatives - on the one hand a maritime lien and on the other hand a claim, in the nature of a pledge. Significantly, the word "pledge" has commonly been used as the English translation of the French term "hypothèque". The *hypothèque* is emphatically not a lien, as the *International Convention on Maritime Liens and Mortgages 1993* well illustrates.
53. I.e., to restore possession of a ship to its rightful owner; an action in its nature indistinguishable from the suit in equity to quiet a title to real property.
54. Samuel Rossiter Betts, sole Judge of the United States District Court for the Southern District of New York (the busiest Admiralty Court in America) and author of "*A Summary of Practice ... in the Admiralty Courts of the United States*", New York, 1838.
55. I.e., to determine the legal title to a ship.
56. The cognisance of suits instituted by petitory libel was frequently prohibited by the courts of common law; but the Admiralty Court did exercise petitory powers on an ancillary basis in appropriate cases.

57. I.e., "inherent".
58. Betts, *supra* note 7, p. 16. Emphasis supplied.
59. The Schooner "Tilton", 23 Fed. Cas. 1277 (No. 14,054)(C.C.D. Mass. 1830).
60. See Prichard and Yale, *supra* note 5, at introduction pp. cxxx - cxxxiv.
61. Though the terms "statutory right in rem" and "statutory lien" are often used interchangeably, it is important to distinguish between them. A statutory lien is a maritime lien created by the legislature for a specified purpose, as opposed to a lien recognised by the general maritime law. A statutory right of action in rem is more in the nature of an attachment and does not independently survive a good faith transfer of ownership of the ship, whereas a statutory lien - such as the preferred lien of a ship mortgagee - does survive such a transfer.
62. (which, after all, does not exist in the American law of admiralty)
63. Statutory power is, in American admiralty, granted (1) for the decree of injunction against other proceedings which is issued following commencement of an action for limitation of liability. T.46 U.S.C. §185. The decree enjoins related actions in personam from proceeding in the federal courts, or pursuant to the "saving to suitors" clause of the Judiciary Act, T.28 U.S.C. §1333(1), in the courts of the States, and thus "marshals" the limited assets for distribution among all claimants in one proceeding. It is also granted (2) for the decree of injunction of suit when there is a maritime contract calling for arbitration. T.9 U.S.C. §§4, 8.
64. See the Report, Civil Admiralty Jurisdiction, *supra* note 37, ¶143. Also Wiswall, *supra* note 3, at p. 206. And see Crawford, *supra* note 37, at s[124].
65. See Crawford, *supra* note 37, at s[88]. Also the Report, Civil Admiralty Jurisdiction, *supra* note 37, at para. 248.
66. (1992) 38 F.C.R. 227, 110 A.L.R. 463 (F.C.).
67. Port of Geelong Authority v. The Ship "Bass Reefer", (1992) 109 A.L.R. 505 (F.C.).
68. E.g., Crawford, *supra* note 37, at s[10]. This reflects the "abundance of caution" which brought about the inclusion of Part II, Cl. 13 of the Admiralty Act 1988; see Hetherington, *supra* note 44, at p. 10. I cannot resist the conclusion that it was an overabundance of caution.
69. See the Report, Civil Admiralty Jurisdiction, *supra* note 37, para. 95.
70. See Crawford, *supra* note 37, s[10].
71. I forbear at this point to digress into the status of the courts of the Australian States as Admiralty Courts, which I acknowledge to be a constitutional issue.
72. See the Report, Civil Admiralty Jurisdiction, *supra* note 37, para. 95 and fn. 48.
73. See A. Rogers, The Extra-territorial Reach of the Mareva Injunction, [1991] Lloyd's Maritime & Commercial Law Quarterly 231. Justice Rogers argues in favour of broader use through reciprocal enforcement of the orders of foreign courts.
74. The other difference is that property under attachment is taken directly into the custody of the Admiralty Court; property covered by a Mareva injunction is forbidden to be removed

from the Court's geographical jurisdiction but remains otherwise under the control of the defendant to the extent not limited by the wording of the injunction. In theory *Mareva* property is subject to wastage *pendente lite*; in practice it is only so to the extent that the plaintiff might fail to secure adequate limitations in the order of injunction.

75. Admiralty Act 1988, s19. In American admiralty law the ship is personified, and only the wrongdoing vessel may be arrested. Canadian admiralty law also allows arrest only of the wrongdoing ship.
76. See the Report, Civil Admiralty Jurisdiction, *supra* note 37, paras. 85, 94, 124.
77. There seems to be a genuine reluctance in Australia to admit that the Admiralty Court, when not prohibited by the courts of Common Law, was always equally a court of *in personam* jurisdiction. See the Report, Civil Admiralty Jurisdiction, *supra* note 37, at the conclusion of para. 92.
78. For an exposition of the procedural and personification theories of the action *in rem*, see Wiswall, *supra* note 3, pp. 157 - 164. It is fair to say that the writer finds less enthusiasm for the procedural theory in Australia than in England.
79. In *The "Beldis"*, [1936] P. 51, at p. 76, the learned Judge [Sir Boyd Merriman, P] stated that to utilise a process similar to maritime attachment in order to obtain jurisdiction *in personam* "would be disastrous to the prestige of the Court." See Wiswall, *supra* note 3, at p. 170
80. Of Admiralty and Maritime Jurisdiction, *supra* note 37, at p. 106.
81. *The "Sea Gull"*, 21 Fed. Cas. 909 (No. 12,578 C.C.D. Md. 1865).

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