Foreword

Maritime law has historically been of major importance, both in resolving shipping disputes and in settling rules applicable to a much wider range of situations. A number of leading cases in the law of contract are, for instance, maritime cases. The growth of air traffic has to some extent reduced reliance on shipping in international trade but developments such as containerisation have in fact kept the world seaways very busy. The increase in fishing around New Zealand shores, especially by foreign vessels, has also meant that maritime law has maintained its practical significance.

Given the importance of international trade to New Zealand, surprisingly little has been written here on maritime law. It is not a topic which forms part of the core teaching subjects in university law courses. In recent years the Law Faculty at Victoria University has conducted LL.B. (Honours) seminars in maritime law and in 1984 the Faculty ran its first maritime law course for masters students. Considerable assistance was obtained from members of the legal profession and others practising in the field. This volume of the Law Review presents some of the fruits of that programme. We publish here a set of papers including articles prepared by students in the course and talks delivered to the class by experts specially brought in for the programme. We hope that readers will find the collection a helpful and stimulating one.

V.U.W.L.R. Editorial Committee.

The ranking and priority of in rem claims in New Zealand

M. E. Perkins*

This article explores the law relating to the priority of admiralty claims in New Zealand. The law was substantially revised by the Admiralty Act 1973 and the Admiralty Rules 1975. However, account must be taken of other statutory provisions, the traditional maritime lien and other statutory liens and rights. Following the flexible approach of English law, the New Zealand courts have, according to the author, a wide discretion in the determination of the priority of claims. The author nevertheless sets out what is the likely applicable ranking in New Zealand. The possibility of a change in the law is also raised. This would happen if New Zealand were to ratify the relevant international conventions.

I. INTRODUCTION

The purpose of this article is to consider the principles which would be adopted by the courts of New Zealand in exercising their jurisdiction under the Admiralty Act 1973, to determine the priority of claims following the order for sale of any ship subject to proceedings under that Act and to consider as far as possible the likely order of such claims. This necessarily involves a consideration of the nature of a maritime lien because of the importance attached to the maritime lien holder's claim in this area of the law. There have been many decisions, both in the United Kingdom and the United States determining the order of priorities amongst claimants. These decisions have dealt with claimants from two or three classes of claim and have evolved certain underlying principles and it is these principles themselves rather than the multiplicity of decisions which are of importance.

As there is a disparity in the manner in which various admiralty jurisdictions around the world determine the priority of claims, and in fact define the maritime lien, difficulties have arisen in the application of the principles under the conflict of laws. These considerations under the conflict of laws need to be kept in mind in determining the order of priorities between rival claimants where the various claims against one vessel arise from different jurisdictions. In dealing with the conflict of laws and other problems associated with priority of claims, one is naturally led into the area of international unification. Two international conventions adopted at Brussels in 1926 and 1967 deal specifically with maritime liens and mortgages. Unfortunately these conventions have had little support from their signatories

* Barrister and Solicitor, Auckland.

mainly because their ratification would in some cases radically alter the current balance between the commercial interests in each country. However, to resolve the present difficulties in the conflict of laws, universal ratification of the later unification convention is probably the only answer.

There have been few, if any, recorded decisions in New Zealand dealing specifically with the priority of claims in admiralty and accordingly the New Zealand courts would look at the principles established in English law. In considering these principles, however, it is necessary also to consider the New Zealand legislation which is relevant. This consists of legislation determining the rights or causes which give rise to actions in rem and the manner in which New Zealand courts derive their jurisdiction. It also involves a consideration of the Harbours Act 1950, which has relevance to the matter of statutory claims,[1] and the Shipping and Seamen Act 1952, which deals with matters such as the wages of seamen, master's wages and disbursements, the priority of mortgages inter se, rules as to salvage and wreck and rules as to liability and limitations of actions against a ship or her owners. Also in respect of claims against cargo the Mercantile Law Act 1908 has some relevance in the determination of priorities.

II. THE NEW ZEALAND LEGISLATION

The main statutory provisions dealing with the determination of priority of admiralty claims in New Zealand are section 5(3) of the Admiralty Act 1973, and regulation 30 of the Admiralty Rules 1975.[2] Section 5(3) of the Admiralty Act 1973 reads as follows:

> where in the exercise of its Admiralty Jurisdiction the Court orders any ship or other property to be sold, the Court shall have jurisdiction to hear and to determine any question arising as to the proceeds of sale.

The procedures to be adopted by the court in determining such questions are set out in regulation 30 of the Admiralty Rules 1975.

These provisions come into effect in situations involving the arrest of a ship in an action in rem under the provisions of the Admiralty Act 1973 and the Admiralty Rules 1975. The order for sale would follow the obtaining of a judgment by the first in rem claimant to proceed to a hearing or obtain judgment by default where no appearance was entered by the owners of the ship or other persons interested in the ship or her cargo. Subclause (1) of regulation 30 allows any party who has obtained a judgment against the ship at the date of the order for sale, or who subsequently obtains a judgment against the ship, to apply to the court by motion for an order determining the priorities against the claimant.

With the passing of the Admiralty Act 1973 much of the unsatisfactory position existing in New Zealand law as to the admiralty jurisdiction of the New Zealand courts was removed. Prior to this the courts derived jurisdiction from a number of out-dated English and United Kingdom statutes which had been repealed in their

1 See D. R. Thomas *Maritime Liens* (British Shipping Law, Vol. 14, Stevens, London, 1980) 231.

2 S R. 1975/85.

country of origin. In addition to this the procedures of the courts in New Zealand were governed by the ancient and clearly outmoded Vice-Admiralty Rules of 1884 which again had been established by enactment of the United Kingdom long since repealed and which were not even readily available to members of the legal profession; the Rules being obscurely contained in an aged supplement to the New Zealand Gazette of 1884. These Rules did not set out any procedures for the ranking of competing claims.

The point about the Admiralty Act 1973 is that together with its Rules of 1975, it modernised and, while retaining the traditional inherent jurisdictions, codified the basis of the admiralty jurisdiction of the New Zealand courts and provided rules more in keeping with the requirements of modern shipping, linking such jurisdiction in with other existing enactments having effect in the maritime law. So far as the determination of priorities is concerned, the Admiralty Rules set out procedures for this to be achieved. The Act further established in rem jurisdiction before certain claims against ships which had, somewhat illogically, not existed before, while at the same time preserving the special relationship of the maritime lien to admiralty law.

The Admiralty Act 1973, subject nevertheless to the right of a maritime lienee to follow the res, also limits the circumstances under which the statutory claims in rem can be exercised, in that arrest is usually only available where the vessel is at the time of arrest owned by the person who would be liable to the complainant in personam. The Act has also introduced through section 3 (2) (b) (ii) the concept of sister-ship claims into New Zealand law.

As to the inter-relationship between the Admiralty Act 1973 and the other enactments mentioned, it can be said that whereas the Admiralty Act sets out the basis for the courts' dealing with admiralty claims, the other enactments deal with the establishment of substantive rights. These substantive rights first need to be determined and resolved as between the claimants and the res before the court in its admiralty jurisdiction can turn to the question of ranking those claims against the fund available for distribution to the competing litigants.

The Shipping and Seamen Act 1952 is extremely important because it is the codification of all of the rules necessary as a matter of public policy to regulate shipping, to protect and regulate the affairs of seamen, and to ensure that the safety of shipping is upheld within the New Zealand territorial limits. The Shipping and Seamen Act is also important in matters affecting the ranking of in rem claims because it confirms by statute the New Zealand seaman's maritime lien for wages; it creates the master's lien for wages and disbursements, which can only exist through this statutory provision; it codifies rights relating to the recovery of the maritime lien for salvage; it sets out statutory procedures for the recovery of wrecks; it specifically rules on the priority between salvage in respect of preservation of life and other salvage, holding that the former has priority over the latter; it determines the priority between mortgages inter se; it sets out rules as to limitation of liability, which has effect on the maritime lien for damage and personal injury; it sets rules as to time limits for the commencement of claims for damage, personal injury or salvage and apportionment of damage as between joint

tortfeasors.

These claims link in with the Admiralty Act 1973 and thereby the right of the High Court in its admiralty jurisdiction to determine the priority of claims by virtue of section 4(1) of that Act. Section 4(1)(c) gives the court jurisdiction in respect of claims relating to mortgages; paragraphs (d) (e) and (f) give the court jurisdiction in respect of claims for damage done to or by a ship and personal injury; paragraph (i) covers salvage both in respect of property and life; paragraphs (o) and (p) cover the crew's wages and the master's wages and disbursements. The High Court in turn in its admiralty jurisdiction in determining such claims must have regard to the limitations of liability and the time limits for such claims established by the Shipping and Seamen Act. In the determination of priorities, no specific rules are established by statute and accordingly the Common Law rules are grafted into the procedure by the discretion vested in the court under section 5(3) of the Admiralty Act and rule 30 of the Admiralty Rules subject, however, to the statutory provisions in the Shipping and Seamen Act giving life salvage priority over property salvage and priority between mortgages inter se.

The same interrelationship exists between the Admiralty Act and the Harbours Act 1950 and to a lesser extent the Mercantile Law Act 1908, the latter having a greater connection to the ranking of claims through the Common Law possessory lien.

In the determination of priorities the High Court under its admiralty jurisdiction has power under section 4(1)(m) of the Admiralty Act 1973 to consider any claim in respect of the construction, repair, or equipment of a ship or for dock or port or harbour charges or dues. Under section 4(1)(k) the jurisdiction covers claims in respect of pilotage. The authorities already show that where the harbour authority exercises its right of detention in respect of harbour dues under section 111 of the Harbours Act 1950 this purely statutory claim has to be satisfied before other in rem claimants can be considered. However, in respect of claims for damage to the harbour authority's property, or where the authority claims salvage, or pilotage, the authority merely participates as a maritime lienee subject to the limitations as to liability and other relevant provisions under the Shipping and Seamen Act 1952. Hence in respect of such claims and their priority there is a linking up between the Admiralty Act, the Shipping and Seamen Act and the Harbours Act.

So far as the Mercantile Law Act 1908 is concerned, to the extent that a possessory lien is created in favour of a wharf or warehouseowner over freight or cargo, the High Court in its admiralty jurisdiction has power to consider the matter and determine the priority of such a claim. This results from section 4(1)(h) of the Admiralty Act 1973 which gives the court jurisdiction in respect of any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

The various statutory provisions discussed therefore do interrelate. Unless there is a special mandatory provision fettering the court's discretion in the determination of priorities such as the statutory power of the harbour authority to seize and retain possession of a vessel for dues, or the priority as between salvage pre-

serving life and salvage preserving property, or priority of mortgages inter se, then the court determines priority according to the rules established under the common law. Accordingly it is now necessary to give consideration to such principles.

III. THE PRINCIPLES APPLIED TO THE DETERMINATION OF PRIORITY OF CLAIMS

Throughout the law concerned with the determination of priorities, while certain rules have been established, it is the equity of a particular situation which in the end determines which claim has priority over the other. This is confirmed by Thomas who wrote "That in the realm of priorities there would appear to be no immutable rules of law, but only a number of guiding principles . . . "[3]

A. The Maritime Lien

In the historical origins of the maritime lien two major theories have been evolved known as the personification theory and the procedural theory. Under the personification theory which appears to be the predominant theory under United States law the ship is "personified" and regarded as a distinct juristic entity with a capacity to contract and commit torts.

On the personification theory Gilmore and Black wrote:[4]

> Under what is said to be the predominant American theory the ship, personified, is itself — or herself — the defendant in a proceeding *in rem* to enforce a lien. The ship is the offending thing . . .

Under the English law the second theory known as the procedural theory finds favour. This as Thomas states ". . . is based on the premise that the maritime liens evolved out of the process of arrest of a vessel in order to compel the appearance of the *res* owner and to obtain a security".[5]

Whichever of the two theories is correct, the procedures which have evolved in each of the United Kingdom and the United States for the determination of priorities have similarities. Under the United States law the major difference from English law is that the list of maritime liens is much larger and includes such claims as necessaries and repairs to a ship, general average, and breach of the contract of affreightment. Also the position with mortgages is somewhat different. Under English law, in a similar fashion to New Zealand law, the list of maritime liens has been restricted to bottomry (which is now obsolete), damage by collision, salvage, seamen's and master's wages, and master's disbursements. Price states that "these are the only 'genuine' maritime liens in our law, but in a few cases liens arise indirectly out of the provisions of some statute".[6] It is probably as a result of the personification theory in the United States that a greater number of maritime liens have been created. One reason for this may be the suggestion by Thomas that

3 Thomas, idem.
4 G. Gilmore and C. L. Black *The Law of Admiralty* (2 ed., Foundation Press, Mineola, N.Y., 1975) 589.
5 Thomas, supra n.1, 7. See also G. Price *The Law of Maritime Liens* (Sweet & Maxwell, London, 1940) 8.
6 G. Price "Maritime Liens" (1941) 57 L.Q.R. 409.

> The fact that certain liens would appear to accrue independently of any personal liability on the part of the *res* owner; the fact that maritime liens travel with a *res* into the hands of the transferee, and the fact that in certain circumstances the value of the incumbranced *res* represents the limit of a maritime lienee's entitlement, would all appear to be facets of the contemporary law which are consistent with the tenets of the personification theory.[7]

The first comprehensive definition of a maritime lien is contained in the judgment of Sir John Jervis in the decision of *Hamer* v. *Bell "The Bold Buccleugh"*:[8]

> A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict sense in which we understood it in the Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in Civil Law, by which there might be a pledge with possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and by Mr Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem,* and adds, that wherever a lien or claim is given upon a thing, then the Admiralty forces it by a proceeding *in rem,* and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem,* a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, and to whosesoever 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.

While this definition was held subsequently not to be correct in respect of the statement "it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists", it is nevertheless a comprehensive and in all other respects a reliable definition of the maritime lien and the effects and rights which attach to it.

Another often quoted definition of the maritime lien is that of Price:[9]

> A maritime lien may be defined as:
> (1) a privileged claim,
> (2) upon maritime property,
> (3) for service done to or injury caused by it,
> (4) accruing from the moment when the claim attaches,
> (5) travelling with the property unconditionally, and
> (6) enforced by means of an action *in rem.*

Because the maritime lien therefore is a right which "is of respectable antiquity and an important feature of maritime law",[10] it plays an important part in the determination of priority of claims against a ship where the value of that ship or

7 Thomas, supra n.1, 7, fn.40.
8 (1853) 7 Moore P.C. 267, 13 E.R. 884.
9 G. Price, supra n.5, 1.
10 Special Law Reform Committee on Admiralty Jurisdiction *Admiralty Jurisdiction* (Wellington, 1972) 5.

the fund is insufficient to meet the claimants in full. The reason for this is that one of the underlying principles in the determination of priorities is the matter of public policy.

B. Public Policy

Public policy pervades most of the maritime liens and this is one of the reasons for their position in the maritime law. As Thomas has written:[11]

> Considerations of public policy underpin and advance the importance of each of the clearly recognised maritime liens. The difficulty in assessing the significance of public policy is associated not so much with the pinpointing of the various policies but in identifying which particular public policy will prevail when several compete for priority. Collectively however the various considerations of policy secure for maritime liens as a class a high priority in relation to other classes of claimants.

In so far as the maritime lien for wages is concerned Connor says this ranks as one of the highest classes of maritime lien because commerce would not take place without men to man ships and that men will not sign on without a trustworthy security for wages. Also he states that without protection resort may be had to the unprotected position of the seaman and his inability to learn of the solvency of the owner.[12]

This had been established very early on in English law. For instance in *The Madonna D'Ira*[13] Sir W. Scott stated that[14]

> Now it must be taken as the universal law of this Court that mariner's wages take precedence of bottomry bonds. These are sacred liens, and, as long as a plank remains, the sailor is entitled, as against all other persons to the proceeds as a security for his wages. This is a principle universally admitted . . .

And the same Judge stated in the case of *The Sydney Cove*[15] "That a seaman's claim for his wages was sacred as long as a single plank of the ship remained."[16]

In respect of salvage Connor states that the precedence which this lien has "rests on the need to encourage the saving of maritime ventures".[17] Thomas wrote that there are few subjects more affected by public policy than the law relating to salvage. He stated further:[18]

> Throughout the development of this branch of maritime law the consistent judicial viewpoint has been that salvage service is to the general benefit of humanity and commerce and therefore to be encouraged through a felicitous system of law and the liberality of the reward. These considerations of policy together with the superior equity emanating from the preservation of the *res* have secured for the salvage lien a substantive priority.

11 Thomas, supra n.1, 236.
12 Connor "Maritime Lien Priorities: Cross Currents of Theory" (1956) 54 Mich.L.R. 777, 791-2.
13 (1811) 1 Dods 37; 165 E.R. 1224.
14 Ibid. 40; 1225.
15 (1850) 2 Dods 11; 165 E.R. 1399.
16 Ibid. 13; 1400.
17 Connor, supra n.12, 792.
18 Thomas, supra n.1, 238.

Public policy has in the United States also played a part in the prominence of the ship mortgage in the priority of claims although this is not quite so true in the English law where mortgages have a lower status. The policy behind this prominence in the United States appears to have resulted from the downgrading of the merchant fleet in the United States at the beginning of and during the first World War. The effect of the Shipping Act 1920 was to give the "preferred mortgage" created by it priority over all claims against a vessel except preferred maritime liens and expenses, fees and costs fixed by the court.

The elements of the damage lien are also closely connected with matters of public policy. Connor states that collision liens are desirable because they promote safety in navigation,[19] and Thomas writes[20]

> The encouragement of safe navigation and reparation for damage and loss negligently inflicted in the course of navigation have long been concrete policies of the Admiralty Court. The damage lien is therefore jealously regarded for it represents a prominent weapon by which these policies may be facilitated.

C. The Preserver of the Res

As stated earlier in the determination of priorities the equitable situation is of paramount importance to the court. Many varied rules have been evolved for the determination of priorities and most of these have arisen through the operation of public policy or the equitable principles themselves. However, while the court will tend to follow these rules, if the equities of the case would suggest a departure, then the rules will not be held inviolable. One of the major equitable rules to evolve is that priority will be given to the claimant whose actions have contributed to the preservation of the res for the benefit of already existing claimants.

Arising out of the principle of the preserver of the res is the inverse order of attachment rule which relates to claims ex contractu. This rule originally arose on the basis that the later claimant was likely to have acted in a manner to preserve the res for the benefit of earlier contractual claimants. The principle was confirmed by Gorrell Barnes J. in *The Veritas*:[21]

It would seem clear that maritime liens may be divided into two classes — first, liens arising ex delicto; and, secondly, liens arising ex contractu or quasi ex contractu. It is almost obvious that liens of the latter class must in general rank against the fund in the inverse order of their attachment to the res. They are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests.

As between claims ex delicto and ex contractu he further held that the former had precedence over the latter. In deciding on this point he enunciated a further equitable principle when he stated that the principle reason for this order of priority:[22]

19 Connor, supra n.12, 792.
20 Thomas, supra n.1, 239.
21 [1901] P.304, 313.
22 Idem.

> . . . appears to be that the person having the right of lien ex contractu becomes, so to speak, a part owner in interest with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option.

The inverse order rule was also discussed by Brandon J. in *The "Lyrma" (No. 2)*:[23]

> It has long been an established principle that a maritime lien on a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely that the salvage services concerned have preserved the property to which the earlier liens have attached, and out of which alone, apart from personal remedies against the ship owners, the claims to which such liens relate can be satisfied.

Brandon J. did state however that if it were shown that an application of the rule would produce a plainly unjust result then it would be departed from.[24] Thomas is of the view that the inverse order rule will only be applied upon firm evidence that the later ex contractu claimant contributed to the preservation of the res.[25]

D. Laches

Another principle which has arisen in the ranking and priority of claims against a ship is that relating to delay. In the maritime law generally that are certain time limits for the commencement of actions. For example under section 471 of the New Zealand Shipping and Seamen Act claims for damage, injury and salvage must be commenced within two years from the date when the damage, loss or injury was caused or the salvage services rendered. Cargo claimants generally have to commence their claims within twelve months of the date of discharge. Claims for seamen's wages must under the Limitation Act 1950 (section 4(8)) be commenced within six years of the date of the cause of action. Other in rem actions are, however, specifically exempt from the Act but would remain subject to the doctrine of laches. Providing claims are commenced within time no problems will arise. However, delay in actually prosecuting the claim to the detriment of other claimants to the ship or the fund may result in the particular claim being lost or deferred. Varian states that:[26]

> Any priority rule dependent upon time and diligence of enforcement inevitably produces contentions of prejudicial delay, particularly in admiralty where jurisdiction is exercised upon equitable principles. Thus the doctrine of *laches* (delay coupled with prejudice) becomes an important factor in determining rank and priorities.

Gilmore and Black state that the lienee who delays enforcement of his claim until after the relevant priority period runs the risk of having the claim deferred or losing his lien altogether.[27] However, Benedict shows that the doctrine of laches has in some statutory situations only limited effect:[28]

23 [1978] 2 Lloyds Rep 30, 33.
24 Idem.
25 Thomas, supra n.1, 236.
26 G. L. Varian "Rank and Priority of Maritime Liens" (1973) 47 Tulane L.R. 751, 763.
27 Gilmore and Black, supra n.4, 764.
28 E. E. Jhirad and A. Sann *Benedict on Admiralty* (7 ed. (rev), Bender, New York, loose-leaf) Vol. 2, para. 53, pp.4-12,

> Whenever laches are mentioned in a priority context it can mean either of two things: a claimant may be guilty of laches as against the vessel owner in which case the lien may be lost altogether, or the claimant may merely be guilty of having waited too long to bring his lien to the attention of subsequent innocent lienors in which case his lien will be subordinated to theirs. (*The Nebraska* 69 F.1009). However, as in the case of establishing priorities, the presence of a preferred ship mortgage can effectively reserve all normal expectations. A pre-mortgage lienor can conceivably be innocent of laches with respect to the mortgagee on the date of the mortgage and yet be guilty with respect to a post-mortgage lienor. Nevertheless such neglect will not act to alter any of the priorities dictated by the Ship Mortgage Act.

Under New Zealand law claimants wishing to participate in the distribution of the fund would need to proceed with reasonable diligence. A ninety day notice period is allowed under rule 30 of the Admiralty Rules 1975 and presumably the fund would be distributed to claimants who had participated in the determination of priorities under rule 30 and any claimant coming along with a judgment after that and who had not obtained an extension would be too late.

In the United Kingdom it appears that the doctrine of laches does play a part although general principles as to delay seem to determine whether a claim will be delayed or lost. In *The Bold Buccleugh* Sir John Jervis stated that:[29]

> It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come.

It can be said that again in determining whether or not there has been due diligence in prosecuting the lien or claim the overall justice of the situation will be looked at and in particular whether to allow the matter to proceed will have a prejudicial effect on other claimants or third parties.[30]

E. The Possessory Lien

The possessory lien, while not strictly an admiralty claim, nevertheless plays an important part in English law in the determination of priorities as between claimants to a ship or fund. The importance of this lien is closely connected to the fact that under English law, in contrast with American law, ship builders or ship repairers do not possess a maritime lien and therefore rank low in the order of priorities. Under sections 4(1) and 5(2) of the New Zealand Admiralty Act 1973 claims for construction and repair of a vessel are now regarded as statutory claims in rem and the vessel may be subject to arrest for them. However, prior to the coming into force of the Admiralty Act even the right of arrest for such claims did not exist and hence the retention of possession by such claimants was of vital importance.

Price's view is that the absence of the maritime lien for repairs in English law is illogical.[31] However, the effect of this was to make the Common Law possessory lien assume prominence in admiralty law. Hall defines a possessory lien as "a right

29 (1853) 7 Moore P.C. 267, 285; 13 E.R. 884, 891.
30 Thomas, supra n.1, 283.
31 G. Price "Maritime Liens" (1941) 57 L.Q.R. footnote 1.

in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession are satisfied".[32] By the Common Law such possessory lien was good against all the world. In a situation therefore where a repairer or ship builder retained possession, such security would only last as long as the possession. However, while such possession lasted, the lien holder had a right to fend off all claimants no matter what the consequence, as Hall shows:[33]

> The right of lien is one of passive detention only, and this is, in general, the only remedy permitted to the person entitled to a lien. He may detain the subject matter of the lien but must put up with any inconvenience retention may entail.

Halsbury's Laws of England relates this definition to the position of the repair man in admiralty:[34]

> A possessory lien is the right of a person, in whose possession a ship or her appurtenances is or are, to retain possession of her or them until payment or discharge of some debt or obligation due to that person in respect thereof. Such a right belongs to one who repairs, alters or otherwise bestows labour or skill upon a ship, and retains possession of her. There is no power to realise the security, even though expenses and inconvenience must be incurred in keeping it.

To accommodate the possessory lien in respect of in rem claimants the practice evolved whereby the possessory lien holder would surrender the vessel to the Admiralty Marshal, to enable sale under the best possible conditions, on the understanding that the possessory lien holder's position would be protected. The possessory lien holder would then participate in rankings of claim and rank behind prior maritime liens and the statutory claims and expenses but ahead of subsequent maritime liens, all mortgages and lower ranking claims. This was the effect of the decision in *The Russland*.[35] Prior to the 1973 Admiralty Act in New Zealand, once possession was lost the repairman or ship builder would rank very low indeed and have no right of arrest. Since the New Zealand Admiralty Act the repairman and ship builder have acquired a statutory right in rem and power to arrest. However, such statutory right in rem has a ranking below mortgages and accordingly even now the possessory lien and the retention thereunder are of paramount importance in securing such claims.

IV. THE ORDER OF PRIORITIES IN NEW ZEALAND

So far as New Zealand is concerned, unless there is to be ratification of the later international convention on liens and mortgages of 1967, there is very little likelihood of the position altering from an adherence to the approach adopted in the United Kingdom. Both countries have very similar statutory provisions and New Zealand has retained jurisdiction which recognises the principles of the general maritime law. This means therefore, that by applying the general principles previously discussed the following ranking would, subject to individual equity in each case and the exceptions mentioned by the commentators, apply in New

32 L. E. Hall *Possessory Liens in English Law* (Sweet & Maxwell, London, 1917) 18.
33 Ibid. 67.
34 (4 ed., Butterworths, London, 1983) Volume 43, para. 1141, p.780.
35 [1924] P.55.

Zealand:[36]

(a) The harbour authority's statutory claim for dues backed up by possession under section 111 of the Harbours Act 1950.

(b) The expenses of the High Court Registrar in having the vessel arrested.

(c) The costs of the producer of the fund regardless of where such claimant's substantive claim is ranked.

(d) Seamen's wages (for which judgment had been obtained) pursuant to section 99 of the Shipping and Seamen Act 1952 but subject to prior salvage unless the subsequent wages were earned in preserving the res.

(e) Master's wages (for which judgment had been obtained) pursuant to section 100(1) of the Shipping and Seamen Act 1952 but subject to prior salvage unless the subsequent wages were earned in preserving the res.

(f) Master's disbursements (for which judgment had been obtained) pursuant to section 100(2) of the Shipping and Seamen Act 1952 but subject to prior salvage unless the subsequent disbursements were incurred in preserving the res.

(g) The damage lien subject to later salvage and subject to limitation of liability under the Shipping and Seamen Act 1952.

(h) Life salvage; the priority over property salvage being determined by section 356(2) of the Shipping and Seamen Act 1952.

(i) Property salvage (for which judgment had been obtained) pursuant to sections 356-368 of the Shipping and Seamen Act 1952.

(j) The possessory lien including, where the claim relates to freight or cargo, the wharf or warehouse owner under the provisions of the Mercantile Law Act 1908, and the repairman and shipbuilders who retain possession.

(k) Mortgages which pursuant to section 420 of the Shipping and Seamen Act 1952 rank inter se according to the date of registration and not according to the date of the mortgage itself.

(l) The statutory liens or statutory claims in rem which include all claims or questions specified under section 4(1) of the Admiralty Act 1973 which are not also maritime liens or, because of the circumstances, classified as possessory liens.

V. CONCLUSION

As a starting point in the consideration of priorities of in rem claims, it can be seen that attention must be given to the provisions of the Admiralty Act 1973 and its Rules of 1975 which establish the jurisdiction and procedures of the High Court sitting in admiralty to make such a determination. Underlying principles of the Common Law are applied in a flexible and equitable manner in each case. However, the relationship betwen several statutory provisions and the Admiralty

36 The commentators in the United Kingdom are: Thomas *Maritime Liens,* supra n.5, McGuffie, Fugeman and Gray *Admiralty Practice* (British Shipping Law, Vol. 1, Stevens, London, 1981).