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THE RECOGNITION, TRANSFER AND EXTINCTION OF MARITIME LIENS
IN SOUTH AFRICAN LAW

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PREFACE

The South African Admiralty Jurisdiction Regulation Act 1983, as amended contains no definition of the maritime lien. Neither does the English Supreme Court Act 1981, nor the very recent 1993 International Convention on Maritime Liens and Mortgages. Yet the very distinguishing feature of admiralty law and jurisdiction is the maritime lien, inextricably linked as it is with the action in rem.

This dissertation therefore aims to consolidate into one source an attempted definition of maritime liens, particularly as recognised by South African law, and then to concentrate on two particular aspects of maritime liens which seem to have received little academic and judicial attention namely the transferability of maritime liens and the modes of extinction of maritime liens.

I would like to acknowledge Professor Hilton Stanilands academic 'hegemony' in the field of maritime law in South Africa. A simple glance at the academic articles referred to herein substantiates this description and I would like to thank him, as my supervisor, for his patience and perseverance with me and for his inspiration.

CHAPTER ONE

MARITIME LIENS

1.1 DEFINITIONS AND ORIGINS IN ENGLISH LAW

Sir John Jervis in The Bold Buccleugh gave the first comprehensive and authoritative definition of a maritime lien as follows:

"A maritime lien is well defined to mean a claim or privilege upon a thing to be carried into effect by legal process that process to be a proceeding in rem. This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."¹

Expanding on this definition and providing further elements to the definition is the often quoted judgement of The Ripon City², a maritime lien is

"A privileged claim upon a vessel in respect of services done to it, or injury caused by it, to be carried into effect by legal

1. Harmer v Bell (The Bold Buccleugh) 1852 7 Moo PCC 267.

2. (1897) P 226 at 242.

process. It is a right acquired by one over a thing belonging to another - a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner of the thing."

Essential elements of the definition, and characteristics of maritime liens are therefore as follows:³

1. The existence of a maritime lien enhances the claim out of which it arises, and which it secures into a privileged one, one which in general ranks before other claims including mortgages.
2. The maritime lien is enforced by an action in rem, and the claim is satisfied out of the proceeds of the sale of the thing.
3. The things to which the maritime liens could attach are the vessel, cargo and freight of a maritime adventure.⁴

3. See generally - Herbert "The Origin and Nature of Maritime Liens" (1929) 4 Tulane Law Review 380; Price; "Maritime Liens" (1941) 57 Law Quarterly Review 409; Ryan "Admiralty Jurisdiction and the Maritime Lien" (1968) Western Ontario Law Review 173; Toy "Introduction to the Law of Maritime Liens" (1973) 47 Tulane Law Review 550; Thomas "Maritime Liens" (1980); Jackson "Enforcement of Maritime Claims" (1985).

4. Herbert *op cit*.

4. The lien arises automatically, by operation of law immediately the events giving rise to it occur.⁵
5. The creation of the lien requires no formality or agreement, recognition or registration. It is often for this reason described as 'secret'.
6. The lien is indelible. This is the often used phrase to describe the fundamental characteristic that the lien attaches to and travels with the res despite changes of ownership and possession and irrespective of notice. The term indelible must not be taken to imply that the maritime lien is not extinguishable.⁶
7. The maritime lien is therefore independent of possession by the lien holder.

The concept of the maritime lien is found in most of the principal maritime jurisdictions, but although the nature of the rights conferred is similar great

5. The Mary Ann (1865) LR 1 A & E 8 - at p12 where said Dr Lushington "it springs into existence the moment the circumstances give birth to it."

6. Thomas op cit 25 - 31.

differences exist between the various legal systems as to the range of claims recognised.⁷ Most notable here is the contrast between the English law and the admiralty law of the United States where the primary difference is that in English law the maritime liens are limited to six categories of maritime liens, a settled and closed list - a numerus clausus, whereas in the United States the concept is extensively developed to the extent that every maritime claim enforceable by an action in rem is considered to be secured by a maritime lien.⁸

Contrary to the traditional and orthodox view of English law, there are a number of extensions to the existing liens which ought to be categorised as separate liens (to be referred to as the uncertain maritime liens) and there are a number of liens arising out of statute which although showing the basic characteristics and elements of definition of the recognised maritime liens are not identical, and therefore should also be listed and recognised as separate and distinct from the maritime liens.⁹ These will be discussed *infra*.

The six traditional categories of maritime liens recognised in English law are hereafter referred to as

7. Thomas *op cit* 2.

8. For a comprehensive comparison between the two legal systems" see Toy *op cit* and Price *op cit*, footnote 3.

9. Staniland - "Should Foreign Maritime Liens be Recognised" (1991) 108 SALJ 293.

the established maritime liens¹⁰ and arise out of claims for:

1. salvage;
2. damage done by a ship;
3. seaman's wages;
4. masters' Wages
5. masters disbursements
6. bottomry and respondentia

1.2 THE JURIDICAL NATURE OF MARITIME LIENS

The legal nature of the claims from which the maritime liens arise are different, being *ex contractu* in respect of bottomry, wages and disbursements, *ex delictu* in respect of the damages lien and *quasi ex contractu* in respect of the salvage lien.

Great difficulty exists in classifying maritime liens. Not all of the liens are based on voluntariness in the sense of the choice or discretion which the lienee had over the circumstances giving rise to the claim and therefore the lien, for example the damages lien. Policy considerations are different for the various liens, the liens rank differently, they encumber different property and many other differences exist.

Theories advanced to explain the juridical basis of maritime liens and the action in rem can be categorised into three broad fields of thought.

¹⁰. Bankers Trust International Ltd v Todd Shipyard Corp
The Halcyon Isle (1981) AC 221 PC at 202.

The personification theory ascribes personality to the ship in terms of which the ship is regarded as a distinct juristic person with the capacity to commit torts and to contract.¹¹ The ship is both the source of liability and also the limit of liability of the owner.

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This theory explains comfortably the characteristics of some of the maritime liens that they accrue independently of any personal liability of the ship owner or res owner and that the lien travels with the res irrespective of transfer, but does not provide a satisfactory explanation for the existence of a coincidental personal liability of the res owner in respect of the damage and the disbursement liens, nor does it accommodate the English decisions that doubt that the limit of liability in an action in rem, based upon a maritime lien, is necessarily restricted to the value of the res.

The personification theory had its greatest acceptance in United States admiralty law,¹³ and has received no acceptance by the English judiciary¹⁴

11. The best exposition of the personification theory is found in Herbert "The Origins and Nature of Maritime Liens" (1929) 4 Tulane Law Review 381. See Toy op cit 410. and Thomas op cit 7 (footnote 3).

12. The Conoco Britannia (1972) 2 All ER 238 at 245.

13. See generally Herbert op cit; Toy op cit and Price op cit, (footnote 3).

"The jurisprudence of the vessels 'personality' now appears to offer historical interest only."¹⁵

The theory which enjoys the most acceptance by the English judiciary is known as the procedural theory. This theory holds that maritime liens evolved out of the need to arrest the res in order to compel the appearance of the owner and to obtain security to satisfy judgement.¹⁶

In The Tervaete¹⁷ the maritime lien is described as:

"A means of bringing the owner of the ship to meet his personal liability by seizing his property."¹⁸

In The Ripon City¹⁹ in referring to the right to proceed against the vessel in exercising a maritime lien, Gorrel Barnes. J states:

14. Thomas op cit 8.

15. Toy op cit 560.

16. Herbet op cit 391.

17. (1922) P 267.

18. Ibid.

19. (1897) P 222.

"This right must therefore in some way have been derived from the owner, either directly or through acts of persons deriving their authority from the owner."²⁰

The procedural theory presupposes personal liability on the part of the res owner at the time of the claim arising. The theory does not explain the fact that bottomry never involves the personal liability of the owners nor does it explain the characteristic that the lien travels with the res and is enforceable against a bona fida purchaser without notice.²¹

A third theory, referred to as the conflict theory, ascribes the origin and development of maritime liens to the struggle between the competing courts for jurisdiction in England during the eighteenth and early nineteenth century.²² The English admiralty court had by the eighteenth century had its jurisdiction in personam so restricted by the common law courts that the theory holds, admiralty practitioners grasped upon its jurisdiction over a maritime res to repel further encroachment by the common law courts and to develop its own jurisprudence.²³

20. Ibid at 242.

21. See Price op cit 411.

22. See Toy op cit 569, Thomas op cit 9.

23. Thomas ibid 9.

None of these theories provide a comprehensive explanation for the characteristics of the maritime lien in contemporary law, and for the purposes of this work I shall rely on Toy's excuse:

"Rather than attempting to develop a logical pattern (as to the diversity of the nature and source of maritime liens,) we will be better off recognising the subject as a hodgepodge of inconsistencies and simply record those facets that permit the recognition of a lien and its standing."²⁴

1.3 THE MARITIME LIENS

Although all of the maritime liens share in common the general features and characteristics outlined above, it is necessary to examine each maritime lien independently and to identify additional characteristics peculiar to each category of lien.

1.3.1 THE DAMAGES MARITIME LIEN

The damages maritime lien has its initial judicial recognition in The Bold Buccleugh.²⁵ It is described as probably the most important maritime lien, being

24. Toy op cit 560.

25. Thomas op cit 124.

associated with that aspect of admiralty jurisdiction most frequently resorted to.²⁶

The original jurisdiction of the high court of admiralty was restricted to claims in respect of damages done by a ship on the high seas.²⁷ The Admiralty Court Act of 1840 extended the jurisdiction by removing the restriction that the damage must have occurred on the high seas and the 1861 Admiralty Court Act further extended the jurisdiction to:

"any claim for damage done by a ship."²⁸

Contemporary English law still requires that the ship be the instrument of the damage²⁹ although direct physical contact is not necessary.³⁰

The maritime lien that arises in these circumstances is supported by considerations of public policy encouraging careful navigation and providing "the corpus of the offending ship" as compensation to those injured by the negligence of others.

26. Thomas op cit 103.

27. See Thomas op cit 113.

28. Thomas op cit 22 and Dillon and van Niekerk. Selected Topics on Maritime Law in South Africa.

29. The Escherheim (1976) 2 Lloyds Rep 1.

30. Currie v McKnight (1897) AC 97.

The basis of the claim which the maritime lien secures is tort, so the maritime lien is considered correctly as having arisen ex delictu. The element of fault is essential, the fault of those people in lawful control of the ship and therefore the lien is founded on the personal liability of the res owner, directly or more commonly and likely, vicariously.³¹ Where a demise charterparty exists, a long line of cases concluded that the existence of the demise charterparty did not preclude the existence of the maritime lien, thereby creating an anomaly, which is rather described as an exception to the rule. This exception has been confirmed by the Court of Appeal in The Tervaete,³² and confirmed again as late as 1979 in The Father Thames.³³ However it is open to the ship owner to show that the person in charge of the ship or the persons navigating the ship did not derive any authority from the owners. Where no such authority exists - express or implied - no maritime lien arises.³⁴

The judgement by Sheen, J in The Father Thames confirms and illustrates again the judicial acceptance which the procedural theory had in English law as well as

31. The Parlement Belge 4 Asp. Mar. Law Cas. 234; Thomas op cit 127, and best illustrated in The Utopia (1893) AC 492. The Sylvan Arrow (1923) P 220 contains a review by Hill. J of all the authorities.

32. (1992) P 259 (CA).

33. (1979) 2 Lloyds Rep 364 at 370.

34. The Sylvan Arrow (1923) P 220.

confirming again that personal liability is a condition precedent of this lien.

It is arguable that the damage maritime lien does exist in respect of claims for personal injury and loss of life.³⁵ The statutory extension of the damages maritime lien to include claims for personal injury appears to have commenced with the 1861 Admiralty Court Act. The right to bring an action in rem for personal injury claims is contained in section 20 (2) (f) read with section 21 (4) of the 1981 Supreme Court Act. Considerations of public policy provide the strongest justification for this extension. The existence of the maritime lien for personal injury would encourage safe navigation and would avoid the situation where the protection of property is accorded greater value than the protection of human injury. The extension of this lien to include claims for loss of life is very dubious since it is uncertain in English law whether a claim exists in this regard, despite certain legislation.

The property encumbered by the damage maritime lien includes the ship and all its apparel, as well as any freight or passage money which the ship had earned up to the moment that the damage lien accrued and which had become due. However a lien on the freight can only exist if there is also a lien on the ship.³⁶

35. Thomas op cit 132. The Tolten (1946) P 135; Staniland (1991) P303; Tetley Maritime Liens and Claims (1985) 170.

36. The Castlegate (1893) AC 38.

Cargo carried on the wrongdoing ship is not subject to the damage lien, the element of personal fault not being relevant to the cargo.

1.3.2 THE SALVAGE MARITIME LIEN

The salvage lien accrues the moment a salvage service is rendered to a distressed maritime res. Where there is a salvage in terms of the legal definition, there exists a salvage maritime lien. Public policy is the foundation of salvage law as well as the salvage lien.

A salvage claim may arise out of a salvage contract but generally in the absence of an agreement salvage is considered to have arisen quasi ex contractu, therefore the salvage lien is said to arise quasi ex contractu.

The distinct characteristics of the salvage maritime lien are as follows:

1. The salvage lien attaches to every part of the benefited res and obviously this lien is lost on destruction of the res.³⁷
2. There must have been a benefit conferred upon the property, and the lien accrues only to the extent of the benefit conferred.³⁸

37. The Catherine (1851) 15 Jur 231 cited in Thomas op cit 151.

38. The Cargo Ex Shiller (1877) 2 PD 145.

3. The salvage lien arises independently of a salvage agreement. However an agreement may govern the extent and implementation of the salvage maritime lien.³⁹
4. The lien is independent of any personal obligation on the part of the res owner.⁴⁰
5. Where several proprietary interests benefit by the salvage, each interest is severally and rateably charged with a maritime lien (several but not joint liability.)⁴¹
6. Where two sets of salvors have rendered services to a ship independantly, on separate occasions, the lien of the latter salvor had priority to that of the former.⁴²

The property encumbranced by this lien includes the ship and her apparel, the cargo carried on board or

39. The Goulendris (1927) 182.

40. Thomas 155.

41. Thomas 153 and Halsbury Vol 43 Para 1136. The Westminster (1848) 1 WM Rob 229.

42. Carver - Carriage by Sea 13th ed at 928.

transported in tow, flotsam, jetsam and lagan; freight which was at risk but which was saved by the salvage act; derelict and wreck.

The 1989 International Convention on Salvage, designed to replace the 1910 Convention for the Unification of Certain Rules of Law relating to assistance and salvage at sea, introduced the concept of rewarding services which prevented damage to the environment by substances other than oil.

Article 20 of the 1989 Convention specifically retains the salvors maritime lien under national law or any international convention, but is silent on the question of whether the new obligations created by it will give rise to maritime liens.

Article 6 of the convention allows parties to contract out of the provisions of the convention - with the effect that Lloyds Open Form 1980 and any industry or specific salvage contract may continue to exist - save for two exceptions contained in article 6 (3) referring to articles 7 & 8.

Article 7 gives a court wide jurisdiction to interfere with contracts entered into under the influence of danger or other undue influence. A court may either annul all or part of the contract or modify any of the terms thereof. The terms would have to be shown to be inequitable and there is equal power to reduce an excessive amount as well as to increase the reward where the salvage was more difficult than anticipated. Where the contract is annulled, salvage could be awarded by a court under the general provisions of the convention.

Clearly in this regard the maritime lien only exists in respect of payment for salvaging property in distress.⁴⁵ It would seem therefore that in the absence of specific legislation, by English law enacting the convention, creating new maritime liens, the existing salvage maritime lien does not exist for article 8 claims for compensation for breach, article 13 claims in respect of an enhanced award for the portion of the salvage claim which exceeds the value of the salvaged property and for article 14 claims under the safety net provisions.⁴⁶ Other aspects of the convention which effect the extent and the implementation of the salvage lien are briefly as follows:

1. Time Bar - actions for payment of salvage claims under the convention must be brought within two years of the terminations of the salvage services - article 23.
2. Extension of property subject to a salvage claim. Article 3 excludes offshore structures either permanently installed on the sea bed or semi submersible or mobile offshore drilling units. The exclusion only applies while they are anchored in location and engaged in exploration, exploitation or production. While in transit etc they fall into the

44. Gaskell op cit 238.

45. ibid 285.

46. ibid 285.

Article 8 creates obligations on both the salvor and those benefiting from the salvage to prevent or minimise damage to the environment. The breach of these obligations would give rise to claims for compensation, although the convention is silent on the sanction for breach, an ordinary claim for damages would surely exist.⁴³ While these provisions do not effect the existence of the maritime lien, they do have an effect on the extent and implementation of the lien.

Article 13 contains the criteria to be taken into account when assessing the reward, and importantly adds that the court can take into account skill and efforts used in preventing or minimising damage to the environment and to this extent increase the award. To the extent that this enhanced or increased salvage award exceeds the value of the res benefited, the salvage maritime lien surely does not exist in English law.

Article 14 contains a safety net provision motivated out of reasons of public policy to encourage salvors to undertake environmentally sensitive jobs even where there was a risk of not salvaging property and therefore not receiving a salvage award (the no cure no pay principle is fully retained by the convention.) The safety net provides that at worst the salvor could receive a guaranteed refund of expenses and an upliftment of up to 100% of these expenses. The article 14 payment is also payable by the shipowner alone and could not be recouped by a general average action.⁴⁴

43. Gaskell "The International Convention on Salvage 1989" (1989) International Journal of Estuarine and Coastal Law 4,4 260 and 278.

definition and may be salvaged. The rationale being that such structures while in operation have specific safety plans etc that the average salvor could interfere with. Pipelines are not excluded.⁴⁷

3. Extension of geographical limits - salvage is not restricted to seas or oceans, which was the limitation in English law prior to the convention. Each state may reserve the right to exclude certain inland water vessels from the convention.⁴⁸

1.3.3 SEAMANS LIEN FOR WAGES

The view of admiralty is that the seaman serves the ship and the ship stands as security for his claim for any unpaid wages. Certainly regarding seaman's wages:

"statutes enlarging the jurisdiction of the admiralty court to entertain claims for wages, have been construed by the courts as impliedly extending the ambit of the lien."⁴⁹

The jurisdiction of the (admiralty) court and the existence of a maritime lien are coterminous.⁵⁰ The

47. *ibid* 276.

48. *ibid* 274.

49. Thomas *op cit* 174.

50. *ibid* 175 and The Halcyon Skies (1977) 1 QB 14.

1840 and 1861 Admiralty Court Acts confirmed and statutory extended inherent jurisdiction of admiralty and this extended jurisdiction has been redefined and confirmed in subsequent legislation to the present section 1 of the 1956 Administration of Justice Act.

The seaman's lien for wages is afforded protection in English law by the 1970 Merchant Shipping Act in the form of rendering any agreement by a seaman to forfeit his lien against a ship for his wages void.⁵¹

The judicial basis of the lien being based on service to a ship makes the lien independent of any personal liability on the part of the shipowner, and justifies the personification theory mentioned above. The claim for wages does therefore arise *ex contractu*, out of the general mariners contract or a special contract of employment.

The confusion relating to this aspect was clarified to some extent by Brandon J in The Halcyon Skies⁵² where he held that a failure to pay seaman's pension contributions was a breach of the special employment contract existent for which the seaman were entitled to recover damages. In answer to the question of whether contemporary admiralty law recognised the existence of a maritime lien in respect of wages claims founded on a special contract Brandon J expressed the opinion that:

51. See Thomas 175.

52. *op cit* 25.

"According to my experience, however, the existence of a lien in respect of such a claim (arising out of special contract of employment) has been generally assumed in uncontested cases over many years,"⁵³

and that the extended jurisdiction conferred on the admiralty court by the 1840 and 1861 Act coterminously extended the maritime liens recognised in respect of claims under the existing jurisdiction to claims of a similar kind under the enlarged jurisdiction.

Thus the contemporary law recognises that the basis of a seaman's and the master's claim for wages arises out of the contract of employment with the ship owner (a special contract) and that therefore the maritime lien is a contractual lien.

In contemporary English law the concept of wages has been liberally construed to include many benefits and allowances flowing from a contract of employment 'package.' Aspects like pension\provident fund contributions, tax, trade union dues, sick pay and overtime pay and compensatory damages arising out of wrongful dismissal, are examples. To the extent that if a claim satisfies this widened definition of a wage, there exists a maritime lien.⁵⁴

The property capable of being encumbered by this lien is the ship in respect of which the employment was

53. op cit 27.

54. The Halcyon Skies op cit.

rendered, and every part of that ship, including improvements and accretions effected subsequent to the attachment of the lien. The freight is subject to the lien only in so far as the claim is not satisfied out of the proceeds of the ship. There is no lien for wages on the cargo, which follows from the notion that the lien emanates from service to the vessel.

1.3.4 THE MASTERS' LIEN FOR WAGES

In English law the maritime lien for a masters wages is a creation of statute. Until the 1844 Merchant Shipping Act the master's employment was not seen as service to a ship, but rather as an employment contract personally with the shipowner. After the 1844 Act, and prior to the 1861 Admiralty Court Act, increasing jurisdiction had been given to the admiralty courts to consider claims for wages by a master. The contemporary maritime lien in English law is contained in the provisions of section 18 of the Merchant Shipping Act 1970 which gives to a master the same lien for his remuneration as a seaman has for his wages. However the provision is silent on the aspect of the inalienability which the same act provides in respect of the seaman's lien. The master's claim for wages, clearly arises ex contractu, out of the special contract of service and therefore the lien ought to be classified ex contractu.

The judgement of Brandon J discussed in Paragraph 1.3.3 above must apply equally to the case of masters' wages, since it deals with the special contract of service.

All the other characteristics are the same as those of the seaman's wages lien.

1.3.5 THE MASTERS LIEN FOR DISBURSEMENTS

This is not the place for a discussion of the concept of masters disbursements, save to say that in modern commercial circumstances the concept must be of diminishing significance.⁵⁵

The maritime lien for masters disbursements was the last maritime lien to be recognised, in point of time, and is purely a creation of statute. It has its origin in the 1889 Merchant Shipping Act. The contemporary lien is found in section 18 of the 1970 Merchant Shipping Act in English law. The construction of the provision is to relate the masters' liens to the lien which a seaman has for his wages.

The masters claim, secured by the maritime lien, arises out of his implied or express authority to bind the ship owners credit or to contract on their behalf for all purposes to preserve ship and cargo and to pursue the voyage. The claim is clearly within the ambit of contract and agency. The master made disbursements during the course and scope of his employment as master and had a lien over his employers ship and cargo, from which his employers would earn freight, securing reimbursement by the owners.⁵⁶

The master could recover disbursements which he made to other privileged claimants, like seaman for their wages,

55. Thomas 193.

56. The Ripon City op cit footnote 2; The Orienta (1895) P 150.

and he therefore had his disbursements lien to secure his claim for reimbursement.

The maritime lien arises ex contractu since the nature of the claim is contractual.

The other aspects of this lien are the same as those for the seamans wages lien.

1.3.6 BOTTOMRY AND RESPONDENTIA MARITIME LIENS

Bottomry and respondentia, being once very important sources of shipping finance, played an important role in the development of the law of maritime liens and were one of the earliest liens to be recognised. Like salvage and seamans wages the concept is founded on the notion of service to the ship and in considerations of public policy. The lien is therefore totally independent of the personal liability of the res owner.

Obviously the terms of the agreement, the bond deed, determine the lien in that the agreement will state precisely what res is being hypothecated, and only that res is subject to the lien.

The law relating to the extinction and transferability of a maritime lien generally is of particular relevance to bottomry and respondentia in as far as time limitations are concerned. In this regard bottomry liens have received clear treatment by the courts, unlike the other maritime liens.

Bottomry was the pledge of ship and freight to raise funds during a voyage. Respondentia was a pledge of

cargo only. The pledge was invariably given by the master, who has implied authority to do whatever is necessary and prudent for the preservation of ship and cargo and for the completion of the voyage.

Modern communications and changed financing and banking practice have rendered both bottomry and respondentia totally obsolete.

The law relating to them is relevant from a historical point of view as well as from the judicial indications given in judgements which relate to the other maritime liens.

1.4 THE "UNCERTAIN" MARITIME LIENS

In addition to the established maritime liens, great debate and argument exists as to whether maritime liens attach to a number of other claims. These have been referred to as 'uncertain' maritime liens.⁵⁷ Included in the uncertain list are:

1. Claims for expenses by the receiver of the wreck in terms of section 567 (2) of the English Merchant Shipping Act 1894;
2. Remuneration for coastguard services in respect of the wreck in terms of section 568 (1) Merchant Shipping Act 1894;

57. See Jackson op cit 16; Staniland "Should Foreign Maritime Liens be Recognised" (1991) 108 SALJ 1293 at 300.

3. Damage done to land in rendering assistance to shipwrecked persons or property in terms of section 513 of the Merchant Shipping Act 1894;
4. Pilotage dues;
5. Towage;
6. Damage done by ships to harbours and docks in terms of section 74 of the Harbours, Docks and Piers Clauses Act 1847;
7. Loss of life and personal injury, and,
8. Damage done by a ship in the form of pollution.

The question as to whether maritime liens attach to the above is uncertain in English law and remains open to the courts to determine or for an international convention to clarify.

1.5 STATUTORY AND POSSESSORY LIENS

In English law one must also distinguish statutory liens and possessory liens from maritime liens. Certain statutory liens attach when property is arrested in an action in rem in admiralty jurisdiction. The action in rem and lien are contained in the various statutory provisions, examples of which are the warehousemans liens on goods placed in his custody for unpaid dues and expenses - contained in the English Merchant Shipping

Act 1984; and the harbour and dock authorities rights in respect of unpaid dock and harbour dues, damage to harbour and dock works etc in terms of the Harbours, Docks and Piers Clauses Act 1847. Section 20 of the English Supreme Court Act 1981 provides statutory liens for necessities supplied to a ship. Statutory liens are enforced by an admiralty action in rem and satisfied out of the sale of the property. Statutory liens are of no avail against any subsisting charge on the property (mortgage bonds etc) or against a bona fida purchaser for value.

Certain possessory liens also exist, giving the right to the party in possession of the ship to retain possession until payment of certain claims, most particularly for repairs done, or where labour and skills have been bestowed on the ship. The possessory liens exists only while actual possession is retained and there is much case law on what constitutes possession.⁵⁸ Such possessory liens do not include the power to sell the vessel. The property may be held only until the original claim is paid even though they probably incur expenses in doing so.⁵⁹

In English priority or ranking of liens the statutory liens for dock and harbour authorities rank above all other liens including maritime liens, which rank next, and then in order are mortgages and statutory liens. Possessory liens rank after all liens which attached

58. See The Scio (1867) LR 1 A&E 353; The Katingaki (1976) 2 Lloyds Reps 372; The Ijaola (1977) 1 Llyods Rep 103.

59. Sommes v British Empire Shipping Co (1860) 8 HL Cas 338.

before the possession, and above all liens which attach after possession is taken.

1.6 THE MARITIME LIEN - PROCEDURAL REMEDY OR
SUBSTANTIVE RIGHT?

It remains a contentious issue whether the maritime liens provide simply a procedural remedy or whether they give rise to substantive rights in the res.

In the last decade a number of cases have highlighted the need for certainty in this regard, and the far reaching consequences of the classification one way or the other.⁶⁰ These cases have related to the general choice of law rules of private international law as to whether to apply the law of the forum or the law of the place where the contract arose for example. The classification is important and has consequences with regard to the transferability of maritime liens as will be discussed supra.

The use of the word 'inchoate' in Jervis C J's judgement in The Bold Buccleugh⁶¹ has been interpreted as detracting from the force of the rights acquired by the lienee immediately and therefore is cited as authority

60. Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle) (1981) AC 221 PC; and Southern SS Agency Inc v M V Khalij Sky 1986 (1) SA 485 C.

61. Infra footnote 1.

for the maritime lien being a procedural remedy - the remedy of attachment.

Jackson however argues that on analysis of the whole judgement Jervis C J was at pains to distinguish the maritime lien from the other liens, mainly possessory liens which were devised to compel the appearance of the owner defendant, or else were processes for foreign attachment, founding jurisdiction when foreign debtors existed.⁶² In so distinguishing Jackson argues that Jervis C J saw the maritime lien as substantive in character.

In The Tervaete⁶³ in emphasising the personal liability of the ship owner the procedural nature of the maritime lien is emphasised, as in The Castlegate⁶⁴, per Lord Watson:

"in as much as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability."

In the Ripon City,⁶⁵ however the maritime lien is clearly seen as conferring a substantive right " - a jus

62. See Jackson op cit 221 - 222.

63. (1922) 259, 267.

64. (1893) AC 38, 52.

65. (1897) 226, 242.

in re aliena..... a subtraction from the absolute property of the owner of the thing."

The matter has recently received extensive treatment in the case of Bankers Trust International Ltd v Todd Shipyards Corp. (The Halcyon Isle).⁶⁶ In the Halcyon Isle the majority judgement concluded that the maritime lien created no immediate right of property, and that the maritime lien is a procedural remedy. Therefore for a foreign maritime lien to be recognised by an English court, the lex fori must recognise that maritime lien, since it is the lex fori that determines all aspects of procedure.

Lord Diplock, delivering the majority decision in The Halcyon Isle argued that maritime liens give rise to procedural remedies by emphasising the inchoate character, that a maritime lien has no legal consequences until carried into effect by an action in rem. Jackson argues that Diplocks reasoning is semantic - that there is no distinction between a substantive right which has to be enforced by legal proceedings and a right which depends on the taking of legal proceedings for its substance (an inchoate right):

"whether proceedings can be bought and whether a claim exists in simply to put the same issue in different ways."⁶⁷

66. (1981) AC 221 PC.

67. Jackson 223.

Analogous to a mortgage, the substantive right exists and it is an actual encumbrance on the vessel even though the mortgagors satisfaction is dependent on his ability to enforce his rights only through legal proceedings.

A further problem which flows from the majority decision of The Halcyon Isle is that if the maritime lien is seen as giving rise to a procedural remedy only, then as a vessel travels the world through different jurisdictions maritime liens attach or are discarded depending on the recognition by the lex fori in each jurisdiction. This is in contradiction to the established element of the definition of the maritime lien that it travels with the vessel regardless of possession and changes of ownership etc. This also has the effect of promoting forum shopping which is undesirable in that it detracts from free trade and international certainty.

Whether the majority decision in The Halcyon Isle is binding on South African law, will be considered supra. In the final analysis the uncertainty created in this regard is detrimental to international trade and legal certainty and needs to be addressed by an international convention. Neither the 1926 nor the 1967 International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages have been acceded to by English or South African law.

The 1993 International Convention on Maritime Liens and Mortgages will also be discussed supra.

1.7 NO COMPREHENSIVE DEFINITION IS POSSIBLE

The above definitions and discussions of the different maritime liens and their characteristics goes some way towards illustrating:

"the complex nature of the maritime lien, which is an amalgam of jurisdictional, procedural, remedial, substantive and proprietary rights. Whenever any one such right is emphasised while any other such right is ignored, the definition of the maritime lien is necessarily incomplete and even incorrect maritime liens, despite their common characteristics are immensely variable - that each lien had its own historical development; that each lien serves its own policy concerns; that the requisites for the creation of the liens differ; that liens are ranked differently; that liens are not equally transferable; that liens may encumber different property; and that liens may be extinguished in different ways."⁶⁸

68. H. Staniland (1991)108 SALJ 293 at 295.

CHAPTER TWO

THE SOUTH AFRICAN ADMIRALTY LAW

2.1 THE SOUTH AFRICAN ADMIRALTY LAW

In South African law all disputes concerning shipping and maritime matters generally are to be adjudicated exclusively before the South African admiralty court.

The exclusive jurisdiction of the admiralty court is governed by the South African Admiralty Jurisdiction Regulation Act, Act 105 of 1983; as amended.

Every division and local division of the supreme court of South Africa is constituted as an admiralty court in terms of the Admiralty Jurisdiction Regulation Act when it adjudicates upon matters within its area of jurisdiction.

Prior to the promulgation of this act the English Colonial Courts of Admiralty Act 1890 applied in South Africa, in a most unsatisfactory manner.⁶⁹

69. On the position prior to the 1983 act and the 1983 act generally see inter alia H Booyesen - "SA New Admiralty Act - A Maritime Disaster" (1986) (6) BML 75; H Staniland "Developments in S A Admiralty Jurisdiction and Maritime Law" (1984) Acta Juridica 271; Advocate "Farewell Victoria Admiralty Law" (1983) 23 BML 84; A Rycroft "Changes in South African Admiralty Law" (1984) 3 LMCLQ 417; H Staniland "The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa" (1984) 3 LMCLQ 422; C

In terms of the latter act a colonial court of admiralty was constituted in South Africa to adjudicate upon claims over which it had jurisdiction and it applied English admiralty law as it was in July 1891, while the supreme court of South Africa was still competent to apply South African Roman Dutch law to matters falling within these courts jurisdiction. Thus there was dual jurisdiction over one matter with two distinct systems of law which could be applied.

The 1890 Colonial Courts of Admiralty Act provided the admiralty courts with jurisdiction under fourteen specific heads of jurisdiction. These heads of jurisdiction were contained in various of the provisions of the two English Admiralty Courts Acts of 1840 and 1861 respectively.

In exercising this jurisdiction however, no distinction was drawn between the jurisdiction and the law applied by the English admiralty courts, with the result that the substantive English maritime and admiralty law as it had developed to the point of the promulgation of the 1890 act, that is July 1891, was the law which was applied by the South African admiralty courts.⁷⁰

Forsyth "The Conflict between Modern Roman Dutch Law and the Law as Administered by the South African Courts" (1982) 99 SALJ 255; and D Shaw Admiralty Jurisdiction and Practice in South Africa (1987).

70. Crooks and Company v Agricultural Co-operative Union Ltd 1922 AD 423; Beaver Marine (Pty) Ltd v Weust 1978 (4) SA 263 A; Staniland op cit.

Among the fourteen heads of jurisdiction were claims arising out of and secured by the maritime liens recognised by English law.

The duality of jurisdiction mentioned above, and the obligation of the courts to apply very often outdated English law were two of the unsatisfactory areas of South African admiralty law which the South African Legislature had to attempt to correct.

This remained the position in South African law until the promulgation of the Admiralty Jurisdiction Regulation Act in November 1983. This act removed the duality of jurisdiction of the supreme court and the admiralty court over maritime legal matters and provided inter alia for the exclusive jurisdiction of the admiralty court over all maritime claims defined in the act, as well as attempting to define the law to be applied by the admiralty courts.

Section 1 of the Act⁷¹ provides an extensive list of maritime claims over which the admiralty courts have jurisdiction. Included in this list are claims and disputes arising out of and secured by the maritime liens of English law.

Section 2 of the act provides the admiralty courts with jurisdiction:

"to hear and determine any maritime claim..... irrespective of the place where it

71. As amended by Act 87 of 1992.

arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner."⁷²

The recognition of and existence of a maritime lien plays a further role in that section 3(4) of the act provides that a maritime claim may be enforced by an action in rem if the claimant had a maritime lien over the property to be arrested. The action in rem can only be instituted by the arrest, within the courts area of jurisdiction of a ship, the whole or any part of its equipment, furniture, stores, or bunkers or the whole or any part of the cargo or freight of the ship.⁷³

The act also introduced into South African law the advanced concept of the action in rem against, and the arrest of a ship associated to the ship in respect of which the maritime lien attached, instead of the offending ship herself.⁷⁴

The act makes no attempt to define the action in rem or to define and give content to the term maritime lien.⁷⁵

72. Section 2.(1).

73. Section 6 (5).

74. Section 3(6) See Staniland and McLennon - "The Arrest of an Associated Ship" (1985) 102 SALJ 148; Staniland (footnote 69) 9; Staniland (footnote 69) 273; Forsyth op cit 81; E E Sharp and Sons Ltd v M V Nefeli 1984 (3) SA 316 C.

75. Shaw op cit believes this to be well judged and fortunate, in light of the difficulties which the courts

It has been argued that in the context the maritime liens are defined by reference to the 1840 and 1861 acts and are limited to those so recognised by English law at that stage. Good argument has also been made for the statutory recognition of a wider set of maritime liens recognised by other foreign jurisdictions.⁷⁶

2.2 THE LAW TO BE APPLIED

Section 6 of the act provides that in the exercise of its admiralty jurisdiction a South African court, when adjudicating claims arising out of and secured by the recognised maritime liens, must apply the English admiralty law as the High Court of Justice of the United Kingdom, in the exercise of its admiralty jurisdiction would have applied at 1 November 1983.

Section 6 provides as follows:

- (1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall

and academics have experienced with the concepts - op cit 25 and 86.

76. Staniland "The Recognition of an American Maritime Claim for Services and Disbursements" (1986) 103 SALJ 542; Staniland "The Halcyon Isle Revisited: A South African Perspective" (1989) 2 LMCLQ 174; Staniland "Should Foreign Maritime Liens be Recognised?" (1991) SALJ 293.

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this act, apply the law which the high court of justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter, at such commencement, in so far as that law can be applied.

The High Court of Justice of the United Kingdom refers to the Supreme Court of England and Wales constituted by the Supreme Court Act 1981.⁷⁷

Therefore, the English law as it had developed to the point of promulgation of the Admiralty Jurisdiction Regulation Act in November 1983 is the law to be applied by the admiralty court to those claims which the colonial courts of admiralty had jurisdiction over.⁷⁸

77. Shaw op cit 73.

78. This interpretation was preceded by lengthy debate See Advocate "Farewell Victoria Admiralty Law" (1983) 13 BML 84; A Rycroft "Changes in South African Admiralty Law" (1984) 3 LMCLQ 417 at 418 and H Staniland "The Implementation of the AJRA in SA" (1984) 3 LMCLQ 422 where it is argued that the phrase "at such commencement," in section 6(1)(a) must be interpreted by reference to the prior phrase "before the commencement of this act" which refers to itself (the 1983 Act) and not the Colonial Courts

All other maritime claims, as defined in section 1, are to be adjudicated in terms of the common law of South Africa, the Roman Dutch law - section 6 (1) (b).

"It would appear that the application of the English law of maritime liens is preemptory by virtue of section 6(1) (a) of the 1983 Act."⁷⁹

Section 1 however is always subject to section 6 (2) which provides that where specific statutory laws of South Africa are in conflict with the English law, then these statutory provisions will prevail. Therefore the provisions of the Merchant Shipping Act and the Carriage of Goods by Sea Act will be applied notwithstanding the fact that the law of United Kingdom might be different.⁸⁰

In determining what the English law is, in order to apply it, a South African admiralty court must decide what law the English supreme court would have applied on the 1 November 1983. The hierarchical appellate structure of the English Supreme Court is the High Court, the Court of Appeal, and the House of Lords. The Privy Council, which was the highest court of appeal.

of the Admiralty Act of 1890. This view seems to prevail today and is generally accepted by all commentators, see Shaw (1987) 73.

79. Staniland "The Halcyon Isle Revisited" op cit 177.

80. Shaw op cit 73.

The Colonial Courts of Admiralty is not part of this structure.

Complications do however exist in South African law in that the appellate division decision of Van der Linde v Calitz⁸¹ requires a South African court to refer to and be bound by decisions of the privy council in ascertaining and determining the English law. The case of van der Linde v Calitz was a decision on the law of evidence. Certainly as regards the law of evidence and decisions of the South African supreme court the latter case is binding precedent. However, good argument has been made for distinguishing this case in that it relates to the law of evidence only, and binds the supreme court and not the admiralty courts when applying maritime law.⁸²

In the case of De Lasala v De Lasala⁸³ apparently confirmed, the reasoning in van der Linde v Calitz per Lord Diplock:

"So the modern rule is the judgements of the English Court of Appeal on matters of English law where it is applicable in Hong Kong are of persuasive authority only. They do not limit the Hong Kong Court of Appeal."

However this decision must surely be distinguished in that it applies to a situation where the English Court

81. 1967 (1) SA 239 (A).

82. Staniland (1986)103 SALJ 542.

83. 1979 (2) All ER 1152.

of Appeal can not prescribe law to another country overruling the latter's courts, including the highest court of appeal which happens to be the Privy Council. In the situation envisaged by Section 6 (1) (a) a South African court must sit as a "notional English court" and decide what the law is that that English court would apply in England, and then apply this to the case before it (albeit that this court is situated in South Africa and must apply South African laws in all other aspects of the case e.g procedure, ranking etc.)

Van der Linde v Calitz has not been followed by the courts in the cases of The Andrico Unity;⁸⁴ The Fidias;⁸⁵ and The Kalantiao⁸⁶

Decisions of the Privy Council are of persuasive value only on the various divisions of the supreme court of England (The High Court; The Court of Appeal and The House of Lords.) It is the decisions of the English courts of appeal that must be referred to in determining the relevant English law, and only in the absence of such a decision would decisions of the Privy Council be of great persuasive force.⁸⁷

84. Transol Bunker B V v M V Andrico Unity 1987 (3) SA 794 (C).

85. Oriental Commercial and Shipping Co Ltd v M V Fidias 1986 (1) SA 714 (D).

86. Brady-Hamilton Stevedore Company v M V Kalantiao 1987 (4) SA 250 D.

87. This interpretation is contrary to the view of Shaw op cit who asserts that van der Linde v Calitz must be

In applying section 6 (1) (a) therefore the following is the position in deciding what law the High Court of Justice of the United Kingdom would have applied at 1 November 1983:

1. United Kingdom statutes which would have applied at 1 November 1983 shall apply, always, of course, subject to section 6 (2). Problems with this aspect, which would require legislative correction, are firstly, the unsatisfactory position which would follow when and if these statutes are repealed in the United Kingdom yet still would be applicable by the South African courts; and secondly, the uncertainty and obscurity introduced by the phrase "in so far as that law can be applied." in section 6 (1) (a).⁸⁸

followed. This view was however taken prior to and without reference to the cases of The Andrico Unity, Fidias and Kalantiao. Staniland "The Halcyon Isle Revisted" (1989) 2 LMCLQ 174 175 to 179 discusses the judgements of the three latter cases and convincingly argues that where a South African court had to apply English law it must apply the most authoritative statement of such law and that it is the English High Courts and Courts of Appeal who would make such statement and that Privy Council decisions do not override decisions of the Courts of Appeal.

88. Shaw op cit 74.

2. Relevant decisions of the High Court, the Court of Appeal or the House of Lords will apply. Where no relevant decision exists, then a decision of the Privy Council is of great persuasive value.⁸⁹ Where a House of Lords decision is followed the South African court will have to examine the decision and decide whether the House of Lords itself would follow such a decision.⁹⁰ What of decisions after 1 November 1983? If new law is created by subsequent decisions these cannot be applied, but where a subsequent case corrects the law that was wrongly expounded in pre 1983 decisions, then these decisions are applicable, since they represent the latest decision to state what the law was at November 1983.

89. Ibid 74.

90. R v Cunningham (1981) 2 All ER 870, which discussed the circumstances relating to the House of Lords practice statement of 26 July 1966 wherein Lord Gardiner on behalf of the Lords of Appeal made the practice statement which modified the practice of the House of Lords to depart from previous decisions when it appears right to do so. This statement is reported in (1966) All ER 77.

CONCLUSION

In determining what the South African law is regarding the recognition, status and legal consequences of maritime liens, the South African admiralty courts shall:

1. have exclusive jurisdiction to adjudicate on such disputes;
2. apply the English law as would have been applied as at 1 November 1983; by the High Court, The Court of Appeal and the House of Lords.
3. apply United Kingdom Statutes which prevailed at 1 November 1983;
4. relevant South African legislation will always prevail over the English law applicable.

2.3 RECOGNISED MARITIME LIENS IN SOUTH AFRICAN LAW

The only maritime liens currently recognised in South African law, by virtue of section 6 (1) (a) of the Admiralty Jurisdiction Act are the six maritime liens as recognised by English law, which arise out of the six categories of claims as follows;⁹¹

91. Southern Steamship Agency Inc & Another v MV Khalij Sky 1986 (1) SA 485 (C); Oriental Commercial and Shipping Co v M V Fidias 1986 (1) SA 714 D at 717 and Transol Bunker BV v

1. damage caused by a ship;
2. salvage;
3. seaman's wages;
4. master's wages;
5. master's disbursements;
6. bottomry and respondentia

Bottomry and respondentia are now obsolete and no further specific consideration will be given to these claims and liens.⁹²

However these maritime liens of South African law are not identical to their English counterparts, due mainly to the provision of section 6 (2) that South African legislation of relevance prevails over the English law.

The differences which exist between some of the South African recognised maritime liens and their English counterparts can be categorised as follows:⁹³

1. Differences in the ranking of claims and the priority of payment out of a fund in court;

MV Andrico Unity 1987 (3) SA 794 (C) and 1989 (4) SA 325 (A).

92. The Halcyon Isle op cit 202.

93. See Staniland (1991) 108 SALJ 293.

2. Some of the South African maritime liens have restrictions on the geographical area where they arise imposed by South African legislation.
3. Some differences occur in the types of property which some of the liens encumber.
4. Procedural differences arise out of the provisions of the Admiralty Jurisdiction Regulation Act relating to the enforcement, transfer and extinction of the South African maritime liens.

2.3.1 RANKING OF CLAIMS

Briefly the order of priority of claims against a ship in English law is based on the principle that equity must be done to the parties in the circumstances.

"In distributing a limited fund that is insufficient to pay in full all creditors - the court is no longer concerned with enforcing against the debtor himself all of the creditors original rights against him. It is primarily concerned with doing even handed justice between competing creditors whose respective claims to a debtor may have arisen under a whole variety of different circumstances and, it may be conflicting systems of national law."⁹⁴

94. Halsbury Laws of England Vol 43.

Positivists seeking certainty in the law have attacked the English system, while the system is defended on the basis that there is no international uniformity governing maritime liens and other maritime claims and that therefore the English system is flexible enough to accommodate competing claims from foreign systems.

General rules and principles, extrapolated from the various case decisions reveal a very logical ranking between claimants. These general rules are however very flexible and the case law reveals many inconsistencies and exceptions.

These general rules are as follows:

Dock and harbour authorities exercising statutory rights including the right to sell and detain a ship in respect of dock and harbour dues override all other claims.

Thereafter, firstly, claims for services which have conserved the res rank before earlier charges, because the latter have been preserved by the salvage.⁹⁵ These salvage claims rank *pari passu inter se*.

Secondly, maritime liens arising *ex delictu* rank in priority to claims arising *ex contractu*.⁹⁶ Liens *ex delictu* rank *pari passu inter se*, even where damage arose out of separate collisions at various different times.

95. The Stream Fisher 1937 P 73.

96. See Halsbury Laws of England Vol 43 Para 1143.

Thirdly, liens arising ex contractu rank in inverse order to the date of their attachment to the res, the reason being that the lien holder impliedly takes the risk of fresh liens arising during a voyage.⁹⁷

Fourthly, however, the seaman's wages lien and the master's wages and disbursements lien take priority over all other liens arising ex contractu.⁹⁸

Thereafter mortgages apply, in priority to other statutory liens like the necessaries man, and the solicitor's lien for costs. Possessory liens take priority over claims and statutory and maritime liens arising after the res was taken into possession, but is postponed to all those existent prior to possession. Thus in many cases the possessory lien holder ranks prior to maritime liens arising after possession e.g. seaman's and master's wages lien.

The South African Admiralty Jurisdiction Regulation Act, as amended codified the order and priority of the ranking of claims, based on the rules contained in the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1967.⁹⁹ In 1992 the provisions of the act relating to, inter alia, ranking were amended, and the position is as below.

97. See Carver Carriage by Sea 12th Ed Vol 2 Para 788.

98. The Mons (1932) 111.

99. SA Law Commission report on the tabling of the Admiralty Jurisdiction Regulation Bill 1983.

Section 11 of the Act stipulates that claims with regard to a fund shall be paid in an order which could be summarised as follows.¹⁰⁰

1. The legal and related costs of procuring the sale of the vessel and the distribution of the proceeds, and all costs incurred to preserve the property shall be immediately met by the fund.
2. Salvage claims and claims relating to the removal of any wreck of a ship or any general average claim rank next.¹⁰¹
3. Claims with a preference based on possession is paid before any claim which arose after it.¹⁰²
4. The next in priority are a number of claims, including those to which the maritime liens attach, which must have occurred not earlier than one year before the commencement of proceedings, and which rank *pari passu*.¹⁰³

100. Section 11 (5).

101. Section 11 (5)(b).

102. Section 11 (5)(a).

103. Section 11 (5)(c).

- i) masters and crews wages and disbursements;
- ii) port dues;
- iii) claims for personal injury and loss of life, directly connected to the employment of the ship, and whether occurring on land or water;
- iv) delictual claims for damage to property, directly connected with the operation of the ship, whether occurring on land or water;
- v) repair costs, necessaries and services supplied;
- vi) premiums due in terms of any policy of marine insurance or any liability in respect thereof; and;
- vii) claims by any protection and indemnity body for contributions against any liability.

5. Mortgage claims, and any rights of retention on the ship valid in accordance with the law of the flag of the ship and in respect of any lien held by master, shipper, charterer or agent for payment or disbursements made on behalf of the ship, its owner or charterer.

6. The remaining maritime liens, which at present simply refers to the obsolete bottomry and respondentia liens, but would include any other maritime lien recognised by the court as the law develops.

7. All other claims.

Clearly therefore the English Law has been departed from, in the following ways.

1. All maritime liens attaching before the one year period, fall to be ranked last, with the category of "all other claims." In English law, as will be discussed in the following chapter, most maritime liens have the time for the enforcement of thereof time barred by statute, none of which is as short as one year.

The effect is therefore that many claims lose their ranking priority, which is one of the primary advantages of a claim secured by a maritime lien, so many of the reported cases revolve around claimants seeking to establish a maritime claim so that their claim will rank with favourable priority over other claimants against a fund in court.¹⁰⁴

All other claims rank equally and according to the law of insolvency in South Africa and are therefore unlikely to realise much of a dividend, especially where vessels have been heavily bonded.

2. Salvage is not clearly defined in the provisions of section 11 to the extent that a salvage claim might rank as an

104. The Louisa (1848) 3 Wm Rob 99; The Cornelia Henrietta (1866) LR 1 A & E 51, The James W Elwell (1921) P 351.

expense incurred in preserving the res and therefore enjoy top priority. The amendments to the act in 1992 have substantially altered the position in this regard. Salvage now ranks second to the sale and preservation costs, similar to English law, whereas previously salvage claims were restricted to those claims arising within one year of proceedings and ranked after claims based possessory liens and rights.

3. It provides foreign litigants with a reasonable amount of certainty which is of benefit to international commerce and shipping, yet the English system does prevail in so many maritime nations that to depart from English law could be argued to create further uncertainty. The major advantage to the codified system in South African law is to spare the courts the task of having to apply the principles of private international law (conflict of laws\rules) and the interpretation and application of the laws of foreign jurisdictions leading to all the difficulties encountered as a result of and experienced by The Halcyon Isle¹⁰⁵ for example.

The courts are also spared the task of having to apply the enormous body of

105. (1981) AC 221 (PC).

English case law to decisions of ranking and of resolving all of the inconsistencies which exist.

4. A further important consequence of the provisions of section 11 is to lend support to the theory of the extension of the damages maritime lien to include personal injury.¹⁰⁶ Section 11 (4) (c) (iii) is as follows:

"loss of life or personal injury, whether occurring on land or on water, directly resulting from the employment of the ship." This provision must be read with the definitions of maritime claims in section 1 (1) (ii) (f) which is as follows:

"loss of life or personal injury caused by a ship or any defect in a ship, or occurring in connection with the employment of a ship"

This latter definition of a maritime claim extends the jurisdiction of the South African admiralty court to include loss of life and personal injury claims. A jurisdiction which was inherent in the English admiralty court and which has been statutorily confirmed in section 21 (4) Supreme Court Act 1981.¹⁰⁷

106. See Staniland (1991) 108 SALJ 293 at 303.

107. See Staniland *ibid* 302.

The section 11 provision places the ranking of personal injury claims squarely with the order of the other maritime liens.

In the case of The Fidias¹⁰⁸ the plaintiffs used exactly this argument in an effort to persuade the court to recognise a claim for the supply of necessaries as a maritime lien, suggesting that because in section 11 (i) (c) (of the old act before the amendments of 1992, new section 11 (4) (v)) the claim for necessaries is grouped with the other maritime liens it must equally be recognised as one.

Nienaber J rejected the argument contending that ranking deals with the consequences and not the nature of the claims.

However the personal injury claim is an extension to the damages maritime lien already fully recognised in our law, whereas the "necessaries lien" is not an extension of an existing maritime lien and is not recognised in English law.

Furthermore, Brandon J in The Halcyon Skies¹⁰⁹ argued and accepted that statutes enlarging the jurisdiction of the admiralty courts in English legal history have been construed by the courts as having impliedly extended the maritime liens attaching to the claims now falling

108. Oriental and Commercial Shipping Co Ltd v M V Fidias 1986 (1) SA 714 D.

109. (1977) 1 QB 14.

within the jurisdiction. He provides a full review of all of the authorities and instances in this regard.

The public policy considerations are those of encouraging safe navigation and high safety standards in shipping, and the recognition that personal injury should be given equal if not greater legal protection than damage to property.¹¹⁰

A further indication of the importance which the legislature places on personal injury is section 300 of the Merchant Shipping Act¹¹¹ which provides for the payment of a reasonable amount of salvage in respect of salvage services in saving life from any ship within the territorial waters of South Africa, or elsewhere from a South African ship - section 300 (1). A statutory lien, and possibly a maritime lien, is available to the salvor upon the ship or wreck in this regard - section 300 (1). This preservation of life salvage is also payable in priority to all other salvage claims - section 300 (2).

Thus the salvage maritime lien, recognised in South African law has been both extended and restricted by prevailing legislation, and to this extent differs from the English lien.

The salvage claim for which the admiralty court has jurisdiction therefore includes life salvage within the territorial waters. Section 1 (i) definition (k) of the

110. Staniland (1991) 108 SALJ at 303.

111. Merchant Shipping Act 57 of 1951 section 300.

Admiralty Jurisdiction Regulation Act does not restrict salvage claims to salvage of property.

Therefore by virtue of section 6 (1) the English maritime lien for salvage is recognised in South African law, as modified by prevailing South African legislation which includes life salvage within the territorial waters of South Africa or elsewhere from a South African ship.

This proposition applies mutatis mutandis in English law, section 544 of the Merchant Shipping Act 189 providing similarly for life salvage within British waters or elsewhere from a British vessel, with a lien attached. Thomas argues that this provision extends the salvage maritime lien:

"It would be curious indeed to limit that assertion in the case of life salvage to a statutory lien, and allow a maritime lien for property damage."¹¹²

2.3.2 GEOGRAPHICAL EXTENSIONS AND RESTRICTIONS

Obviously the South African Merchant Shipping Act has had the effect of creating differences between the English and South African maritime liens purely by virtue of different geographical restrictions arising out of the Merchant Shipping Act.

112. Thomas op cit 19.

The salvage claim for preservation of life is restricted to South African territorial waters or where the salvage occurred from a South African registered ship.

Likewise any salvage claim, which occurred in South African territorial waters and any claim for wages by crew or master of a South African registered ship will necessarily be different from their English counterparts to the extent that they are governed by the provisions of the Merchant Shipping Act as interpreted by South African courts. These differences are however more in theory than in practice.

2.3.3 PROPERTY ENCUMBRANCED

Differences in property encumbranced by the liens could also exist, particularly regarding salvage and the provisions relating to wreck in the Merchant Shipping Act.

2.3.4 PROCEDURAL DIFFERENCES

The major procedural differences relating to the enforcement of the liens will be discussed under the heading of the extinction of maritime liens in the following chapter.

2.4. THE RECOGNITION OF FOREIGN MARITIME LIENS IN SOUTH AFRICAN LAW

As noted earlier, the maritime law of the United States of America recognises and grants an extensive list of maritime liens, in fact every maritime claim which is enforceable by an action in rem is secured by a maritime lien. The 1993 Convention on Maritime Liens & Mortgages recognises a category of "domestic" maritime liens recognised by particular legal systems of various party states. Yet South African law in following the English law does not recognise these foreign maritime liens.

In South African law decisions of the Privy Council are of great persuasive but not binding authority on the admiralty court, which theoretically leaves the admiralty court free to depart from the majority decision in The Halcyon Isle.

While a number of South African admiralty cases have followed the majority decision of The Halcyon Isle they were not directly involved in questions of ranking maritime liens, nor in answering the question of the substantive or procedural nature of the lien. Never the less in following The Halcyon Isle majority the effect is that maritime liens are seen as procedural remedies and therefore the *lex fori* determines whether a legally recognised maritime lien exists or not. South African law therefore does not recognise foreign maritime liens.

The Khalij Sky¹¹³ did not follow the majority decision

113. Southern Steamship Agency Inc v Khalij Sky (1986) (1) SA 485C.

and held that maritime liens were proprietary rights which if validly conferred by the lex loci travelled with the vessel into whatever jurisdiction. This decision is not binding in that by agreement the decision was based on the law as it was prior to the introduction of the 1983 Admiralty Jurisdiction Act.

In The Andrico Unity¹¹⁴ the majority decision was followed and while the more complex nature of the maritime liens was recognised, the procedural nature was emphasised. Marais J held

"the main if not the sole purpose of conferring a (maritime lien) is to enhance the creditors prospect of payment... it is not in truth a jus in re aliena, nor is it a subtraction from the absolute property of the owner in the ship. It is a concept which is sui generis and its reason for existence is to improve the holders prospect of his claim being paid. It is therefore designed to secure payment and to confer same priority when there is competition for payment."

However the appellate division decision in The Andrico Unity followed the majority decision. In The Kalantiao Leon J although recognising that the majority decision has been "cogently criticised," followed it, and on analysing dicta from The Bold Buccleugh concluded that English law viewed maritime liens as remedies more than substantive rights.

114. Transol Bunker BV v M V Andrico Unity and others 1987 (3) SA 794 C and Transol Bunker B V v M V Andrico Unity and others; Grecian-Mar SRL v M V Andrico Unity and others (1989) (4) SA 325 A.

However, as is convincingly argued by Staniland:¹¹⁵

"while the maritime lien is thus dependant for its existence upon the substantive rights giving rise to the under-lying maritime claim, it also augments these rights because it provides... the additional and proprietary right of bringing an action in rem notwithstanding any change of ownership or possession."

Staniland points out other arguments favouring the proprietary and substantive nature of the rights conferred by the maritime lien as being.

1. That the maritime lien arises independantly of any personal liability of the owner in respect of the salvage lien; the bottomry lien; the wages lien of the crew and master.
2. The maritime lien attaches only to the ship, cargo and freight and not to any other property of the shipowner.
3. That the action in rem based on the maritime lien is limited to the value of the res, and is dependent on the existence of the res.

115. (1989) 2 LMCLQ 174 at 188 - 189.

All of these features point to the maritime lien conferring proprietary and substantive rights in the res.

The problematic consequences flowing from the present state of the law in not recognising foreign maritime liens, (that is the lack of international uniformity which detracts from the principles of free trade and the development of merchant fleets and which encourages forum shopping which results in inequitable situations that the lienee is denied the opportunity of ever bringing an action in rem in certain jurisdictions) could best be overcome by South Africa acceding to the latest international convention on the subject.

2.5 THE 1993 INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES.

On the 6 May 1993 The International Convention on Maritime Liens and Mortgages was concluded in Geneva. The convention is open for signature between 1 September 1993 and 31 August 1994 and enters into force once ten states have expressed their consent to be bound by it. Thereafter states may accede to the convention at any time.

Article 4 provides a list of claims which are secured by a maritime lien on the vessel. The list effectively includes the six categories of maritime liens recognised in South African law and adds the following claims:

- "1. claims in respect of loss of life or personal injury occurring whether on land

or water in direct connection with the operation of the vessel; and

2. claims for port, canal and other waterway dues and pilotage dues; and
3. claims based on tort arising out of physical loss or damage caused by the operation of the vessel. This category of claims is far wider the traditional collision damage claim and maritime lien.

As regards claims in respect of personal injury it is argued that the traditional collision damage lien has been extended to include personal injury and that for reasons of public policy this is most desirable.¹¹⁶ Following Brandon J in The Halcyon Skies

"the relevant maritime liens should be regarded as extending to claims under the enlarged jurisdiction."¹¹⁷

it is cogently argued that as section 1 (1) definition (f) of a maritime claim in the Admiralty Jurisdiction Regulation Act (as amended) enlarged the jurisdiction of the South African courts, so the maritime lien was extended. Since this definition includes

116. Staniland (1991) 108 SALJ 293 at 302 - 303.

117. (1976) ALL ER 856.

"occurring in connection with the employment of a ship",

the claims referred to in the 1993 convention are of the same extent. In this regard the convention therefore really does no more than confirm the already extended maritime lien for damages.

As regards claims for loss of life, the same argument is valid, that the enlargement of the courts jurisdiction to include claims for loss of life extends the damages maritime lien accordingly. A breadwinners action has always been accepted in South African law and therefore such an extension is not abhorrent to South African law as it might be to English law. It is never the less uncertain as to whether English law provides a lien for loss of life. The convention therefore clarifies this aspect and is desirable in that public policy surely requires that the protection of human life is given equal or greater value than the protection of property.

As regards port, canal and pilotage dues, the convention clearly would extend the list of maritime liens in South African law. Pilotage dues are provided for in terms of legislation which does not provide a maritime lien.

As regards

"claims based on tort arising out of physical loss or damage caused by the operation of the vessel"

it must be noted that consequential damages are clearly envisaged under this widely phrased provision. The phrase is much wider than "damage caused by a ship" which is the wording of the definition of the relevant maritime claim in section 1 (1) (e) of the Admiralty

Jurisdiction Regulation Act and which if restrictively interpreted could be argued to relate to direct damage only.¹¹⁸ Included in this category of claims would be consequential pollution damage. The wording "physical loss or damage" is uncertain - could this be interpreted to exclude pure economic loss consequential upon the claim? Certainly in South African law the provision would exclude any claimant whose claim did not sound in patrimonial loss to the claimant.¹¹⁹

Article 4 includes

"claims for wages and other sums due to the master, officers and other members of the vessels compliment in respect of their employment on the vessel."

Staniland has argued that this provision is wide enough to include claims by crew for short or bad provisions. The effect is that this article probably provides the master and crew with a maritime lien over the vessel where they have been in receipt of short or bad provisions which is not unacceptable in South African law, since the Merchant Shipping Act provides that a seaman has a claim for reduced or bad rations or provisions which may be recoverable as wages.¹²⁰

118. Staniland *ibid* 301.

119. *ibid* 301.

120. *ibid* 305; Merchant Shipping Act 57 of 1951, section 156 read with section 165 (1) and (2).

To the extent that it is desirable to extend the list of maritime liens, the convention should be acceded to, and the accession is facilitated in that the extensions are argueably already part of South African law anyway.

The 1993 Convention is curious in that despite the broad listing of maritime liens in article 4, article 6 provides that any state party to the convention may grant other maritime liens on a vessel that its domestic law recognises. These have been referred to as domestic maritime liens whereas the article 4 liens could be described as the international liens.

These domestic maritime liens are of the same effect as all other maritime liens, save that they would be extinguishable after a period of six months or arrest and forced sale, or importantly, after 60 days from the date of sale to a bona fida purchaser, whichever date is the earlier - article 6 (b)

These domestic liens also rank after the article 4 maritime liens and after all registered mortgages and other charges referred to in the convention - article 6 (c).

To the extent that accession to the convention is anticipated as the solution to the confusion and uncertainty regarding the recognition of foreign maritime liens, this is confounded by article 6. It will be still be necessary for admiralty courts to consider whether it may recognise a foreign maritime lien not falling within the article 4 list. The phrase in article 6 "each state party may under its law grant other maritime liens" clearly implies that such maritime liens are only enforceable in the jurisdiction

of that state and other signatory states cannot be bound by these domestic maritime liens if they are not recognised in the municipal law of the signatory state.

2.6 OTHER LIENS IN SOUTH AFRICAN LAW

2.6.1 SOUTH AFRICAN COMMON LAW LIENS

In common with English law, all common law liens in South Africa are possessory liens. The common law liens are grouped into two main categories:

- (a) debtor\creditor liens; and
- (b) enrichment liens.

2.6.1.1 DEBTOR\CREDITOR LIENS

Any person in possession of another's property, who has incurred expenditure in respect of that property, with the express or implied consent of the owner, has a lien over the property until the whole amount has been paid. The debtor in this case is taken as having expressly or impliedly agreed to expenditure. The juridical basis of these liens is therefore seen to be contractual or by virtue of implied contract.

The essential requirement for these liens is possession. The requirements for possession are similar to English law in that:

- (a) The lien terminates with the loss of possession, unless loss by unfair means -

Van Nierkerk v Van der Berg¹²¹ and Beetge v Drenka Investments.¹²² If the loss was not intended the lien may then revive on repossession of goods - de Jager v Harris and The Master.¹²³

(b) Temporary loss of possession or lack of occupational control does not extinguish the lien. Possession is a question of fact in each circumstance. In Cape Tex Engineering v SAB Lines¹²⁴ ship repairers who left one or two employees on board the vessel after repairs had been completed were taken as having lost possession.

The debtor\creditor lien only avails against the other contracting party. On the other hand the lien does attach to the property in that if the property is sold, the purchaser is bound by the lien if he had knowledge of it - Levy v Tyle.¹²⁵

121. 1962 (2) SA 525 AD.

122. 1964 (4) SA 62 W.

123. 1957 (1) SA 171 SWA.

124. 1968 (2) SA 528 C.

125. 1953 CPD 377.

The lien covers both the principle debt and all additional expenses necessary to maintain the lien, as well as those expenses to preserve the property.

Examples of debtor\creditor liens in South African law are Brooklyn House Furnishers v Knoetze & Sons¹²⁶ where it held that a carrier has a lien on goods carried by him for the freight; Patel v Keeler¹²⁷ and Walker v Durant and Fraser¹²⁸ where a clearing and forwarding agent has been held to have a lien upon goods landed, for his reasonable expenses incurred in carrying out his principal's instructions.

In common with English law, the lien only exists over property in respect of which the debt arose. Thus in the case of African Coasters v Hilde: Dorikat Shipping Intervening¹²⁹ the subcharterer of a vessel was held to have no lien over the vessel for advances made by the subcharterer to the master, the subcharterer's action being between himself and the charterer.

Included in this category of liens would be the equivalent of the lien for expenditure on cargo in English law, thus making the South African lien a much wider form of security.

126. 1970 (3) SA 264 AD.

127. 1923 AD 506.

128. 1882 (2) SC 361.

129. 1968 (2) SA 111C.

2.6.1.2 ENRICHMENT LIENS

Analogous to the English lien for general average contributions, enrichment liens in South African law exist over property in the possession of the lienholder against the owner who has benefited by the actions of the lienholder in improving or preserving the property.¹³⁰ As mentioned in English law the judicial basis of general average is not certain. In South African law unjust enrichment seems to be the basis of this lien and Waring has argued that this is the most appropriate basis of general average in South African law.¹³¹ For these liens no contract or express or implied agreement need be present.

It is not, however, every expenditure on another's property which gives rise to a lien. It is only in recognised circumstances that a lien arises.

The most important of these circumstances are as follows:

- (a) where the possessor, acting under bona fide and reasonable belief that he is the owner of the property, improves it;
- (b) where the possessor, although not the owner, incurs expense in improving the property under a contract with a person

130. Wille and Millin, Mercantile Law of South Africa 17 ed 330 - 340 and Gibson Mercantile Law 601 - 603.

131. Waring A - Charterparties 122 - 125.

whom he genuinely believes to be the owner (thus in South African law in a situation where the wrong goods are carried or where goods are shipped in fraud of their true owner, the shipowner would have a lien for his freight);

- (c) where the possessor is the bona fide occupier of the property and improves the property.

It is only in respect of necessary and useful expenses that the enrichment liens arise, and not in respect of luxurious expenses which merely gratify the caprice or fancy of the person.

This group of liens is further divided into two types: salvage liens and improvement liens. The salvage lien refers to a lien in respect of expenses incurred in preserving or protecting the property. Despite the use of the term salvage, these liens are not to be confused with the maritime lien for a salvage claim. The salvage maritime lien is recognised in South Africa and it is here that the requirement of possession is the most significant distinguishing feature. The shipowner's lien in respect of general average contributions would fall under this category of so-called common law salvage lien.

As far as the improvement liens are concerned, they are based on the principle of enrichment. Because there is no general enrichment action in South African law, but only a number of enrichment *condictio*s, residue of the Roman law, the number of enrichment liens is therefore limited. The lien is only in respect of any amount to

which the property subject to the lien has had its market value increased. At most, the lienholder is entitled to recover his actual expenses incurred in increasing the market value. See Fletcher and Fletcher v Bulawayo Auto Works.¹³²

It is in respect of this last category of liens, available in South African law, that the South African law is far wider than the English law. There is no equivalent in English law to the enrichment lien, however it is only in those narrow circumstances where a person would be entitled to an enrichment *condictio* in South African law that the lien arises.

SUMMARY - THE DISTINCTION BETWEEN MARITIME LIENS AND COMMON LAW LIENS

1. The common law debtor\creditor and enrichment liens are entirely dependent on possession and are extinguished as possession is lost. The maritime lien is independent of possession.
2. The debtor\creditor lien arises out of contract or implied contract whereas maritime liens attach to the various maritime claims.
3. The common law lien exists only over property in respect of which the debt arose. Maritime liens encumber far wider categories of property - freight; cargo; apparel etc.

132. 1915 AD 636 at 649.

4. The common law lien is enforceable only against the other party to the contract, unless the property is purchased with knowledge of the lien. The maritime lien avails against the whole world and travels with the res irrespective of changes in ownership.
5. The common law lien only secures the personal action of the lienee\contracting party. The maritime lien is enforced by means of an action in rem.
6. Enrichment liens are also dependent on possession and enforceable only against the person\owner who has benefited and been enriched.
7. The enrichment lien only arises in specific circumstances giving rise to the specific *condictio's* of Roman Dutch law.

2.6.2 STATUTORY LIENS IN SOUTH AFRICAN LAW

The various statutory liens which relate to maritime matters are as follows:-

Section 51A of the Merchant Shipping Act, an amendment introduced in 1977, creates a collision lien in favour of a shipowner or other person whose ship or property is damaged by some wrongful act of navigation or negligence or want of skill in the navigation of the ship, over the latter.

CHAPTER THREE

TRANSFER OF MARITIME LIENS

3.1 TRANSFER OF MARITIME LIENS IN ENGLISH LAW

One can do no better than to introduce this chapter with an extended quote by Thomas in his very brief discussion on whether a maritime lien is a transferable interest,

"The question posed is one of the most vexing questions in the law of maritime liens and the absence of firm judicial authority inevitably means that no authoritative answer as yet may be offered. It is remarkable that after so many years of active admiralty litigation the issue has still not come squarely before the court for determination. Nor is a ready answer to be derived from principle, to which both the paucity and variety of attitudes adopted by the various commentators is adequate testimony."¹³³

The term transferability is used in its broadest sense to include any means by which the rights and privileges of a maritime lien enjoyed by the lien holder now come to be enjoyed by a third party. Such transferability therefore includes a general concept of automatic transferability in certain circumstances, the cession or assignment of such rights, judicial consent to transfer, operation of law, and subrogation.

133. Thomas op cit 278.

In order to determine what the position in South African law would be, as applied by the admiralty courts, it is obviously necessary to consider the position in English law. This will then be compared with general principles of South African law, in order to establish how different the two systems are.

3.1.1 A GENERAL CONCEPT OF TRANSFERABILITY

In English law there is no general concept of the transferability of maritime liens. In fact to the contrary,

"It has long been a common observation that a maritime lien represents an interest which is incapable of transfer so as to convey to the transferee the same privilege and right in rem as enjoyed by the transferor."¹³⁴

By general concept of transferability it is meant an automatic transfer of rights and privileges, by operation of law immediately upon the satisfaction of certain circumstances. In other words, and analogous to the concept of subrogation, a general concept of transferability would envisage that immediately upon the payment and discharge of a lienees claim by a third party, whether voluntarily or by reason of some pre-existing obligation, the third party automatically stands in the shoes of the lienee and enjoys the same

134. Thomas op cit 265; See Halsbury Vol 43 Para 1155.

rights and privileges as the lienee. This general concept is occasionally referred to as a

"quasi subrogatory concept."¹³⁵

Thomas cites an anonymous case of 1696 which held that the seaman's maritime lien for wages was personal and could not be transferred to a master of a ship who had personally paid the wages and sought to recover against the shipowner.¹³⁶ In the mid 1800's Dr Lushington in The Louisa¹³⁷ refused to admit a transfer of rights arising out of a salvage situation, where an agent who had made advances to a salvor sought to recoup these by utilising the salvage lien to recover from property in the hands of the court.

There were a number of cases in the mid 1800's which complicated the matter and which allowed an automatic, quasi subrogatory transfer to parties who voluntarily had paid seaman's wages - The Tagus¹³⁸ and its judgement by Phillimore.J is the best example. However The Petone¹³⁹ confirmed a number of contrary decisions and denied

135. See Thomas op cit 267 para 474 and 475.

136. See Thomas 266.

137. (1848) 3 WB Rob 99.

138. (1903)P 44. The William F Stafford (1860) Lush 69 and The St Lawrence (1880) 5 PD 250 and The Tagus allowed persons who discharged wages (and pilotage and dock dues) the same rights and remedies as the discharged payees.

139. (1917) P 198.

the existence of such a quasi subrogatory doctrine, and it is this judgement and case which has been followed and applies to date.

The maritime lien which secures bottomry bonds however, has always been considered transferable, subject to equities, providing the transferee with no better title than the original bondholder had.¹⁴⁰

3.1.2 TRANSFERABILITY AFTER PAYMENT WITH JUDICIAL CONSENT

It is established practice to allow a party, who with the consent of the court pays off a wages claimant, the maritime lien and priority of ranking which the latter affords. Successful application must be made to court before payment is made.¹⁴¹

The cases however all relate to the payment of wages claims and the question remains unanswered as to whether this principle is of general application to all maritime liens.

"Although judicial authority is bare it is difficult to see good reason why a transfer with judicial consent should be confined to

140. The Catherine (1847) 3 WM Rob 1; The Rebecca (1804) 5 C Rob 102; and Thomas op cit 266 and Halsbury para 1155.

141. The Cornelia Henrietta (1866) LR 1A & E 51. The James W Elwell (1921)P 351 at 357.

wages liens and not be of general application."¹⁴²

3.1.3 ASSIGNMENT

Assignment of the rights and benefits of a maritime lien seems the obvious method of transferability. However, there is little judicial authority in point and the commentators are vague. The only case of direct relevance is The Wasp¹⁴³ wherein the contention that the assignment of a statutory lien could not take place until it was crystallised by the arrest of a vessel, was rejected. The validity of the assignment as such was not doubted and said Dr Lushington

"It seems to me, however, that the assignment by the plaintiffs to the bank of the courses of action would carry with it all right of action to recover the debt, including any right for that purpose to proceed against the vessel which might then be, as it were inchoate, but which subsequently became complete."¹⁴⁴

142. Thomas op cit 269 para 477; Jackson op cit P239 agrees "there seems no reason why the principle should not apply to all maritime liens."

143. (1867) LR 1A & E 367.

144. Ibid 368 cited in Thomas 271.

The assignment in this case was an equitable one, the lien a statutory one in terms of section 4 of the 1861 Admiralty Court Act, and the decision was not taken on appeal at all nor has it been subsequently developed at all by further decisions - therefore as Thomas puts it -

"It cannot be pretended that The Wasp represents a strong enough precedent upon which to build a thesis of assignability."¹⁴⁵

The indication in The Wasp is clear, and it therefore becomes necessary to examine the concept of assignment in English law and equity more carefully.

3.1.3.1 ASSIGNMENT - THE CONCEPT IN ENGLISH LAW

In English law the rights which arise out of contract and out of delict, which are personal rights of a proprietary nature, and which are not capable of physical possession are known as choses in action.

The question of whether a maritime lien is itself a substantive right or simply a procedural remedy could be of great relevance to this discussion, although

"Whether it is seen as proprietary or remedial it is likely that it would be seen, for assignment purposes, as a 'chose in action' - for the lien is essentially a method of assuring that a claim is met."¹⁴⁶

145. Thomas op cit 271.

3.1.3.2 CHOSSES IN ACTION

In English law and equity,

"Chose in action is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."¹⁴⁷

It is a right to recover by action, either in law or in equity.¹⁴⁸

Included in the group of things that have been held to be choses in action are debts due by simple contracts; the benefits of a contract; a right of action arising out of a tort; rights under all policies of insurance, bills of lading, charterparties; actions for unliquidated damages for breach of a contract.¹⁴⁹

It is important to distinguish between the application of English common law and the decisions of the courts of equity in this regard. Historically and subject to three exceptions, which are of no relevance to this

146. Jackson op cit 237.

147. Torkington v Magee (1902) 2 KB 427 at 431; see also Halsbury Laws of England 4 Ed Vol 6 Para 1.

148. See Torkington v Magee (1902) KB 427 at 430.

149. See Halsbury op cit Para 8.

discussion, English common law did not permit the assignment of choses in action, but the courts of equity have always permitted and given effect to assignments of all kinds of choses in action, as long as the assignment is made for value, and is not contrary to public policy.¹⁵⁰

The Supreme Court Act 1981, section 49 now provides for the concurrent administration of law and equity by the supreme courts.

The English admiralty court is a court within the supreme court structure. It is therefore governed by the Supreme Court Act 1981, which continues the developments to the English court structure which began with the Supreme Court of Judicature Act 1873.

Section 49 of the Supreme Court Act 1981 provides for the concurrent administration of equity and common law by the supreme courts. The admiralty courts must therefore apply principles of admiralty, common law and equity, without however abolishing the substantive distinctions between the rights liabilities and interests of the common law and equity.¹⁵¹

Equity grew out of the inherent power of the king to dispense justice where the common law was defective. The

150. Halsbury para 9 and para 26. Fitzroy v Cave (1905) 2 KB 373.

151. See generally Halsbury op cit paragraphs 9 & 26; D C Jackson (1985) P6 - 9 and Halsbury Statutes Vol 51 Courts P643 - 646.

king referred petitions for justice to the chancellor and so the Court of Chancery originated. Conflict between the chancery courts and common law courts resulted in equity having the power to interfere with common law on the basis of perceived justice, during the 17th century.

The admiralty courts developed independantly, through a period of conflict with the common law courts during the eighteenth and early nineteenth century until its jurisdiction was confirmed and expanded in the Courts of Admiralty Act of 1840 and 1861. The 1843 Judicature Act integrated the admiralty court into the high court structure, where it is now, in terms of section 5 of the 1981 Supreme Court Act, part of the chancery division queens bench. Common law and equitable principles are all available to the admiralty court.

"it is fundamental to stress that English 'maritime law' is still composed of rules having their roots in statute, rules of court and judicial doctrine of admiralty, common law and equity."¹⁵²

Section 49 of the Supreme Court Act 1981 provides as follows:

"(1) Subject to the provisions of this or any other act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis

152. Jackson op cit 9.

that, wherever 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.

(2) Every court shall give the same effect as hitherto-

(a) to all equitable estates, titles, rights, reliefs, defences and counter-claims, and to all equitable duties and liabilities; and

(b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute,

and, subject to the provisions of this or any other act, shall so exercise its jurisdiction in every cause or matter before it so as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those is avoided.

3.1.3.3 ASSIGNMENT IN EQUITY

An equitable assignment is the transfer of an equitable, though not a legal, right to the chose in action. Equitable assignment requires no formalities as long as the intention is clear, supported by some act by the

assignor showing that he is passing the chose in action to the assignee.¹⁵³

The assignment may of course be written and may be implied by conduct or by a course of dealings.

Equitable assignment can be voluntary or for value and does not require notice being given to the debtor. However to make the assignment effective against the debtor and third parties the assignee must give the debtor notice.¹⁵⁴

The assignee takes subject to equities and therefore has no better right than the assignor.¹⁵⁵

The effect of equitable assignment of an equitable chose in action is obviously that the assignee has the right to sue for recovery, and in his own name without further reference to the assignor.

If the chose in action is a legal one, arising out of law and not equity, then even if the equitable assignment was absolute, the assignor ought to be party to the action (either as plaintiff or defendant.)¹⁵⁶ If

153. *Ibid* para 30.

154. *Ibid* para 42.

155. *Ibid* para 61.

156. The Leage (1984) 2 Lloyds Rep 259; William Brandts Sons & Co v Dunlop Rubber Co Ltd (1905) AC 454. The Aioios (1983) 2 Lloyds Rep 25.

there is any doubt as to the validity of the assignment, in that the formalities were not complied with or any disputes in this regard, the court will be loathe to grant damages or other legal remedies.¹⁵⁷ This requirement is purely procedural and could in no way effect the cause of action itself if such joinder were omitted.

Ackner L J in Central Insurance Company v Seacalf Shipping Corp (The Aiolos) held:

"In a case in which there is a dispute between the parties as to whether the documents relied on constitute assignments at all, the ordinary requirement that the assignors should be before court is not one which I feel could be dispensed with The joinder is a purely procedural requirement."¹⁵⁸

3.1.3.4 THE LAW OF PROPERTY ACT - STATUTORY ASSIGNMENT

The Law of Property Act 1925 section 136 provides for the legal assignment of choses in action of certain debts and certain other rights as follows:¹⁵⁹

157. *ibid.*

158. The Aiolos 1983 (2) Lloyds Rep 25.

159. Section 136 Law of Property Act 1925, which replaced the provisions of the repealed Supreme Court of Judicature Act 187, section 25 (6). See also Fitzroy v Cave (1905) 2 KB 373.

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice -

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that , if the debtor, trustee or other person liable in respect of such debt or thing in action has notice -

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

The assignment takes effect from the date of the notice and the assignment is always subject to equities.¹⁶⁰

The effect of this act was not to create any new rights, since these rights were all assignable in equity, but the effect is to transfer the legal right to the chose in action, as opposed to an equitable right including all remedies which flow from or with the action.

A valid and enforceable legal assignment is restricted to debts and other legal things in action. Debts must be liquidated, for a definite sum of money, due or payable at a specified future time.¹⁶¹ These clearly include debts secured by mortgage deeds, and other liquidated contractual debts. The phrase "other legal things in action," in section 136 has been given wide interpretation by the courts to include rights which a court of equity would accept as assignable.

'Other legal chose in action' means a debt or right which the common law looks on as not assignable by reason of it being a chose in action, but which a court of equity deals with as being assignable.¹⁶²

Therefore in Shayler v Woolf¹⁶³ where a contract was

160. Halsbury Para 12.

161. Ibid para 14.

162. Torkington v Magee (1902) 2 KB 427 at 431.

163. (1946) 2 All ER CA.

assignable, an arbitration clause contained therein was considered assigned with the contract, where normally an arbitration clause is seen as being too personal to assign in common law.

The effect is therefore that all choses in action recognised by equity as assignable, are assignable if the formalities of the Law of Property Act are complied with. Those choses in action that are not assignable in equity are few and limited and have public policy as the basis for this forbidding. The commonest examples of these are pensions and salaries of certain public officers, the maintenance rights of ex spouses and "bare rights of litigation." The latter referring mostly to personal rights in which others could never have a genuine commercial interest - for example the right to sue for defamation, rights for an unimpaired dignity etc. The only interest which another party could have in such personal rights would have to arise out of champerty or maintenance which the law does not recognise and will not give effect to.¹⁶⁴

Tolhurst v Associated Portland Cement Manufacturers¹⁶⁵ is authority for the assignment of the rights and all other benefits in a contract to supply goods of a particular kind.

Harwood v Millers Timber and Trading Co Ltd¹⁶⁶ held that

164. See Halsbury op cit para 87 and Trendtex Trading Corporation v Credit Suisse (1981) 3 All ER 520 HL.

165. (1903) AC 414, HL.

166. (1917) 1 KB 305 CA.

the assignment of the right to a salary (already earned but not paid) under a contract of service was within the meaning of the act, and was therefore assignable, but not future earnings.

Russel and Co v Austin Fryers Bray J held that while a contract of employment is not assignable by reason of it being personal between the parties the rights to moneys due under the contract for services already rendered are assignable.¹⁶⁷

The assignment passes all legal and other remedies to the chose in action to the assignee, who may sue in recovery thereof in any court in his own name, without reference to the assignor; and do all other things necessary to protect, defend and exercise his rights.

The procedural requirement that the assignor be joined as a party to the proceedings in the event of a dispute relating to the assignment itself applies equally in statutory assignment.

The aspect of "other remedies" must be stressed. The act reads

"all legal and other remedies for the same."

Ancillary rights like the action in rem and the maritime lien, being so integral to the claim from which they arise, would so far as the common law is concerned surely fall within this definition.

167. (1909) 25 TLR 414.

The doubt relating to this expressed by the courts and commentates, as seen earlier, relates to whether in the jurisprudence of admiralty law the maritime lien is considered too personal a right and privilege to be assigned.

3.1.3.5 THE ASSIGNMENT OF MARITIME LIENS

From the examination of the principles of assignment in equity and in law, it can be concluded that the practical effect of each is very similar in as far as the transfer of rights and interests is concerned, with the only important differences being the following:

1. in equitable assignments no formalities are required;
2. where an equitable assignment of a legal chose in action occurs, it will often be necessary for the assignee to sue in the name of the assignor, or for the assignor to be a party to the action in some way (by joinder or interpleader for example) so as to ensure that the assignment is valid and that the full extent of the courts remedies are available.

Contemporary judgements and academic commentators make no importance of the distinction between the two.¹⁶⁸

168. For example Trendtex Trading Corporation v Credit Suisse (1980)3 All ER 721 CA, (1981)3 All ER 520 HL; and Jackson op cit 237.

William Brandt's Sons and Co v Dunlop Rubber Corporation
169 confirmed that if an assignment does not satisfy the formalities of the Law of Property Act, an equitable assignment will be given effect to by the courts, if at all possible in the circumstances.

Per Lord McNaughton "The Judicature Act does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree."

Lord Roskill in Trendtex Trading Corporation v Credit Suisse summarised the contemporary rules of assignability as such:

"It is today true to say that an assignee who can show that he has a genuine interest in the enforcement of the claim of another, and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment The courts should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit, I can see no reason why the assignment should be struck down."¹⁷⁰

169. (1905) AC 454.

170. op cit 531.

The test of whether a maritime lien is assignable is therefore twofold:

Firstly, is it capable of being defined as a chose in action; and if so,

Secondly, is the chose in action a property right or interest as opposed to a personal right? or alternatively, did the assignee have a genuine commercial interest in taking the assignment and enforcing it for his own benefit?

In answer to the first element of the test, as stated Jackson believes that maritime liens are choses in action.¹⁷¹ The rights which they give rise to are of proprietary nature (i.e rights in the maritime res to which they attach, or a judgement sounding in money or a right to a fund held by the court,) in recovery of a loss suffered as a result of circumstances giving rise to the claim, and the only way of enforcing these rights is by an action in court. (Personal rights, by comparison, are the rights to an unimpaired dignity, not to have ones character defamed or body injured etc.

But the maritime lien only arise upon the events giving rise to the claim, happening. The claim is not dependent on the existence of the maritime lien rather the claim must arise which coincidentally and concurrently gives rise to the maritime lien, which secures the claim.

171. Jackson op cit 236.

"A maritime lien is, it is suggested, a property right but it may well be argued that it is incidental to the claim, and not vice versa."¹⁷²

It is the nature of the claim which gives the attaching maritime lien its property content. Therefore the categorisation of maritime liens according to the juridical nature of the claim from which they arise and which they secure is determinant.

The master's disbursements lien, the masters wages lien and the seamans wages lien and the bottomry bond lien all arise ex contractu or at least quasi ex contractu - seamans wages under the antiquated general employment contract. The right to enforce the claim, the chose in action, are therefore contractual and there is ample authority for the proposition that rights flowing from contracts, be it in the form of debts or damages are regarded as choses in action.¹⁷³

The damages lien arises ex delictu. The claim arising out of tort is a chose in action, therefore the maritime lien which secures the right is a chose in action.

The same argument should surely be valid for the salvage claim and the salvage maritime lien being choses in action.

172. Jackson op cit 237.

173. See Infra 3.1.3.2.

The answer to the second aspect of the test is more complex. The test is clearly that proposed by Lord Roskill in Trendtex Trading Corporation v Credit Suisse.¹⁷⁴ Is the maritime lien more than a "bare right of litigation," alternatively, if it is a "bare right of litigation," does the assignee have a genuine commercial interest in it.

Each maritime lien must be examined and by reference to the nature of the right and claim from which it arises and which it secures it will be seen whether each lien is a property right or interest or a personal right or interest.

"So it is the nature of the claim which should govern its assignability and the maritime lien of itself, it is suggested, does not supply the necessary property interest."

The alternative leg of the test, whether or not the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit, depends entirely on the facts of each specific assignment and each specific set of circumstances - the totality of each transaction must be examined. This being a factual rather than a theoretical consideration nothing further can be said in this work.

174. op cit footnote 35.

THE ASSIGNABILITY OF THE BOTTOMRY BOND MARITIME LIEN

By its very nature as a commercial transaction, a pledge securing a loan of money, the bottomry bond is a property right. Property is hypothecated by the bond. For this reason it has always been assignable and the maritime lien which attaches to it has been held to be assignable.¹⁷⁵

THE ASSIGNABILITY OF THE MASTERS LIEN FOR DISBURSEMENTS

This claim is based on contract. The disbursements have been made by the master of a ship. If they were made within the scope of his general authority as master, or with specific authority from the ship owner, or within the ordinary scope of his employment then the master has a claim for reimbursement against the owners, secured by a maritime lien on the ship and cargo.¹⁷⁶ Clearly his right of action is a property right. The claim is invariably liquidated or easily ascertainable and is not a claim for general damages.

Could it be argued that because of the personal nature of an employment contract, which obviously involved considerations of a personal nature like the personal skills of the employee, the confidence which each party had in the other etc, that claims arising out of the contract, the express or implied mandate to bind the

175. The Petone (1917)P 198 at 208.

176. The Ripon City (1897)P 226.

employer, are also personal? The case of Russel and Co Ltd v Austin Fryers¹⁷⁷ refutes this argument, in holding that money due under a contract of personal service may be assigned although the contract itself is not assignable.

The case of The Ripon City¹⁷⁸ gives the clearest indication of the courts acceptance of the equitable assignment of the masters disbursements lien. On the facts of the case the supplying creditors were issued with a memorandum, formalising what seemed to have been an informal arrangement between the parties, authorising them to exercise the masters disbursements lien against the vessel. Clearly an equitable assignment existed as a result of this memorandum, but the court found it not necessary to expressly decide this issue. However, apart from brief involvement in an initial arrest of the ship, which lapsed, the master had no further involvement in the proceedings - other than as plaintiff in name only.

THE MASTERS CLAIM FOR WAGES

This claim is also based on contract. The contract of employment between the master and the ship owner, or the persons whom the ship owners allowed to have possession and control of the ship.¹⁷⁹

177. (1909) 25 TLR 414.

178. (1897) P 226.

179. The Castlegate (1893) AC 38.

While a contract of service might be so personal as to make it not assignable, property rights arising out of the contract are assignable.¹⁸⁰ Harwood v Millers Timber and Trading Ltd held that the right to a salary already earned under a contract of service was an assignable right within the meaning of the law of Property Act.¹⁸¹

The English Merchant Shipping Act 1970, section 18 is silent on the aspect of the inalienability of the masters claim for wages, which the provisions relating to a seamans claim for wages contain. This is by virtue of excluding the master from the definition of seaman. Any agreement by a seaman to forfeit his lien, against a ship for wages, is by virtue of the 1970 Merchant Shipping Act void.

The maritime lien for master's wages is therefore assignable.

THE SEAMANS CLAIM FOR WAGES

This claim is also based on contract. The same considerations apply regarding the assignability of property rights, and debts, arising out of the contract.

However the 1970 Merchant Shipping Act, section 18 unequivocally renders a seamans claim for wages

180. Russel and Co v Austin Fryers op cit.

181. (1917) 1 KB 305.

unassignable. The maritime lien is specifically referred to and specifically rendered not assignable and any arrangement or agreement having the effect of depriving the seaman of his maritime lien on the ship is void.

THE SALVAGE CLAIM

The salvage claim is considered to arise quasi ex contractu, if not out of the terms of a specific salvage agreement.

Salvage rights are property rights. A salvage claim arises out of salvage services rendered to ships on the high seas. There is nothing personal about the relationship between the salvor and the parties interested in the salvaged property. The amount of salvage payable is not dependent on any personal considerations between the parties.

On the basis of the above arguments, the salvage claim is a property right, it is therefore an assignable right and the nature of this claim makes the salvage maritime lien assignable.

THE DAMAGES CLAIM

The damages claim arises ex delictu. The rights which flow from a collision tort are property rights, no different to any other claim for damages in tort for damages arising out of physical damage to property and consequential losses related thereto. These types of rights are assigned constantly in the normal course of

commercial life. There can be no argument that damages arising out of collision are based on a bare right of action of a personal nature. The tort sufferers interest is only to recover the amount of his loss occasioned to his property resulting from the tortfeasors acts. The assignment by an assured to his insurer of his rights against a tortfeasor has been held valid and enforceable,¹⁸² and would be considered trite law in modern commercial and insurance circles.

CONCLUSION

In English law the claims giving rise to the maritime liens, being property choses in action are therefore assignable with the exception of seamans wages, the assignment of which is statutorily restricted. The maritime lien being at very least a remedy ancillary to the chose in action would therefore satisfy the provisions of section 136 (1). Therefore if the formalities are complied with there seems to be nothing to preclude a legal assignment in terms of the act from being enforceable. If the formalities are not complied with, there seems to be nothing to preclude an equitable assignment from having the same effect. There certainly seems to be no justification for the proposition that the maritime lien is too personal a privilege to be assignable.

Article 9 of The International Convention for the Unification of Certain Rules of Law relating to Maritime

182. Compania Columbiana de Seguros v Pacific Steam Navigation Co (1965) 1 QB 101.

Liens and Mortgages 1967, provided an indication of the direction which international maritime law would go, and specifically and expressly recognised the assignability of maritime liens. In 1993 the International Convention on Maritime Liens and Mortgages was concluded, which contained article 10 (1) which provided as follows:

"The assignment or subrogation to a claim secured by a maritime lien, entitles the simultaneous assignment of or subrogation to such maritime lien."¹⁸³

3.1.4 SUBROGATION

Subrogation is a doctrine applicable to insurance law. In English law the doctrine is not restricted to insurance law, but applies to all contracts of indemnity.¹⁸⁴ The contract of insurance creates a personal right for an insurer, who had indemnified an insured, to "stand in the shoes" of the insured and recoup itself out of the proceeds of any rights which the insured may have against third parties in respect of the loss.¹⁸⁵

183. See Thomas 279.

184. See Morris v Ford Motor Co Ltd 1973 QB 792 CA and Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd 1961. 2 All ER 487 (QB) and Jones v Anglo African Shipping Co (1936) Ltd 1972 (2) 827 A.

185. Castellain v Preston (1887) 11 QBD 380 (CA).

In English law the doctrine encompasses a further aspect by creating a trust (a concept of equity) held by the insured in favour of the insurer of all that the insured receives from third parties in excess of his loss. The purpose of this aspect is to protect the insurer, in the event of the insured's insolvency, against ordinary creditors.

The doctrine of subrogation originated in English common law but was received into South African law in the case of Ackerman v Loubser.¹⁸⁶ It is doubtful that Roman law played any real part in the development of the doctrine.¹⁸⁷ The case of Castellain v Preston¹⁸⁸ is the locus classicus on subrogation in English law.

The purpose of the doctrine is clearly to avoid a double indemnity by an insured.

The insurer's rights arise out of the contract of insurance, either express but more often than not implied.

"As between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled, or unfulfilled or in remedy for tort capable of being insisted on or already insisted on, or

186. 1918 OPD 31.

187. LAWSA Vol 12 Para 224.

188. op cit.

in any other right, whether by way of condition or otherwise legal or equitable, which can be or has been exercised or has accrued and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise of or acquiring of which might or condition the loss against which the assured is insured can be or has been diminished."¹⁸⁹

Thus in scope the doctrine is a very wide, entitling the insurer to take advantage of all the insured's remedies against third parties. However there must be some connection between the subject matter of the insurance and the rights to be exercised by the insurer. The most illustrative example is that the insurer is not entitled to exercise the assured's rights to recover freight lost as a result of damage to a ship.¹⁹⁰

The requirements for the exercise of the rights of subrogation are therefore as follows:

1. a valid contract of insurance must exist;
2. the insurer must have indemnified the assured; and

189. Castellain v Preston op cit 388 referred to in Ackerman v Loubser op cit 34.

190. Sea Insurance Co v Hadden (1884) 13 QBD 706 CA.

3. the assured must obviously have rights against a third party out of loss which has been indemnified.

The consequences of subrogation are therefore as follows.

1. The rights against third parties remain vested in the assured, but contractually the insurer is entitled to enforce them in the name of the assured. Therefore as against third parties there is no actual transfer of the assured's rights, subrogation is neither an assignment, a cession, nor a transfer of rights.¹⁹¹
2. Subrogation confers no rights nor imposes liabilities on third parties.¹⁹² As far as the third party is concerned the action is brought by the assured who has suffered the loss. The third party defendant can raise any defence which he is entitled to against the assured.

Likewise should the assured do anything to release the third parties liability, this will be binding and the insurer thereafter has a contractual right of recourse against the insured. This right

191. Yorkshire Insurance Co Ltd v Nisbet op cit: 490.

192. ibid.

of recourse must be a term of the contract, express or implied.

3. The assured is the plaintiff in any action, and judgement will be in his name and execution thereof will be paid to the assured. The insurer is entitled to reimbursement out of the proceeds. Any costs recovered by the plaintiff are payable to the insurer, and the insurer is liable for the costs of action and may be required to indemnify the assured against costs.
4. The subrogated insurer is only entitled to receive from the results of exercising the assured's rights to the extent of the indemnification irrespective of whether the assured is better off after the action or not.
5. The assured is not obliged to take all steps to enforce his rights against a third party after being indemnified. Therefore it is the subrogated insurer who must take steps to interrupt prescription etc.

MARITIME LAW

Subrogation is not a transfer of rights. It is simply the right to enforce the indemnified assured's rights in

the name of the assured and to recoup the amount of indemnification to the assured and no more.

The subrogated insurer will therefore only be enforcing the assured's rights, including all other remedies which secure these rights. Clearly the maritime lien therefore remains fully in place.

The Marine Insurance Act 1906, section 79 sets out the insurer's right of subrogation in English law. This section makes separate provision for total and partial loss, providing for subrogation only in so far as the insurer had indemnified the assured. But the act is clear on the insurer being subrogated to:

"all rights and remedies of the insured."

Section 79 (1) of the Marine Insurance Act causes some confusion in that the doctrine of abandonment is also raised.

"Section 79 (1) Where the insurer pays for a total loss either of the whole, or in the case of goods, any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss."

It is essential to distinguish between abandonment and subrogation. Abandonment entitles the insurer to the

vessel and any right attaching thereto after the abandonment, including for example a claim for freight earned after abandonment.

Abandonment does not transfer any maritime liens that the res owner held prior to the abandonment.

Thomas¹⁹³ and Jackson¹⁹⁴ are clear that the maritime lien falls within the rights and remedies specified in the act.

The effect of subrogation might be similar to a transfer of the maritime liens to an insurer, but clearly it is not a legal transfer.

The application of the doctrine is limited to circumstances where a valid contract of insurance exists and indemnity has been paid thereunder.

Practically therefore subrogation will be most commonly found in circumstances where the damages lien exists, most marine insurance contracts being to indemnify property loss or damage.

It is of course conceivable that insurance contracts could exist providing indemnity in the event of loss suffered by the breach of a salvage contract, or even a breach of a special employment contract, but in practice I believe this is uncommon and unlikely.

193. op cit 273.

194. op cit 239.

CONCLUSION

In both English law and South African law the doctrine of subrogation operates as an express or implied term of any contract of insurance to afford the insurer in certain circumstances practical access to the benefits of the maritime lien for damages done by a ship.

Subrogation is not a legal transfer of rights and benefits to a maritime lien.

The rights of subrogation may be provided for, amended, modified, or excluded by the insurance contract.

In the International Convention on Maritime Liens and Mortgages 1993 express recognition of subrogation of a maritime lien is contained in article 10 (1). Article 10 (2) adds:

"Claimants holding maritime liens may not be subrogated to the compensation payable to the owner of the vessel under an insurance contract."

This subsection is in conformity with the principles of subrogation in South African law.

3.1.5 INSOLVENCY AND DEATH

In the event of the insolvency of the lienee the position in English law is governed by statute, the Insolvency Act 1986. However the South African

Insolvency Act will prevail over the English legislation in terms of section 6 (2) of the Admiralty Jurisdiction Regulation Act. The English Insolvency Act provides for an automatic assignment by operation of law, of all causes of action, claims, bankrupt rights etc of a proprietary nature to the trustee of the estate immediately upon bankruptcy order being made, again to be contrasted with person causes of action for example, slander, defamation, trespass etc.¹⁹⁵

The position is exactly the same in South African law, by virtue of the provisions of the South African Insolvency Act.

In the event of the death of the lienee, in terms of the Administration of Estate Act, all causes of action and rights in favour of the deceased vest in the deceased estate, with the executor and administrator having power to exercise them on behalf of and for the benefit of the estate.

Again this represents an automatic transfer by operation of law.

3.2 TRANSFER OF MARITIME LIENS IN SOUTH AFRICAN LAW

Subject to certain statutory restrictions on the transfer of certain maritime claims and the liens attaching, the South African admiralty court is bound to

195. Section 306 Insolvency Act 1986.

apply the English law and principles relating to transferability.

From a brief examination of the South African legal principle of cession it will be clear that very little difference exists between South African law and English assignment, so that the application of the concept of assignment will not offend the South African courts.

Ultimately the whole question of transferability awaits litigation of a test case, so that the courts are obliged squarely to face the question and provide definitive answers and decisions thereon.

3.2.1 STATUTORY RESTRICTIONS ON TRANSFER

Section 134 (2) of the South African Merchant Shipping Act 1951 provides the clear restriction, so similar to its English statutory equivalent, that a seaman shall not by agreement forfeit his lien on the ship for his wages or be deprived of any remedy for the recovery of wages and that any stipulation in an agreement to that effect will be void.

Section 143 (1) of the same act provides that the master of a South African ship will have:

"the same rights, liens and remedies for the recovery of his wages as a seaman has under this act or by any law or custom."

Section 143 (2) provides that the master will have:

"the same rights, liens and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages."

The construction of these provisions, referring as they do ultimately to the seaman's rights and liens, excludes the restriction on alienability applicable to seaman, from applying to the master. This is by virtue of section 2 definition of "seaman" specifically excluding the master.

There is therefore no restriction of the master's ability to forfeit, alienate or waive his wages or disbursements lien, in South African law, as in English law.

These provisions of the Merchant Shipping Act prevail over the English law, although in effect no difference exists since section 11 and 18 of the English Merchant Shipping Act 1970 are of almost identical effect *mutatis mutandis* regarding nationality of the vessel and geographical differences.

3.2.2 CESSION IN SOUTH AFRICAN LAW

It is not necessary to consider the South African concept of cession, having already concluded that the English law of transferability is to be applied by the South African admiralty court, and that therefore the English law of transferability is the South African law of transferability of maritime liens (subject always to specific statutory modifications.) It is however of interest to briefly examine the similarity in practical effect between cession and assignability.

In South African law, the concept of cession approximates, and is said to be synonymous with assignment in English law.¹⁹⁶ However the two terms and concepts should never be so compared, although the effect is very similar.

"Cession is a bilateral juristic act whereby transfer of a right is effected by agreement between the transferor, termed a cedent, and a transferee, termed a cessionary."¹⁹⁷

In qualification of this definition cession is limited to the transfer of personal rights, in the classification of rights in Roman Dutch law as opposed to real rights in property (to be registered and conveyed) or personality rights.

196. Gibson SA Mercantile and Company Law 6th ed; LAWSA Vol 2 198; and Scott The Law of Cession End ed.

197. LTA Investments Co Ltd v Seacot Investments (Pty) Ltd 1974 1 SA 747 A at 762.

Historically cession has its origins and development in Roman and Roman Dutch law and English law is said to have brought little influence to bear upon South African law in this regard,

"the English doctrine of assignment of choses in action is totally foreign in South African law."¹⁹⁸

This might be true except insofar as the South African admiralty court is obliged to apply English law in terms of section 6 of the Admiralty Jurisdiction Regulation Act 1983.

Cession requires no formalities and may be effected by words or conduct. A valid cession must however satisfy all of the requirements for a valid contract in South African law.

With cession, rights are transferred subject to contingency and the cessionary does not get a stronger right than the cedent had.

Future rights may also be ceded in South African cession, unlike the English assignment.¹⁹⁹ As a general rule cession may take place without notice to, or the consent of, the party against whom the rights are enforceable.²⁰⁰ This principle is subject to the test

198. LAWSA Vol 2 341.

199. Rushworth v SIR 1964 4 SA 493 A at 499.

200. East Rand Exploration v Mol 1903 TS 53.

of "reasonable or substantial difference," in terms of which if the rights are of so personal a nature as between the parties as to make a "reasonable or substantial difference" to the exercise of the rights, then the consent of the other party is required. This is a matter of fact in each case. Therefore contracts of service in South Africa cannot be ceded without the service provider's or the employees consent²⁰¹ along with all of the qualities, advantages and privileges attached,²⁰² including all accessory securities attaching to the right.²⁰³

Clearly despite juridical differences, the effect of the concepts of assignment and cession are so similar, that the effect of the South African admiralty court recognising the assignment of a maritime lien as it is obliged to do in applying English law in terms of section 6, ought not to offend the South African law.

For the admiralty court to recognise an assignment of a chose in action which satisfied English law - would have a practical effect so similar to the common cession as not to make it offensive. Thus in South African matter - while a cession might have existed - as long as in the circumstances the cession in fact satisfied the requirements for an assignment in English law - the admiralty court ought to give effect to it.

201. Katsoupdis v Bilardi 1970 2 SA 391 C.

202. Heydenryck v Standard Bank Ltd (1906) 16 CTR 85.

203. Lief v Dettman 1964 (2) SA 252 A.

In all other aspects of South African law, assignment of choses in action has no place.

CONCLUSION

A South African court adjudicating on a claim secured by a maritime lien ought to give effect to an assignment which is valid in English law.

CHAPTER FOUR

THE EXTINCTION OF MARITIME LIENS

The events and circumstances which have the practical effect of extinguishing a maritime lien could be categorised into two categories, having the same practical effect, but a different legal basis. Firstly events that actually extinguish the lien, and secondly, events that sterilise the effect of the lien, making the effect of the lien redundant. Extinguishing the lien involves the discharge of the claim or some other act or circumstance which finally terminates the lien itself, in substance. Redundancy of effect implies that the lien legally still exists although the lienee is prevented from exercising it and enjoying any benefits from it.

4.1 THE ENGLISH DOCTRINE OF LACHES

The doctrine of laches encompasses loss of rights through lack of reasonable diligence in enforcing them. It requires that claims be prosecuted and advanced with "reasonable" expedition. The doctrine exists in common law and equity and the court of admiralty has long recognised it. It's association with maritime liens heralds from The Bold Buccleugh.²⁰⁴

204. (1851) 7 Moo PC 267 at 285.

"but where reasonable diligence is used and the proceedings are had in good faith the lien may be enforced into whosoever possession that thing may come."

Whether laches will apply seems to involve two considerations:

1. the period of delay; and
2. the extent to which other parties and third parties are prejudiced or compromised thereby.

The period of delay is a relative concept. English cases have considered the application of the doctrine in laches where the delay was of ten months through to a delay of eleven years.²⁰⁵ Considerations relating to delay are whether witnesses remain available, whether other evidence still exists etc. Mere delay in itself will rarely be destructive of a claim, is the message of the case law.

It is the second aspect, the effect on the rights of the defendant and other third parties that is the pivotal consideration.

"It is probably true to say that where there has been delay, an attempt to enforce a lien against a transferee of the res will be more closely scrutinised by the court than when the res continues in the possession of the original owner."²⁰⁶

205. Thomas op cit Para 502, 281.

The test is whether the lienee has exercised "reasonable diligence" in the execution of the lien, which is a factual question to be decided on the merits of each case. It has been held that in the exercise of reasonable diligence it is not necessary for a lienee to follow the ship and pursue the remedy in a foreign court, or even to issue a writ in anticipation of the ship returning to the courts territorial jurisdiction - The King Magnus.²⁰⁷

In The Fairport²⁰⁸ the masters honest and reasonable belief that the shipowner would recompense him where a charterer had failed to, was not considered negligence sufficient to enforce the doctrine of laches.

In South African law there is no equivalent concept, but in the application of the reasonableness test on the circumstances in each case the courts would have no difficulty.

The doctrine of laches goes to making the effect of the lien redundant. The lien is in itself not extinguished, but its effect is rendered unenforceable by the courts.

206. op cit Para 503, 282.

207. (1891) P 223.

208. (1872) LR 3 A&E 48 discussed in Thomas op cit 283.

4.2 PRESCRIPTION AND STATUTORY TIME LIMITATIONS

The extent of statutory time limits reduces the relevance and application of the doctrine of laches. Laches cannot apply during the period allowed by statute within which to bring a claim.

In South African law, the Admiralty Jurisdiction Regulation Act, section 1 (2) (a) defines the moment when an admiralty action is deemed to have commenced, for the purpose of interrupting prescription for a statutory time limitation set out in any law of South Africa or elsewhere as -

- "2 (a) An admiralty action shall for any relevant purposes commence -
- (i) by the service of any process by which that action is instituted;
 - (ii) by the making of an application for the attachment of property to found jurisdiction;
 - (iii) by the issue of any process for the institution of an action in rem;
 - (iv) by the giving of security or an undertaking as contemplated in section 3 (10) (a)."

SALVAGE AND DAMAGE

The South African Merchant Shipping Act 1951 applies to all South African registered or licenced ships, wherever they may be in the world, by virtue of the provisions of section 3, which also provides for ministerial extension of the application of the act over certain foreign vessels or categories of vessels. The act also applies

territorially to the whole of South African and its territorial waters. In respect of these ships, and claims relating to them and causes of action arising within South Africa, section 344 of the Act provides,

344 (1) Prescription. The period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or her owners in respect of any damage to or loss of another ship, her cargo or freight or damage or loss of life or personal injury suffered by any reason on board her caused by the fault of the former ship, or in respect of any salvage service, shall be two years and shall begin to run on the date when the damage or loss or injury was caused or salvage service rendered."

344 (3) Any court having jurisdiction to try proceedings if it is satisfied that owing to the absence of the defendant ship from the Republic and its territorial waters and from the country to which the plaintiffs ship belongs or in which the plaintiff resides or carries on business and its territorial waters, the plaintiff has not during such period had a reasonable opportunity of arresting the defendant ship, extend such period sufficiently to give him such reasonable opportunity."

By virtue of section 2 of the Admiralty Jurisdiction Regulation Act, the only courts to have jurisdiction over these claims in South Africa are the admiralty courts, constituted thereby.

The South African provisions are almost identical to the English legislation contained in section 8 of the Maritime Conventions Act 1911.

In respect of salvage claims in English law the provisions of the International Salvage Convention 1989 apply, which include a time bar where an action must be brought within 2 years of the terminations of salvage services. The convention application may be excluded by parties to a salvage agreement.

Where the maritime lien exists over cargo, as it does only in respect of a salvage lien and not the damages lien, the Carriage of Goods By Sea Act, 1 of 1986, provides that both the carrier and the cargo are discharged from "all liability whatsoever" when a suit is not brought within one year of delivery of the cargo or the date when delivery should have taken place. This is in terms of rule 6, article III of the schedule, the Hague-Visby Rules, which also prevail in English law in terms of the English 1971 COGSA.

SEAMANS WAGES AND MASTERS WAGES LIENS

These liens, which are recognised and enacted in the provisions of sections 134 and 143 of the Merchant Shipping Act respectively, are also governed by specific South African legislation.

They fall within the provisions of the Prescription Act 68 of 1969. In terms of section 11 (d) the period of prescription of any debt is three years. Included in this broad definition of debt are outstanding wages, and

disbursements. In the previous 1943 Prescription Act section 3 was far more specific and spoke specifically under the heading of debts of any remuneration or disbursements due to any person in connection with services rendered or work done.

The extinction of a debt in terms of this act results in the simultaneous extinction of a right or cause in action, in terms of section 9. This act specifically provides that a debt is completely extinguished after the lapse of the relevant period.

In respect of proceedings against the state the Merchant Shipping Act provides, in section 344 (4), that the period of extinctive prescription shall be one year.

In English law however, The Limitation Act of 1939, section 2 (1) applies and perpetuates the long standing provision in admiralty law that a claim for seaman's wages must be brought within six years of the cause of action arising.²⁰⁹

In English law, the effect of statutory time limits and prescription is to render the lien unenforceable but not finally extinguished.²¹⁰ A similar position applied in South Africa under the Prescription Act of 1943, whereby although debts would prescribe in terms of the time periods allowed, the natural debt was not extinguished but simply the right to enforce it before the courts was

209. Thomas op cit Para 284.

210. The P.L.M (1920) P 236.

removed. This position was specifically and pertinently changed by the 1969 Act.

BOTTOMRY AND RESPONDENTIA BONDS

In respect of bottomry and respondentia claims and liens, the provisions of the Prescription Act would presumably also apply. Section III provides an extinctive prescription period of six years for debts secured by notarial bonds. Whether the bottomry bond or respondentia bond would have been considered as notarial bonds it is not certain. There is no case law to be found on the definition for prescriptive purposes of a bottomry bond.

4.2.1 THE 1993 INTERNATIONAL CONVENTION ON MARITIME LIENS AND MORTGAGES

Article 9 of this convention provides that the maritime liens set out in article 4, the international maritime liens, shall be extinguished after a period of one year, or arrest and seizure leading to a forced sale, whichever is the earlier.

The one year period is to commence the moment the claims secured by the liens arise, except in the case of claims by master and crew in respect of their employment with the vessel, which shall commence immediately upon the claimants discharge from the vessel.

period will not be subject to suspension or interruption, although it will not run during any period that the arrest of a vessel is not permitted by law.

Accession by South Africa to this convention would require the amendment of a number of South African statutes, but would provide clarity, uniformity among the various liens and international certainty.

4.3 BAIL AND SECURITY

The provisions of section 4 of the Admiralty Jurisdiction Regulation Act govern the procedure and the rules of the South African admiralty courts. In terms hereof the rules of the admiralty courts are those rules made under section 43 of the Supreme Court Act 59 of 1959. The rules of the admiralty court were promulgated in 1986. Insofar as these admiralty court rules are inconsistent with the supreme court uniform rules, the admiralty rules prevail, with the effect that if the admiralty rules are silent, the uniform rules of the supreme court will apply.

In terms of section 3 (10) (a) of Admiralty Jurisdiction Regulation Act:

"3(10)(a) Property shall be deemed to have been arrested or attached and to be under arrest or attachment at the instance of a person if at any time, whether before or after the arrest or attachment security or an undertaking has been given to him to prevent the arrest of attachment or the property or to

obtain the release thereof from arrest or attachment."

Section 3 (8) is also of relevance:

"3(8) Property shall not be arrested and security therefore shall not be given more than once in respect of the same maritime claim by the same claimant."

These provisions enact and formalise the contemporary practice most favoured for securing the freedom of the maritime res, encumbered by a maritime lien, in English and South African law.

In practice a maritime claimant agrees to accept an undertaking, in the form of a guarantee by a third party, to pay such sum as the court may ultimately order or that the parties may agree in settlement. In the event of such undertaking being given, the property is deemed under arrest or attachment for purposes of all of the other provisions of the Admiralty Jurisdiction Act. If the arrest has already occurred, the claimant will as agreed release the ship and other arrested property, alternatively if the undertaking is given before arrest, the arrest is deemed to have occurred.

The effect of this security is that the ship is released, and may not be re arrested, by virtue of section 3 (8). Therefore the maritime lien which the claimant has in respect of the specified cause of action is in effect extinguished. All other liens of course remain untouched.²¹¹

211. See Thomas op cit 291.

The guarantee itself is a contract between the claimant and the guarantor, and does not involve the court, save that:

"3(10)(b) That security shall, for the purposes of section 9 and 10 (the sale of arrested property and creation of a fund held in court) be deemed to be the freight or the proceeds of the sale of the property."

If the guarantor were to default on payment the claimant only has a personal right of action arising out of the guarantee, and he would have to proceed against the guarantor in a separate action.

The English courts have permitted the re-arrest of a res in circumstances where the guarantor is insolvent, but all of the authority relates to matters of bail to be discussed supra.

In light of this it is submitted by Jackson²¹² that the maritime lien is not fully extinguished until at least judgement on liability. In other words the effect of the lien is removed by the provision of security but the lien in substance remains and its effect may be revived in these circumstances. Jackson submission that the judgement is the moment of final extinction is in itself problematic, many cases and commentators referring to the lien as being transferred to the fund in court on judgement - which is clearly erroneous and will be discussed later. The point of final extinction seems to

212. D C Jackson op cit 243.

be the moment of judicial sale, also discussed supra. If the lien is not fully extinguished then the power to re-arrest is still inherent in it, and the provisions of section 3 (8) become problematic. Section 3 (8) seems to be quite clear, unambiguous and peremptory.

The practical consequences therefore seems to be that upon agreement to release an arrested res, or upon agreement not to arrest, the ship is deemed arrested for the purposes of the action before the admiralty court. The guarantee becomes the asset of the fund in court, in terms of section 9 of the act and all other proceedings before the court are satisfied. If the guarantor then defaults, the fund is of no value, until the plaintiff in a separate action, proceeds against the guarantor. This subsequent action will be a maritime claim in terms of section 1 (1) definition (bb) of a maritime claim of the Admiralty Jurisdiction Act which is as follows and which therefore gives the admiralty court jurisdiction:-

"(bb) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter auxiliary thereto including the giving or release of any security, and the payment of interest."

For this purpose the admiralty court has power in terms of section 5 to order joinder in proceedings and make any other order relating to security for costs, including an order that notwithstanding the provisions of section 3 (8) property be arrested - section 5 (2) (d). Section 5 (2) (a) also gives the court power to:

"consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim."

In the case of security for the release of or agreement not to arrest a maritime res, the act therefore provides dual heads of admiralty court jurisdiction over disputes relating to that security.

In terms of this legislation, the position in South Africa therefore is clearer than that in English law. In English law it is possible in certain circumstances for the effect of the lien to be revived and for the ship to be arrested more than once for the same cause of action by the same claimant, but all of the case authority in this regard relates to the payment of bail.²¹³

In English law the concept of bail has a long case history and must therefore be considered in contrast to the concept of the provision of security. While the practice of the payment of bail is accepted as being out of date and rarely resorted to, it is of historical interest in that the contemporary practice of providing security obviously grew out of bail practice, and therefore the consequences of bail are indicative of the effects of security on a maritime lien.²¹⁴

213. Thomas op cit Para 516 291; Jackson op cit 244.

214. See Thomas op cit 287 footnote 32.

Bail is a bond or undertaking to the court executed by a surety on behalf of the defendant for a sum of money, which normally represented the maximum liability. The effect is that of surety, that the bond is only executed if the defendant defaults. The further effect is that the res is released from arrest or an undertaking is given not to arrest, on the strength of this security, and therefore the effect of the maritime lien is extinguished.

Most importantly, however, is that the bail, given as it is to the court, can only be given once the matter is before the court, and an appearance has been entered to defend the matter. In such a case, by virtue of the appearance to defend, the defendant has submitted to the concurrent in personam jurisdiction of the court, and the matter could proceed as an action in personam against the person of the defendant, incurring the defendant's personal liability.²¹⁵

In English law, in certain circumstances re arrest of a res is permitted, the effect being to revive the maritime lien.

Despite dicta by Dr Lushington in The Kalanazoo²¹⁶ and Bateson J in The Point Breeze²¹⁷, there are a number of cases indicating the circumstances under which the lien

215. See Shaw op cit and Thomas op cit 288.

216. (1851) 15 Jur 885.

217. (1928) P 135, 142.

was revived and the re-arrest of a res in the same cause of action was permitted.

The circumstances where re-arrest was permitted were when the surety to the bail became insolvent; where the original bail was insufficient; where the bail was insufficient to cover costs; and where proceedings were abandoned or the case dismissed prior to judgement (all costs having been met if called for.)²¹⁸ Most of these circumstances have been covered by legislation in South Africa in terms of section 5 of the Admiralty Jurisdiction Regulation Act, and so the need for re-arrest in South African law is statutorily provided for in sections 5 (2) (b), (c), (d).

In conclusion therefore it may be said that while in English law it appears to be the case that the provision of bail or security does not necessarily finally extinguish the maritime lien, in South African law, by virtue of statute, the provision of security has the effect of finally terminating the maritime lien.

4.4 PAYMENT OF CLAIMS

Maritime liens are discharged and finally terminated by the payment, and acceptance thereof, of the claim.²¹⁹ This is irrespective of when the payment of the claim is made, before, during or after legal proceedings and

218. See Thomas op cit 289.

219. Thomas op cit Para 511, 286.

judgement. Obviously payment only extinguishes the lien of the person so paid and does not effect the rights of other lien holders.

4.5 SALE BY COURT

In English law it is clear that the sale of a ship and other encumbered property by order of a court of competent jurisdiction in proceedings in Rem, has the effect of extinguishing all maritime liens and passes to the purchaser property which is free of all encumbrances.²²⁰ The proceeds of the sale are then held in a fund in court and all liens are transferred to this fund. This should not be construed as a transfer of the maritime liens however, but the phrase is used to convey the understanding that by application of law the privileged ranking and order applicable to the liens is applied against the fund in court. All of the other aspects of the maritime lien are extinguished no transfer can therefore be said to have taken place. The maritime lien itself is terminated upon the moment of a valid, judicial sale. Insofar as South African legislation does not modify these principles, the position in South African law is the same. There are a number of elements to this mode of extinguishing completely the maritime liens, which require closer examination.

220. The Optima (1905) 10 Asp. Mar. Law Cas 147; The Acrux (1962) 1 Lloyd's Rep 405.

4.5.1 BY ORDER OF A COURT OF COMPETENT JURISDICTION

In South African law it is only an admiralty court which has the jurisdiction to adjudicate upon maritime claims, and to therefore adjudicate actions in rem. In terms of section 9 of the Admiralty Jurisdiction Regulation Act

"9. A court may in the exercise of its admiralty jurisdiction at any time order that any property which has been arrested in terms of this act be sold."

The South African admiralty court is therefore the only court of competent jurisdiction to order the sale in an action in rem.

For a South African court to recognise the sale by a foreign court, it must be satisfied that the foreign court was of competent jurisdiction, and more importantly that the proceedings were in rem, against the ship or maritime res itself and not the person of its owner or other parties.

4.5.2 IN PROCEEDINGS IN REM

If the proceedings are not in rem, against the ship itself then the maritime liens are not extinguished. If the sale was ordered by a court in any other personal action it would simply amount to a sale in execution of a court judgement, a totally different concept to the judicial sale of the defendant res itself in rem proceedings. Clearly a maritime lien travels with the res into the hands of bona fida purchasers pursuant to a sale in execution irrespective of notice. Even if the

sale is made with an express term, as is usually the case in an judicial sale, to the effect that the vessel is sold free of encumbrances and liens, the maritime lien is not effected, and the purchaser would only have a right of recourse, against the seller.²²¹

The proceedings of a foreign jurisdiction would have to be examined by the South African court to determine whether they are of the same effect as an action in rem.

"It is important that the judgement should show on the face of it that the proceedings against the vessel are not merely against the owners as such, or the captain, but that the proceedings had in contemplation the ultimate sale of the ship and a judgement ordering the ship to be sold.²²²

4.5.3 ALL MARITIME LIENS

All maritime liens and statutory liens, are extinguished by the sale. The giving of security or bail only has the effect of extinguishing that particular claimants maritime liens in respect of that particular and specified cause of action, leaving all other maritime liens in tact. A judicial sale extinguishes all maritime liens, from all causes of action.

221. The Goulendris (1927) P 182, Thomas op cit P300.

222. The City of Mecca (1861) 6 PD 106, 116 cited in Thomas ibid.

4.5.4 BENEFITS OF THE LIEN 'TRANSFERRED'

The fund in court, thereafter represents the res and all claims that may be made against the res, are proved against this fund and will receive payment in accordance with the order of priority and ranking applicable to the maritime liens. Thus the benefits of the lien in terms of the privileged claim and priority of ranking still attach to the fund by operation of statute law (section 9 of the Admiralty Jurisdiction Regulation Act) in South African law despite the extinction of the lien. In English law the transfer of these benefits of the maritime lien is by operation of admiralty law.

4.5.5 1993 CONVENTION

Article 9 of the 1993 International Convention on Maritime Liens and Mortgages provides that maritime liens shall be extinguished after a period of one year, unless prior to the expiry of that period the vessel has been arrested or seized, such arrest or seizure leading to a forced sale.

Notice of a forced sale has to be provided to, inter alia, all holders of mortgages, maritime liens, who have given notice of their respective claims to the competent authority conducting the forced sale, and to the registered owner of the vessel, at least thirty days prior to the sale - article 11.

Article 12 reinforces article 9 in that in the event of a forced sale of a vessel, inter alia, all liens and

encumbrances of whatsoever nature shall cease to attach to the vessel.

4.6 DESTRUCTION OF THE MARITIME RES

This is the best example of the final termination and extinction of the maritime lien. Essential to the definition of a maritime lien is the continued existence of the res. The existence of the res is also a condition precedent of an action in rem. With the permanent and total destruction of the res both the action in rem and the maritime lien are forever lost.

A partial loss or destruction has no effect on the maritime lien, other than reducing the value of the security. The maritime lien attaches and exists as long as a "single plank remains." Likewise a temporary loss leaves the maritime lien in tact.²²³

4.7 STAY OF PROCEEDINGS

Section 7 of the Admiralty Jurisdiction Regulation Act empowers the South African admiralty court as follows:

"7(1)(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal

223. The Cargo ex Shiller (1877) 2 PD 145.

or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by and such court or by such arbitrator, tribunal or body."

This provision is simply the statutory recognition of the "forum non conveniens" principle.²²⁴

The basis of this principle which originated in Scottish law, is that if there are reasons why another forum is more "appropriate", then a court had an inherent discretion to decline to exercise jurisdiction. Among the relevant reasons that might be "appropriate" are inter alia considerations of the difficulty of having to prove foreign law or the availability of foreign witnesses; that neither or any of the parties is not resident within the courts jurisdiction and the obvious inconvenience caused thereby; questions of effectiveness - the ability of the court to give practical effect to its judgements in terms of execution etc. These considerations have been expressed in the case of The Eleftheria²²⁵ approved and confirmed in Inter-continental Export Co (Pty) Ltd v M V Dien Danielson.²²⁶

The principle of forum non conveniens has been particularly applied in cases relating to the payment of

224. See Shaw op cit 53.

225. (1969) 2 All ER 641.

226. 1982 (3) SA 534 N at 541.

wages of seaman and shipping crews, where considerations of having to bring foreign seaman into the courts jurisdiction as witnesses and having to repatriate any award ordered, make it far more appropriate that the court of residence of the seaman adjudicate the matter.

The important aspect of the South African legislation is that it applies to proceedings not yet instituted. Presumably this aspect would be raised by the registrar of the admiralty court at the time of issuing a writ in rem. Section 7 (1) (a) was amended in 1992 to include reference to arbitration after the objection by Shaw that section 7 (1) (a) previously only referred to any "court tribunal or body" and therefore by inference, from the wording of section 7 (1) (b) excluded arbitration, since the latter sub section deals explicitly with arbitration.²²⁷

Section 7 (1) (b) empowers the admiralty court to stay any proceedings where there is an agreement that the matter be referred to arbitration or

"if for any other sufficient reason the court is of the opinion that the proceedings should be stayed."

A stay of proceedings is normally ordered by a court if it is satisfied that the action is vexatious or oppressive or that there has been a submission to a foreign jurisdiction. The line between forum non conveniens and a stay of proceedings is a fine one.²²⁸

227. *ibid.*

228. Shaw *ibid* 56; The Eleftheria (1969) 2 All ER 641.

The Courts discretion should be exercised by granting the stay of proceedings unless strong cause for not doing so is shown.²²⁹

The question of relevance to the extinction of maritime liens relates to the aspect of a court exercising its powers in terms of section 7 (1) (a) or (b) where proceedings in rem are already instituted and the property arrested, and possibly released upon security given. Is the maritime lien still available to be exercised in some other forum, or having been exercised in the admiralty court is it extinguished.

Jackson suggests that where no equivalent security is ordered, the continuation of the lien is not effected:

"The fact that an English court cannot hear the case should not effect the continued recognition of a security which should not depend on its enforcement in any particular jurisdiction."²³⁰

As already discussed, the provision of security in South African law finally extinguishes the maritime lien. The ship may be ordered to be arrested again, only by the same court in circumstances only relating to the increase of security but this rearrest is an order of court and not the operation of the maritime lien.

229. The Eleftheria *ibid.*

230. Jackson *op cit* 242.

What Jackson is therefore suggesting is that upon declining to exercise jurisdiction or ordering an stay of action the release upon security is taken as not having occurred and the lien is taken as having revived.²³¹ This may be valid in English law applying the authority relating to bail to these circumstances. In exacerbation of this problem the Civil Jurisdiction and Judgements Act 1982 in English law gives the court the power to retain arrested property in proceedings later stayed or dismissed, because of submission to another court or to arbitration. The effect is that the ship remains arrested and the owner cannot have access to it. In cases of stay of proceedings and forum non conveniens a good case seems to exist for legislative intervention to clarify the situation and provide for the revival of the maritime lien upon such an order.

4.8 AGREEMENT, WAIVER AND ESTOPPEL

Subject to the restrictions prohibiting seaman and masters from assigning or waiving their claims and liens in respect of wages and salvage, contained in the Merchant Shipping Act 1951, if a claim to which a maritime lien attaches is waived, the right to assert the maritime lien is also waived, and the claimant estopped from exercising it.²³²

231. The Kronprinz (1887) 12 App Cas 256; The Salyria (1910) P 25.

232. The Goulendris (1927) P 182; The Leon Blum (1915) P 290.

The question of waiver is relevant to the question of the position of the maritime lien in the event of the insolvency of the res owner. In terms of the South African Insolvency Act the lienee is a secured creditor of the insolvent estate or the company in liquidation. As such the lienee is highly unlikely to waive this privileged position and surrender his maritime lien security to the trustee of the insolvent estate or the liquidator of the company in liquidation. If this were the case, such waiver would extinguish the maritime lien, and the lienee would simply become a concurrent creditor.

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