

# **ADMIRALTY JURISDICTION**

**report of the  
Special Law Reform  
Committee on  
Admiralty Jurisdiction**

**PRESENTED TO THE MINISTER OF JUSTICE  
IN MARCH 1972**

Errata

- ↓ page 2 paragraph 3 - penult line, add s to Parliament
- ↓ page 60 insert all after 5 in Line 2
- ↓ page 51 line 35: for "1923" substitute "1924"
- ↓ page 53 delete the fifth line from the bottom of the page,  
and substitute "A.C. 523 (H.L.)"
- ↓ page 57 in the paragraph headed "Customary Law" insert the  
word "belong" at the beginning of the seventh line.  
  
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THE REPORT  
OF  
THE LAW REFORM COMMITTEE ON ADMIRALTY JURISDICTION

To the Honourable Sir Roy Jack  
Minister of Justice

1. MEMBERSHIP OF COMMITTEE

The membership of the Committee was as follows:-

The Honourable Mr Justice Beattie (Chairman),  
Judge of the Supreme Court of New Zealand

A. C. Brassington Esquire of Christchurch,  
Barrister and Solicitor

R. J. Campbell Esquire of Wellington, Engineer

P. A. Cornford Esquire of Wellington, Crown Counsel

Ian M. Mackay Esquire of Wellington, Barrister and  
Solicitor and Protection and Indemnity Association  
Consultant

J. B. Stevenson Esquire of Wellington, Barrister  
and Solicitor

G. J. Grace Esquire, Registrar of the Supreme Court,  
Wellington (Secretary)

2. TERMS OF REFERENCE

Your predecessor, the Right Honourable J. R. Marshall  
appointed us on 26 November 1969 with the following terms  
of reference:-

"To examine and report on all aspects of the  
jurisdiction of the New Zealand Courts in Admiralty  
matters, including the desirability of -

(a) replacing United Kingdom legislation relating to  
the Admiralty at present in force in New Zealand  
by an Act of the New Zealand Parliament; and

(b) redefining the extent of Admiralty jurisdiction,  
and defining the vessels or craft which may  
appropriately or conveniently be made subject  
to it."

3. ANSWER TO TERMS OF REFERENCE

We have met regularly and in accordance with our terms of  
reference have examined all aspects of the jurisdiction of  
the New Zealand Courts in Admiralty matters. In answer to  
the terms of reference, we report:

- (a) that an Act of the New Zealand Parliament should replace, at the earliest opportunity, the United Kingdom legislation which at present governs the Admiralty jurisdiction of the Courts of New Zealand; and
- (b) that Admiralty jurisdiction should be redefined, and that it be made clear which vessels or craft are subject to it.

In elaboration of these answers, we recommend the repeal of most of the Imperial legislation both statutory and subordinate, and the enactment in New Zealand of the Bill which we have drafted and to which we make repeated reference in the following pages.

In our view the provisions of this Bill are adequate to confer on New Zealand Courts not only the jurisdiction which they derive at present from Imperial enactments, but also the extensive additional jurisdiction which the High Court in England has acquired since 1890. At the same time the inherent jurisdiction of the ancient Court of Admiralty will be preserved.

We have prepared tables of the enactments of both the Imperial and the New Zealand Parliament, which will require modification or repeal.

#### 4. METHOD OF APPROACH

In making our report, we have borne in mind the desirability of preserving uniformity with other maritime jurisdictions, and, in particular, with Commonwealth and other countries (including the United States of America) with which New Zealand trades or has maritime links.

We also consider that the Admiralty jurisdiction of the New Zealand Courts should be appropriate for New Zealand's needs and circumstances, and that Admiralty law and procedure should be clear and readily accessible.

#### 5. PRESENT ADMIRALTY JURISDICTION IN NEW ZEALAND

##### (a) The existing law

In Appendix 2 to this Report we have traced the historical development of Admiralty jurisdiction, but we think it proper at this stage to record a statement of the present source of the Supreme Court's jurisdiction in Admiralty; of the practical inconvenience arising from the exercise of that jurisdiction: and of the need to revise the law to make it consistent with modern conditions and appropriate to the international status of New Zealand as a sovereign State.

The law administered in Admiralty is not the ordinary municipal law of the State; it is the law which is to be found in Acts of Parliament, decisions of English and Commonwealth courts of Admiralty, and traditions and principles of English maritime law: /The Gaetano and Maria /78827 P.D. 137 at p.143; The Tojo Maru (1970) P. 21 at p.627

The international element in Admiralty law was stressed by Scott L.J. in The Tolten /79467 P. 135 at p.142 in these words:

"... The question ... calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea amongst Western nations, out of which our maritime law largely grew, and from which it is to the interest of maritime commerce that it should not unnecessarily diverge".

And, elaborating on the principle of uniformity,

"Where there is doubt about some principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our admiralty judges is in favour of the solution which would 'produce uniformity'".

(b) Jurisdiction

The Colonial Courts of Admiralty Act 1890 (Imp.) vested in the superior court of the Crown Colonies and the self-governing Colonies the jurisdiction and powers which were exercised in Admiralty by the High Court in England at the commencement of the Act, namely 1 July 1891. In this way, the Supreme Court of New Zealand and the superior courts of the Australian Commonwealth and of Canada, acquired the jurisdiction which, until 1875, had been exercised in England by the High Court of Admiralty (which had a history reaching back to the 14th Century) and, after 1875, by the Probate Divorce and Admiralty Division of the High Court of Justice.

So far as procedural law is concerned the Rules applicable to New Zealand came into force in 1884 (1884 New Zealand Gazette 418) under the Vice-Admiralty Courts Act 1863. (That Act was repealed by the 1890 Act but the Rules were expressly kept in force until new rules should be made in the various possessions affected.) No changes whatever have been made in the Admiralty Rules, and, until 1947 when New Zealand adopted the Statute of Westminster 1931, no such amendments could have been effective under the 1890 Act without the approval of the Sovereign in Council. That requirement was abrogated by Section 6 of the Statute of Westminster.

(c) Difficulties under the Existing Law

Confusion over Admiralty law and practice is widespread in New Zealand. This is due, we think, to a number of factors, but primarily to the lack of any publication of general availability setting out the heads of jurisdiction, Court precedents and forms, and the decisions of Colonial Courts of Admiralty. Only a specialist in maritime law can readily find his way to the Rules at present in force in New Zealand.

Initial unfamiliarity has led to attempts to have the cause of action adjudicated in the common law jurisdiction of the Supreme Court and, occasionally, the Magistrates' Courts. These attempts have themselves given rise to further confusion. (See e.g. Linton v. Taranaki Harbour Board (1959) N.Z.L.R. 523; Powell v. Galbraith (1950) 46 M.C.R. 63, and Phairn v. Deed 1952/47 M.C.R. 85 - and compare Union Steam Ship Company of New Zealand Limited v. The Caradale 56 C.L.R. 277.)

6. PRELIMINARY QUESTIONS(a) International Conventions

Questions of fundamental importance to our enquiry were the extent to which the jurisdiction assumed under the Bill should conform to international conventions.

We noted that one purpose of the most recent definition of Admiralty jurisdiction in England (namely, the Administration of Justice Act 1956) was to align that jurisdiction with two conventions signed at Brussels on 10 May 1952.

Parallel statutory exercise by the New Zealand Parliament is necessary before this country may adhere to those conventions. They are the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, and the International Convention Relating to the Arrest of Sea-going Ships.

These two Conventions were examined and are mentioned in the footnotes to the relevant clauses of the Bill.

(b) The Extent of Admiralty Jurisdiction to be Given to the New Zealand Courts

We studied the Admiralty jurisdiction vested in the High Court of England and in other Commonwealth courts, and the relevant principles of law relating thereto. Even though New Zealand has neither signed, ratified, nor acceded to the International Conventions mentioned above, we feel that there should be cogent reasons before New Zealand adopts any jurisdiction which is counter to their terms.

The draft Bill preserves all jurisdiction at present vested in the New Zealand courts, but where appropriate to New Zealand circumstances, the extended jurisdiction suggested follows closely that of the High Court of England.

(c) Magistrate's Courts jurisdiction

In our opinion, it is desirable that as many cases as possible, particularly involving pleasure craft and small marine cargo claims, within the monetary limits of the Magistrate's Courts, should be heard in those Courts. Several decisions have cast doubts whether that Court has jurisdiction in Admiralty matters. However, our experience is that the Magistrates' Courts have in the past dealt with many maritime matters, particularly those involving claims for damage to or loss of cargo, and we are strongly of the view that this should be encouraged.

In the very limited number of cases where a plaintiff whose claim is within the limits of the jurisdiction of the Magistrate's Court wishes to bring an action in rem, he should institute proceedings in the Supreme Court. Accordingly the Bill makes it clear that a Magistrate's Court is to have jurisdiction in Admiralty actions in personam only. Because of the very nature of the action itself and its consequences, we consider that jurisdiction in rem ought not to be given to that Court. This view is endorsed by the Admiralty Registrar of the High Court in England (Mr K.C. McGuffie) who kindly advised us on a number of questions.

(d) The Rules

In view of the technical nature of Admiralty procedure, we have, with the concurrence of the Chairman of the Rules Committee of the Supreme Court (the Rt Hon. Sir Thaddeus McCarthy), drafted Admiralty Rules to be read with the Bill.

This was done after we had decided that it would be more convenient to persons involved in Admiralty causes for the Rules to be confined to those matters peculiar to Admiralty actions, and that for other matters the Code of Civil Procedure or the Magistrates' Courts Rules should apply.

Draft Rules for the Supreme Court are set out in Schedule B, and we have made provision for the Magistrates' Courts in Schedule C.

7. ADMIRALTY ACTIONS IN REM AND IN PERSONAM: AND THE MARITIME LIEN(a) Actions in Rem and in Personam

The difference between Admiralty actions in personam and in rem is important. An action in personam is, generally speaking, an action against a person and a judgment for the plaintiff may be enforced against the defendant and executed against his property.

An Admiralty action in rem is against property within the jurisdiction (e.g. a ship or cargo), and its importance is that the plaintiff may proceed against the ship, cargo or property involved without having to ascertain the owner, and judgment for the plaintiff may be enforced against the ship, cargo or property. Generally the plaintiff in rem is in a much stronger position to obtain satisfaction of a judgment than a plaintiff in personam, but subject to the qualification that a writ in rem, unlike a writ in personam, cannot be served out of the jurisdiction.

(b) The Maritime Lien

This right is of respectable antiquity and an important feature of maritime law. In general, a maritime lien follows the ship even if the ownership is changed. This lien is defined in the Bill and is referred to in more detail in para. 4 of Appendix 1.

8. PRIZE JURISDICTION

There is a substantial body of Prize Law which is applicable to New Zealand and may be exercised in appropriate circumstances. In view of the technical nature of the jurisdiction in Prize and the rare occasions for exercising it, we make no recommendation for substituting local legislation for imperial enactments in this area; but we consider it desirable that the Supreme Court be given permanent jurisdiction in Prize.

A Colonial Court of Admiralty is not a permanent Court of Prize jurisdiction. Its latent authority to adjudicate is derived from a commission and proclamation issued by the Queen in time of war. Moreover, subject to the dispensation by the Queen in Council, all droits of Admiralty or droits of the Crown or forfeitures must be accounted for to the British Treasury or dealt with in accordance with its directions. In the Bill we have drafted we have made provision for construing references to the Admiralty, or the Treasury, in all British legislation on prize as references to New Zealand equivalents - likewise all references to Her Majesty's ships and aircraft.

Jurisdiction under the Imperial Slave Trade Acts falls to be exercised by a Prize Court: Colonial Courts of Admiralty Act 1890, s.2(3) (proviso (b)). No doubt the retention of such jurisdiction when the Supreme Court becomes a permanent Court of Prize is a matter for the Government.

9. OIL RIGS

We consider that no special provision should be made at this stage as to when an oil rig constitutes a 'ship', and that this is a matter which may be left to the Court to decide on the facts of each particular case.

10. ROSS DEPENDENCY

We are of opinion that no special provision should be made for this area.

11. ASSESSORS AND EXPERT'S REPORT

The present position is that the Supreme Court has power to appoint assessors in Admiralty proceedings. Likewise, the Magistrates' Courts have power to appoint assessors in salvage disputes under s.359(2) of the Shipping and Seamen Act 1952. The Committee does not know of any case where these powers have been exercised, but considers that there are difficulties associated with "assessors" and that it is better for the court to have power to appoint an expert to report to the court.

The Committee recommends that "assessors" be discontinued and that the court be given power to appoint an expert to report to it. The reasons for the recommendation of the Committee are given in more detail in paragraph 12 of Appendix 1.

12. TIME LIMITATION IN ADMIRALTY PROCEEDINGS

Apart from a number of specific limitation periods, there is no general limitation period in Admiralty actions fixed by statute. The general rule is merely that actions must be brought within a reasonable time. Further comments are contained in paragraph 13 of Appendix 1.

13. In APPENDIX 1 will be found an elaboration of the more important of the topics dealt with only briefly in the Report, together with other observations which the Committee considered worth recording.

14. The HISTORICAL DEVELOPMENT of Admiralty jurisdiction is set out in Appendix 2 to this report.

..... *A. Scobie* ..... Chairman

..... *A. C. Brassington* .....  
(A. C. Brassington)

..... *R. J. Campbell* .....  
(R. J. Campbell)

*P. A. Cornford*  
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(J. B. Stevenson)

*G. J. Grace*  
.....  
(G. J. Grace) Secretary

Wellington

29<sup>th</sup> March 1972

SCHEDULE AADMIRALTY BILL

1. This Act may be cited as the Admiralty Act, 1972.
2. In this Act, unless the context otherwise required -

"Aircraft" has the same meaning as in the Civil Aviation Act, 1964:

"Collision Regulations" has the same meaning as in s.286 of the Shipping and Seamen Act 1952:

"Court" means any court upon which jurisdiction is conferred by this Act:

"Goods" includes baggage:

NOTE:

This extended definition is contained in the Administration of Justice Act, 1956, (U.K.) and it appears desirable to include it here.

"Hovercraft" means a machine designed to be supported in the atmosphere, wholly or partly by air expelled from the machine to form a cushion extending beneath the machine to the surface of any ground, water, or other part of the earth's surface.

NOTE:

We have considered several definitions including those set out in the Transport Act, 1962, the Hovercraft Act, 1968 (U.K.) and the Hovercraft Act, 1971, and consider it desirable that the definition which is in force by virtue of the Hovercraft Act, 1971, should be adopted for Admiralty purposes.

"Maritime lien". Without derogating from the generality of the term, a maritime lien includes a lien in respect of bottomry, respondentia, salvage of property, seamen's wages and damage.

"Master" means any person (except a pilot) having command or charge of any ship:

"Ship" includes any description of vessel used in navigation (including a hovercraft):

"Territorial waters" includes any bay, gulf, harbour, river, lake (whether inland or otherwise) or other water included for the time being within the territorial sea of New Zealand as defined by sec. 3 of the Territorial Sea and Fishing Zone Act, 1965.

NOTE:

"Territorial waters" are referred to in Cl. 6(1)(b) of the Bill and some reasonable definition is required. The definition given is considered to be sufficiently flexible for its intended purpose.

In addition, we have not been unaware of the type of complication which faces litigants in the United States of America where one of the general tests of whether or not a particular matter falls within Admiralty jurisdiction is the "navigability" of the waters upon which the cause of action arose (see 46 U.S.C. para. 740). The definition above eliminates any question of the test of navigability being applied.

"Towage" and "Pilotage", in relation to an aircraft, means towage and pilotage while the aircraft is waterborne.

NOTE:

This definition is taken directly from the Administration of Justice Act, 1956, (U.K.) and makes clear the distinction between an aircraft on the water and in the air.

3. (1) The Admiralty jurisdiction in this Act:
  - (a) may be exercised by the Supreme Court in rem and in personam; and
  - (b) may be exercised by a Magistrate's Court in personam where the debt, demand or damage or the value of the chattels claimed is not more than the amount specified in Section 29 of the Magistrate's Court Act 1947 and it is declared that a Magistrate's Court shall not, for the purposes of this Act, have jurisdiction in rem;
- (2) In addition to the jurisdiction conferred by this Act, the Court may exercise all the powers which it possesses for the purpose of its civil jurisdiction and nothing in this Act shall derogate from any common law jurisdiction of the Supreme Court or the Magistrates' Courts.

NOTE:

- (i) The Admiralty jurisdiction conferred by this clause upon the Supreme Court and the Magistrates' Courts is not limited to the territorial limits of New Zealand. For example, it may be exercised by the Supreme Court in collision, salvage or other Admiralty matters which arise on the high seas, or may be exercised by a Magistrate's Court in such cases in personam and within the limits of its monetary jurisdiction.
  - (ii) The above also gives effect to our decision that the Supreme Court should have full Admiralty jurisdiction but that the jurisdiction of a Magistrate's Court should be restricted in Admiralty matters to actions in personam which are within the limits of its monetary jurisdiction.
  - (iii) Clause 3(2) coupled with the end of clause 4 makes it quite clear that any common law, Admiralty or other jurisdiction currently vested in the Supreme Court or the Magistrates' Courts is continued.
4. (1) The Admiralty jurisdiction conferred by this Act shall relate to any of the following questions or claims:
- (a) Any claim to the possession or ownership of a ship or to the ownership of any share therein;
  - (b) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
  - (c) Any claim in respect of a mortgage of or charge on a ship or any share therein;
  - (d) Any claim for damage done by a ship;
  - (e) Any claim for damage received by a ship;
  - (f) Any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the

- embarkation, carriage or disembarkation of persons on, in or from the ship;
- (g) Any claim for loss of or damage to goods carried in a ship;
  - (h) 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;
  - (i) Any claim in the nature of salvage (including claims for services rendered in saving life from a ship or an aircraft or in preserving its cargo, apparel or wreck pursuant to the provisions of sections 356 and 357 of the Shipping and Seamen Act, 1952);
  - (j) Any claim in the nature of towage in respect of a ship or an aircraft;
  - (k) Any claim in the nature of pilotage in respect of a ship or an aircraft;
  - (l) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
  - (m) Any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
  - (n) Any claim in respect of work done in connection with the loading or discharging of cargo or fuel on or from a ship;
  - (o) Any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Shipping and Seamen Act, 1952, is recoverable as wages or in the court and in the manner in which wages may be recovered;
  - (p) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

- (q) Any claim arising out of an act which is or is claimed to be a general average act;
- (r) Any claim arising out of bottomry;
- (s) Any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty; together with any other Admiralty jurisdiction which was vested in the Supreme Court immediately before the date of the commencement of this Act.

NOTE:

- (1) General: This clause follows closely the Administration of Justice Act, 1956 (U.K.) which in its turn incorporates the provisions of the International Convention Relating to the Arrest of Seagoing Ships (Brussels, May 10, 1952).

As far as can be ascertained at present, New Zealand has neither signed, ratified, nor acceded to the Convention but we consider that the Convention provides a framework appropriate to New Zealand's circumstances. In the absence of cogent reasons it would be undesirable in the interests of international uniformity in maritime matters and commerce to implement legislation which would depart from or be contrary to the terms of the Convention.

- (2) The terms of para. (f) of this clause are such that consideration could now be given to the repeal of section 486(1) of the Shipping and Seamen Act, 1952 (see (4) infra.).
- (3) Para. (i), section 356 of the Shipping and Seamen Act, 1952, refers to salvage for saving life and section 357 to salvage of cargo or wreck.
- (4) Para. (n). These provisions are similar to those contained in section 486(2) of the Shipping and Seamen Act, 1952, which in turn came from the old Merchant Shipping (Stevedores and Trimmers) Act (U.K.). This last-named has now been repealed by the Administration of Justice Act, 1956 (U.K.) for the reason that the arrest of ships in respect of the claims specified in (n) is not authorised by the Brussels Arrest Convention.

However, this jurisdiction to arrest remains in force in New Zealand by virtue of section 486(2) of the Shipping and Seamen Act, 1952. We can see the circumstances arising in this country where it would be desirable to have this power available and consequently, on balance, consider that the provision should be included in the Bill rather than be left in relative obscurity in the Shipping and Seamen Act.

- (5) Para. (o). This is another area which is covered by the Shipping and Seamen Act, 1952, sections 98 to 100 and it will be for the Law Draftsman to consider whether any amendment thereto is called for.
- (2) The jurisdiction of the Court under paragraph (b) subsection (1) of this section includes power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the Court thinks fit.
- (3) The provisions of this section apply -
- (a) In relation to all ships or aircraft whether New Zealand or not and whether registered or not and wherever the residence or domicile of their owners may be;
- (b) In relation to all claims, wheresoever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land), and
- (c) So far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, and whether fixed or floating, including mortgages and charges created under foreign law.

NOTE:

Study of a review of Admiralty jurisdiction recently carried out in Australia shows a recommendation by the Law Institute of Victoria that the words "and whether fixed or floating" be included to describe the charges referred to. The Committee has decided to follow this suggestion.

Provided that nothing in this subsection shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Shipping and Seamen Act, 1952.

5. (1) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed the Admiralty jurisdiction of the Supreme

Court may be invoked by an action in rem against that ship, aircraft or property.

NOTE:

This subsection preserves the status of the maritime lien which carries with it certain rights and privileges not accorded any other type of claim. A general definition of a maritime lien has been inserted in section 2 for the assistance of persons reading the Act because of the wide scope and importance of the term. (See also para. 4 of Appendix I.)

- (2) In addition to the rights conferred by subsection (1) of this section the Admiralty jurisdiction of the Supreme Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act.

NOTE:

The provisions of the Arrest Convention and the United Kingdom Administration of Justice Act have been modified and amended to accord with New Zealand conditions, but in essence this subsection is simply declaratory of the right to bring an action in rem in respect of those matters set out in section 4(1).

Provided that:-

- (a) In questions and claims specified in paragraphs (a) (b) (c) and (s) of subsection (1) of section 4 of this Act the Admiralty jurisdiction in rem may be invoked against only the particular ship or property in respect of which the questions or claims arose.

NOTE:

This paragraph has been worded in such a way as to make it conform clearly to the provisions of Article 3(1) of the Brussels Arrest Convention. A sister ship cannot be arrested in respect of any of the claims enumerated above.

- (b) In questions and claims specified in paragraphs (d) to (r) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the Supreme Court may (whether the claim gives rise to a maritime lien on the ship or not) be

invoked by an action in rem against -

- (1) that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or
- (ii) any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid.

NOTE:

In the recent case The Banco (1971) 1 All E.R.524 at 533-4 the Court of Appeal in England held that the word 'or' where it appears in subpara. (i) (supra) must be construed strictly and not as meaning 'and/or', and the words 'any other ship' which introduce subpara. (ii) mean 'ship' in the singular and not 'ships' in the plural. The Court also held (Cairns L.J. dissenting) that although a plaintiff is not entitled to arrest more than one ship belonging to the defendant he may issue a writ in rem not only against the offending ship but also against all the other ships owned by the defendant at the time the cause of action arose.

The Admiralty jurisdiction in rem cannot be said to have been properly invoked until the writ is served. Where a plaintiff issues a writ against a fleet he must amend the writ by striking out the names of all the other ships before service on the ship which he has decided to arrest.

These subparas (i), (ii) as they appear in the Administration of Justice Act, 1956 (U.K.) contain no reference to the provisions of paragraph (b) being available against a ship which was chartered by demise. In the Andrea Ursula (1971) 1 All E.R. 821 the words "beneficially owned" came before the Admiralty Court for consideration and it was held that they must include a charterer by demise. This was in direct contrast to the St Merriel (1963) 1 All E.R. 537. The reason for the fact that the Court felt at liberty to take a different view in the later case rests in the fact that in two decisions of the Court of Appeal in England it was held that if the meaning of an Act of the United Kingdom Parliament which is intended to give effect to an international convention is not clear, and if the United Kingdom is a signatory to that convention, the Court can look at the terms of the convention to assist it in construing the statute. The Court of Appeal further held that the statute should be so construed as to give effect to the presumption that Parliament intended to fulfill, rather than to break, its international obligations. (Salomon v. Commissioners of Customs and Excise [1966] 3 All E.R. 871, Post Office v. Estuary Radio Ltd [1967] 3 All E.R. 663).

Accordingly, in the Andrea Ursula case, evidence was put before the Court that Article 3 of the Brussels Arrest Convention specifically covered the question of a charter by demise of a ship and provided clearly that the charterer of such a ship could be treated on the same footing as a beneficial owner. New Zealand is not a signatory to that Convention and it therefore follows that evidence of the terms of the Convention would have no bearing if the words "beneficially owned" came before the Supreme Court for interpretation. It is almost certain that the earlier decision in the St Merriel would thus be followed.

Since a number of vessels in the New Zealand trade are on charter by demise it is the view of the Committee that the provisions of our legislation should leave no possible question of doubt as to the availability of the action in rem against a vessel on demise charter in the circumstances set out in paragraph (b) above.

- (3) 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 determine any question arising as to the title to the proceeds of sale.
6. (1) No claim in personam in respect of damage, loss of life or personal injury arising out of
- (a) a collision between ships; or
  - (b) a manoeuvre or omission to carry out a manoeuvre by any ship to avoid a collision; or
  - (c) non-compliance with the collision regulations,
- shall lie unless -
- (i) The defendant habitually resides in New Zealand or has a place of business within New Zealand; or
  - (ii) The cause of action arose within New Zealand territorial waters; or
  - (iii) An action arising out of the same incident or series of incidents is proceeding in or has been heard and determined in the Court.
- (2) No action in personam shall be brought in any court in New Zealand until any proceedings previously brought by the plaintiff against the defendant in any court outside New Zealand in respect of the same incident or series of incidents have been discontinued or otherwise come to an end.

- (3) This section shall not apply where the defendant submits or has agreed to submit to the jurisdiction of the Court.

NOTE:

See The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision (Brussels : May 10, 1952).

7. Nothing in this Act shall be construed as limiting the jurisdiction of the Court to refuse to entertain an action for wages by the master or a member of the crew of a ship not being a Commonwealth or New Zealand ship.
8. (1) The Supreme Court shall be a permanent Prize Court within the meaning of the Acts of the United Kingdom known as the Naval Prize Acts 1864 to 1939.
- (2) In the enactments mentioned in subsection (1) of this section and in any rules or Orders in Council made thereunder references to "the Admiralty" and "the Treasury" shall be read as references to the "Minister of Marine" and "the Minister of Finance".
- (3) All droits of the Crown and forfeitures when condemned by the Supreme Court in the exercise of its jurisdiction under this Act shall be dealt with or disposed of in such manner as the Minister of Finance directs.

NOTE:

This section, in the view of the Committee, is adequate to ensure the preservation of jurisdiction in Prize. Further observations are set out in paras. 12 to 17 of Appendix 2.

9. (1) The Registrar of the Supreme Court shall at all times have and exercise the functions and powers of the Admiralty Registrar and Marshal for the purpose of this Act and any Rules made hereunder.
- (2) The Marshal shall execute by himself or by his appointed officers or agents all instruments issued from the Court which are addressed to him, and shall make returns thereof.
- (3) The district within which the Marshal may exercise his jurisdiction shall be that district defined for the

exercise of his powers when he is acting in the office of Sheriff of the Supreme Court: Provided that the district within which the Marshal at Christchurch may exercise his jurisdiction shall include the Chatham Islands.

10. Subject to Section 28 of the Crown Proceedings Act, 1950, relating to the exclusion of actions in rem against the Crown, this Act shall bind the Crown.

NOTE:

This clause continues the immunity of the Crown for 'every description of vessel used in navigation not propelled by oars' from actions in rem except that section 28 provides that where an action in rem is by mistake commenced against Crown property, the action may be continued in personam.

11. (1) It is declared that rules for the practice and procedure of the Supreme Court in its Admiralty jurisdiction may be made in the same manner as is provided in the Judicature Act, 1908 and its amendments for the making of Rules for Practice and Procedure in the Supreme Court.
- (2) It is declared that rules for the practice and procedure of the Magistrates' Courts in their Admiralty jurisdiction may be made by the Governor-General from time to time by Order-in-Council, pursuant to Section 123 of the Magistrates' Courts Act, 1947.
- (3) Without derogating from the provisions of subsections (1) and (2) of this Section, it is declared that Rules may be made for consolidation of actions; appointment of Court experts; the giving of bail or other security to prevent the arrest of a ship or other res, or to obtain the release of the same after arrest.

NOTE:

The Judicature Act and the Magistrates' Courts Act contain power for rules to be made but we think that it is desirable to have a declaration in the Admiralty Act to this effect. It is necessary to have separate rules for the Supreme Court and for the Magistrate's Court and the appropriate Rules are set out in Schedule B and C to the Report.

- (4) The Governor General in Council may, by Regulation, prescribe all fees payable under this Act.
12. The Court may, of its own motion or upon application, at any stage order that any proceedings be transferred from or to the Court in its Admiralty jurisdiction.
13.
  - (1) In Admiralty proceedings in a Magistrate's Court appeals may be made in the manner provided in the Magistrates' Courts Act, 1947.
  - (2) In Admiralty proceedings in the Supreme Court appeals may be made in the manner provided in the Judicature Act, 1908.
  - (3) Subject to the Rules governing appeals to Her Majesty in Council, appeals in Admiralty proceedings may be made to Her Majesty in Council.
14. The jurisdiction conferred by this Act may be exercised notwithstanding any limitation expressed or implied in Section 53 of the Constitution Act, 1852.
15. Repeals and savings.

SCHEDULE OF REPEALSEnactments of the Parliaments of England  
and of the United Kingdom ceasing to  
have effect in New Zealand

13 Ric. 2, stat.1, c.5	Admiralty jurisdiction
15 Ric. 2, c.3	Admiralty jurisdiction
11 Will. 3, c.7	Suppression of Piracy Act 1698-9
8 Geo. 1, c.24	Piracy Act 1721
9 Geo. 4, c.83	Australian Courts Act 1828
3 & 4 Vict., c.65	Admiralty Court Act 1840
13 & 14 Vict. c.26	The Piracy Act 1850: sections 2 and 3 (Adjudication of piracy)
24 Vict., c.10	Admiralty Court Act 1861
39 & 40 Vict., c.59	Appellate Jurisdiction Act 1876 section 23
53 & 54 Vict., c.27	Colonial Courts of Admiralty Act 1890

Enactment of Parliament of United  
Kingdom modified in New Zealand

27 & 28 Vict. c.25	Naval Prize Act 1864, Part I, III and VI; references to "Her Majesty", "Her Majesty in Council", "Her Majesty's Ships of War" and "Her Majesty's aircraft" to be read as references to New Zealand equivalents - see para. 8 of Report.
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New Zealand Enactments Modified  
or Repealed

Shipping and Seamen Act 1952: Repeal sections  
486(1) and 359(2)

Legislature Act 1908, section 257(1): Repeal  
the words "the Colonial Court of" and  
substitute the words "sitting in".

(NOTE: These tables are not necessarily exhaustive.)

SCHEDULE BSUPREME COURT ADMIRALTY RULES

1. These Rules may be cited as the Supreme Court Admiralty Rules 1972.

2. INTERPRETATION

In these Rules unless the context otherwise requires:-

"The Act" means the Admiralty Act 1972.

"Action in rem" means an Admiralty action in rem.

"Action in personam" means an Admiralty action in personam.

"Central Registry" means the Wellington Registry of the Supreme Court.

"Court" means the Supreme Court of New Zealand.

"Foreign ship" has the same meaning as in the Shipping and Seamen Act 1952.

"Judge" means a Judge of the Supreme Court of New Zealand.

"Registrar" means a Registrar of the Supreme Court of New Zealand.

3. GENERAL PROVISION

In all Admiralty actions and proceedings in or before the Court, or any Judge or Registrar or officer thereof, or over which the Court has jurisdiction, where no other provision is made by the Act or these rules, the Rules, practice and procedure shall, unless the Court otherwise in any special case directs, be in accordance with the Code of Civil Procedure of the Supreme Court and the practice of the Court. Provided that where there is no provision in the Code of Civil Procedure of the Supreme Court or the practice of the Court, or where in the circumstances of the case it may be just, the Court may make such order on practice and procedure as it thinks fit.

4. IRREGULARITY

- (1) Where, in beginning or purporting to begin any Admiralty action or proceedings or at any stage in the course of or in connection with any Admiralty action or proceedings, there is, by reason of anything done or left undone, a failure to comply with the requirements of the Act or of the rules whether in respect of time, place, manner, form or content or in any other respect -
  - (a) the failure shall be treated as an irregularity and shall not nullify the proceedings, or any step taken in the proceedings, or any document, judgment or order in the proceedings; and
  - (b) subject to paragraphs two and three of this rule the Court may, on terms, set aside wholly or in part the proceedings or any step taken in the proceedings or any document, judgment or order in the proceedings or exercise its powers under the Act and the rules to allow amendments and to make orders dealing with the proceedings generally.
- (2) The Court shall not wholly set aside any action or proceedings involving Admiralty on the ground that the action or proceedings were required by any Act or rules to be commenced by process other than the one employed.

- (3) The Court shall not set aside any proceedings or any step taken in any Admiralty action or proceedings or any document, judgment or order in any such proceedings on the ground of a failure to which paragraph one of this rule applies on the application of any party unless the application is made within a reasonable time and before the applicant has taken any fresh step after becoming aware of the irregularity.

NOTE:

This rule to cover irregularities follows the provision adopted in New South Wales and should prevent any Admiralty matter failing on account of a technical irregularity.

5. TYPES OF ACTION

Actions may be in personam or in rem as provided in the Act.

6. ACTIONS IN PERSONAM

- (1) An action in personam shall be commenced by a writ of summons in Form 2 of the First Schedule to the Code of Civil Procedure of the Supreme Court.
- (2) Such action shall be intituled as in Form 1 of the Schedule hereto.
- (3) Subject to the provisions of the Act and these rules, the provisions of the Code of Civil Procedure of the Supreme Court and the practice of the Court shall apply to such actions.

7. ACTIONS IN REM

- (1) An action in rem shall be commenced by a writ of summons in Form 3 of the Schedule hereto.
- (2) Such action shall be intituled as in Form 2 of the Schedule hereto.
- (3) Subject to the provisions of the Act and these Rules, the Code of Civil Procedure and practice of the Court shall apply to such action.

8. SERVICE OF WRIT IN AN ACTION IN REM

- (1) The Writ in an action in rem shall be served as follows:-
- (a) Upon ship or upon cargo, freight, or other property on board a ship, by attaching a sealed copy of the Writ for a short time to the main mast or the single mast or some other conspicuous part of the ship, and by leaving a copy of the Writ attached thereto, or, after attaching the sealed copy of the Writ as aforesaid, by leaving a copy of the Writ with the person apparently in charge of the ship.
- (b) Upon cargo, freight, or other property not on board a ship, by attaching a sealed copy of the Writ for a short time to such cargo or property and by leaving a copy of the Writ attached thereto.

- (c) Upon freight in the hands of any person, by showing to him a sealed copy of the Writ and by leaving with him a copy of the Writ.
  - (d) Upon proceeds in Court, by showing a sealed copy of the Writ to the Registrar and by leaving with him a copy of the Writ.
  - (e) If access cannot be obtained to the cargo, freight or other property on which the Writ is to be served, by showing a sealed copy of the Writ to any person appearing to be in charge of the same and by leaving with him a copy of the Writ.
  - (f) In such other manner as the Court may order.
- (2) The Writ shall be served upon any person who has lodged a caveat in accordance with Rule 9 by delivering a sealed copy of the Writ to the address for service given in the caveat.
  - (3) An affidavit of service exhibiting a sealed copy of the Writ and deposing to the time, place and method of service shall be filed.

#### 9. CAVEATS

- (1) Where a person desires to prevent the arrest of property, he may cause a caveat against the issue of a warrant for the arrest of the property to be entered in the Central Registry. Such caveat shall be as in Form 4 of the Schedule and shall be entered by the Registrar in the Register of Admiralty Proceedings. The caveat shall contain an undertaking to pay into Court or give security to the satisfaction of the Registrar for the amount claimed in the writ within three (3) days of the service upon the caveator of the writ or a notice requiring such payment or security. The caveat may be limited to an amount specified in the caveat.
- (2) If the amount claimed in the writ does not exceed any amount specified in the caveat, the caveator shall pay into Court or give security for the amount claimed within three (3) days from the service of a copy of the writ upon him or the notice.
- (3) If the caveator fails to pay into Court or give security in accordance with Rule 9(2) and the party seeking the issue of a warrant of arrest is prejudiced or suffers damage thereby, the Court may order the caveator to pay in whole or in part such damage unless he shows good and sufficient reason for such failure.
- (4) Nothing in these Rules shall prevent a party from taking out a warrant of arrest of property notwithstanding the entry of a caveat. Where a caveat is entered against arrest of property and a party has that property arrested, that party shall be liable for costs and damages, unless he shows to the satisfaction of the Court good and sufficient reason for such arrest.
- (5) A caveat shall remain in force for six months from the date of filing but a further caveat may be filed.

(6) A caveat may be withdrawn at any time by the filing of a notice of withdrawal but such withdrawal shall not affect any rights or obligations that may have accrued at the date of such withdrawal.

(7) The Court may set aside a caveat.

10. WARRANT OF ARREST IN ACTION IN REM

(1) On or after the issue of a writ of summons in rem, application may be made for a warrant of arrest of the ship or property against which the action is brought. The application shall be in Form 5 of the Schedule hereto provided that where two or more ships owned by the same person are named as defendant in an action arising from a cause of action in respect of one ship only, a warrant of arrest may issue against one vessel only and the plaintiff shall name that ship in the application for the warrant of arrest.

(2) Except with the leave of the Court, no warrant of arrest shall issue against a foreign ship belonging to a port of a state having a consulate in New Zealand unless that consulate has been served with a notice in Form 6 of the Schedule hereto at least twenty-four (24) hours prior to the issue of the warrant. Service of the notice shall be effected by delivering the notice to the consulate.

(3) The party applying for the issue of a warrant of arrest shall cause a search to be made in the Central Registry to determine whether any caveat against the issue of such warrant is in force.

(4) In support of the application for a warrant of arrest, there shall be filed -

(i) an affidavit deposing to

(a) The name and description of the party to whose instance the warrant is to issue.

(b) The nature of the claim.

(c) The name or nature of the property to be arrested.

(d) Whether the claim has been satisfied, the amount claimed paid into Court, or security for payment of the claim has been given to the Registrar.

(e) If a foreign ship is to be arrested, the date and the time the notice in (2) above was delivered at the consulate.

(f) Whether any caveat against the issue of a warrant of arrest has been filed and, if so, whether a copy of the writ or a notice requiring payment or security has been served on the caveator and

(ii) An indemnity in Form 7 in the Schedule to the Registrar and Marshal and security to the satisfaction of the Registrar for the fees and expenses of the Marshal (including Harbour dues).

- (5) Where an application for a warrant of arrest is made in a registry other than the Central Registry, the Registrar shall, before issuing the warrant of arrest, confirm by telegraph or otherwise from the Central Registry whether or not a caveat against the issue of a warrant of arrest has been entered.
- (6) Subject to compliance with the foregoing provisions, the Registrar shall complete the certificate on the application for warrant of arrest and shall issue a warrant of arrest in Form 8 of the Schedule hereto.
- (7) A Marshal may, by telegraph, send notice to his appointed officer or agent, or to any other Marshal, of the issue of a warrant of arrest of any ship, and give instructions for the execution of such warrant; and it shall be contempt of Court for the Master or person in charge of that ship, after notice of the issue of such warrant has been communicated to him, to move such ship from where she is lying except with the consent of the Marshal.
- (8) Notwithstanding the provisions of paragraphs (2), (3) and (5) of this Rule, any Registrar of the Supreme Court may, in the case of an emergency or special circumstances, issue a warrant of arrest forthwith provided that:-
  - (a) The Registrar is satisfied that a writ in rem has been issued and that there is an emergency or special circumstances which justify the issue of a warrant of arrest forthwith and
  - (b) The Registrar is given such indemnity as he may require against any claim arising out of the issue of the warrant of arrest.
  - (c) The Registrar may, in lieu of completing the certificate on the application for warrant of arrest, endorse the application to the effect that the warrant is issued pursuant to Rule 10(8) of these Rules.
- (9) A warrant of arrest shall remain in force for 6 months from the date of issue but a further warrant of arrest may be issued.
- (10) The Marshal may give notice of the arrest of property by serving on any person or by affixing on a conspicuous part of the property a notice in Form 9 of the Schedule.

NOTE:

The Committee has had some discussions with the Foreign Affairs Department on the desirability of providing for a foreign consulate to be notified where it is proposed to arrest a foreign ship. The Department and the Committee are in agreement that it is desirable to give the appropriate notice in order to reduce the risk of the arrest of property owned by a foreign state. The provisions for giving notice follow in general terms the relevant part of Order 75 of the Rules of the Supreme Court in England but have been adapted to New Zealand conditions.

This rule, as drafted, gives the Court or the Registrar power in appropriate circumstances to

allow a warrant of arrest to issue immediately and this would probably be done in the event of a foreign vessel preparing to leave port before the appropriate notice could be given to the consulate.

11. PROPERTY UNDER ARREST IN ACTION IN REM

- (1) Property arrested under a warrant of arrest in an action in rem shall not be released except by leave of the Court, provided that the Registrar may release the property upon payment into Court of the amount claimed in the writ together with the costs of the issue and execution of the warrant of arrest or upon security (including a bond in terms of Form 10 of the Schedule) for the like amounts first having been given to the satisfaction of the Registrar.
- (2) Upon release in accordance with Rule 11(1) of property under arrest the Registrar may give notice to the Marshal of the release of the property. Such notice shall be in Form 11 of the Schedule.
- (3) Where a person desires to prevent the release of property under arrest he shall file a notice objecting to the release of the property and shall serve a copy of the notice on all parties to the action and also upon any person who has lodged a prior notice under this rule. The notice shall be in Form 12 of the Schedule.
- (4) Where a party delays the release of property by entry of such a notice, he is liable for any costs and damage occasioned by the entry unless he shows to the satisfaction of the Court good and sufficient reason for having delayed the release.
- (5) A notice objecting to release shall remain in force for six months from the date of filing but a further notice may be filed.
- (6) A notice objecting to release may be withdrawn by filing a notice of withdrawal.
- (7) The Marshal or any party to an action in rem may apply to the Court for directions in respect of any property under arrest including directions for appraisement and sale of the property. Unless the Court otherwise orders, notice of the application shall be given to all parties to the action and to the Marshal.

12. PAYMENT OUT OF COURT

- (1) Subject to paragraph 3 of this rule, no moneys paid into Court in an action in rem shall be paid out of Court except by order of the Court or a Judge.
- (2) Where in an action in rem a person desires to be heard before any order is made for the payment of moneys out of Court he shall file a notice objecting to the payment out of Court and a copy of the notice shall be served on all parties to the action and upon any person who has lodged a prior notice under this rule.

- (3) With the written consent of all parties to the action, and of any person who has given notice under this rule, and of any intervener under Rule 13, the Registrar may authorize moneys to be paid out of Court.

13. INTERVENERS

Where in an action in rem property is arrested, or money representing the proceeds of sale of that property is in Court, a person who has an interest in the property and who is not a party to the action may, with the leave of the Court, intervene and the Court may order the intervener to file and serve pleadings.

14. PRIORITY AND TITLE IN ACTION IN REM

Where in an action in rem questions of priority arise, or questions of title to proceeds of sale as provided in Section 5(3) of the Act, the Court may make such orders as it thinks fit for determining the order of priority of title and may order that public notice be given or that notice be served on any person.

15. COLLISIONS - PRELIMINARY ACTS

In an action arising out of a collision between vessels, unless the Court otherwise orders, the plaintiff must within fourteen days after the issue of the writ and the defendant must at the time of filing his statement of defence file a document (in these rules referred to as a "Preliminary Act") containing a statement of the following particulars:-

- (i) (a) The names of the ships which came into collision and their ports of registry;
- (b) particulars immediately prior to the collision of the person in command, the persons on the bridge and the persons keeping a lookout on the plaintiff's ship where the plaintiff is filing a preliminary act, and on the defendant's ship when the defendant is filing a preliminary act;
- (ii) the date and time of the collision;
- (iii) the place of the collision;
- (iv) the direction and force of the wind;
- (v) the state of the weather including visibility;
- (vi) the state, direction and force of the tidal or other current;
- (vii) the course steered and speed through the water of the ship when the other ship was first seen or immediately before any measures were taken with reference to its presence, whichever was the earlier;
- (viii) the lights (if any) carried by the ship;
- (ix) (a) the distance and bearing of the other ship if and when its echo was first observed by radar;

- (b) the distance, bearing and approximate heading of the other vessel when first seen;
- (x) what light or combination of lights (if any) of the other ship was first seen;
- (xi) what other lights or combinations of lights (if any) of the other ship were subsequently seen before the collision, and when;
- (xii) what alterations (if any) were made to the course and speed of the ship after the earlier of the two times referred to in article (vii) up to the time of the collision, and when, and what measures (if any), other than alterations of course or speed, were taken to avoid the collision, and when;
- (xiii) the parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact;
- (xiv) what sound signals (if any) were given, and when;
- (xv) what sound signals (if any) were heard from the other ship, and when.

Every preliminary act shall be sealed by the Registrar and shall be filed in a closed envelope (sealed with the official seal of the Court and showing the date of filing) and, unless the Court otherwise orders, no envelope shall be opened until the pleadings are closed and a consent signed by each of the parties to the opening of the preliminary acts is filed.

NOTE:

Some members of the Committee with practical knowledge were particularly concerned to have the preliminary acts cover the manning of the bridge and the look-out at the time of the collision, and all members approved of that addition. The preliminary act follows the form set out in Order 75 of the Supreme Court Practice of the United Kingdom with the appropriate amendment to cover the points raised by members of the Committee.

16. ACTIONS FOR LIMITATION OF LIABILITY

- (1) This rule shall apply to proceedings for relief under Section 460 of the Shipping and Seamen Act 1952.
- (2) The proceedings shall be brought in the Supreme Court in its Admiralty jurisdiction.
- (3) In the action the person seeking relief shall be the plaintiff and shall be described in the writ by name and not described merely as the owner of, or as bearing some other relation to, a particular ship or other property.
- (4) (a) The plaintiff shall make defendants to the action, describing them in the writ by name, such one or more of the persons with claims against him in respect of the casualty to which the action relates as he thinks fit.

- (b) If the plaintiff thinks fit, all other persons with claims against the plaintiff in respect of the casualty to which the action relates, described generally and not by their names, may be included as defendants in the writ.
  - (c) In this rule "name" includes a firm name or the name under which a person carries on his business, and where any person with a claim against the plaintiff in respect of the casualty to which the action relates has described himself for the purposes of his claim merely as the owner of, or as bearing some other relation to, a ship or other property, he may be so described as defendant in the writ and, if so described, shall be deemed for the purposes of this rule to have been named in the writ by his name.
- (5) The writ shall be served on the defendants named in the writ unless the Court otherwise orders.
  - (6) Within thirty (30) days from the entry of appearance by one of the defendants named in the writ or, if none of them enter an appearance, within thirty (30) days from the expiry of the time limited for the entry of appearance by them, the plaintiff shall file a notice of motion seeking a decree limiting his liability or, in default of such decree, directions as to the further proceedings in the action.
  - (7) The notice of motion shall be supported by an affidavit or affidavits proving:-
    - (a) the plaintiff's case in the action; and
    - (b) service of the writ on such of the defendants named as have not entered an appearance and in respect of whom no order has been made under paragraph (5) of this rule.
  - (8) The notice of motion and the affidavit or affidavits in support thereof shall, at least seven (7) clear days before the hearing of the motion, be served on any defendant who has entered an appearance.
  - (9) (a) On the hearing of the motion the Court, if it appears that it is not disputed that the plaintiff has a right to limit his liability, shall make a decree limiting the plaintiff's liability, and fix the amount to which the liability is to be limited.
    - (b) If on the hearing of the motion the Court does not make a decree limiting the plaintiff's liability, it shall give such directions as to the further proceedings in the action as appear to be appropriate.
  - (10) (a) Where the only defendants in the action are those named in the writ and all the persons so named have either been served with the writ or entered an appearance, any decree limiting the plaintiff's liability:-
    - (i) need not be advertised; and
    - (ii) shall only operate to protect the plaintiff in respect of claims by the persons so named or persons claiming through or under them.

- (b) In any case not falling within paragraph (a) of the rule, any decree limiting the plaintiff's liability:-
- (i) shall be advertised by the plaintiff in such manner and within such time as may be provided by the decree;
  - (ii) shall fix a time within which persons with claims against the plaintiff in respect of the casualty to which the action relates may enter an appearance to the action (if they have not already done so) and file their claims, and in cases to which paragraph (11) applies, file a notice of motion, if they think fit, to set the order aside.
- (c) The advertisement required under sub-paragraph (i) of paragraph (b) of this rule shall be inserted in such newspaper or newspapers as the Court thinks fit and in a form approved by the Court and unless the Court otherwise directs shall identify the action, the casualty and the relation of the plaintiffs thereto (whether as owners of a ship involved in the casualty or otherwise as the case may be), state that the decree has been made and specify the amounts fixed thereby as the limits of the plaintiff's liability and the time allowed for the entering of appearances, the filing of claims and the filing of notices of motion to set the decree aside.
- (d) The time to be allowed under sub-paragraph (ii) of paragraph (b) of this rule shall, unless the Court otherwise orders, be not less than two months from the latest date allowed for the appearance of the advertisement. After the expiration of the time so allowed, no appearance may be entered, claim filed or notice of motion filed to set aside the decree except with the leave of the Court.
- (11) (a) Where a decree limiting the plaintiff's liability fixes a time in accordance with sub-paragraph (b) of paragraph (10), any person with a claim against the plaintiff in respect of the casualty to which the action relates who:-
- (i) was not named in the writ as a defendant to the action; or
  - (ii) if so named neither was served with the writ nor entered an appearance;
- may within that time enter an appearance and file a notice of motion seeking that the decree be set aside.
- (b) The notice of motion shall be supported by an affidavit or affidavits showing that the defendant in question has a bona fide claim against the plaintiff in respect of the casualty in question and that he has sufficient prima facie grounds for the contention that the plaintiff is not entitled to the relief given him by the decree.

- (c) The notice of motion and the affidavit or affidavits in support thereof shall, at least seven (7) clear days before the hearing of the motion be served on the plaintiff and any defendant who has entered an appearance.
  - (d) On the hearing of the notice of motion the Court, if satisfied that the defendant in question has a bona fide claim against the plaintiff and sufficient prima facie grounds for the contention that the plaintiff is not entitled to the relief given him by the decree, shall set the decree aside and give such directions as to the further proceedings in the action as appear appropriate.
- (12) Nothing in this rule shall be construed as limiting the right of any person to rely on the provisions of Section 460 of the Shipping and Seamen Act 1952 by way of defence.

17. CONSOLIDATION OF CAUSES OR MATTERS

Where two or more causes or matters are pending, then, if it appears to the Court -

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transactions or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this rule

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

18. APPOINTMENT OF COURT EXPERT

- (1) (a) In any Admiralty cause or matter in which any question for an expert witness arises the Court may at any time on its own motion or on the application of any party, appoint an independent expert to enquire and report upon any question of fact or opinion. An expert shall be a person who has such knowledge or experience of or in connection with that question that his opinion on it would be admissible in evidence. An independent expert so appointed is referred to in this rule as a "court expert".
- (b) Any court expert shall, if possible, be a person agreed between the parties and, failing agreement, shall be appointed by the Court.
- (c) The question to be submitted to the court expert and the instructions (if any) given to him shall, failing agreement between the parties, be settled by the Court.

- (2) (a) The court expert shall send his report to the Court, together with such number of copies thereof as the Court may direct, and the Registrar shall send copies of the report to the parties or their solicitors.
- (b) The Court may direct the court expert to make a further or supplemental report.
- (c) Any part of a court expert's report which is not accepted by all the parties shall be treated as information furnished to the Court and be given such weight as the Court thinks fit.
- (3) If the court expert is of opinion that an experiment or test of any kind (other than one of a trifling character) is necessary to enable him to make a satisfactory report he shall inform the parties or their solicitors and shall, if possible, make an arrangement with them as to the expenses involved, the persons to attend and other relevant matters; and if the parties are unable to agree on any of those matters it shall be settled by the Court.
- (4) Any party may, within 14 days after receiving a copy of the court expert's report apply to the Court for leave to cross-examine the expert on his report, and on that application the Court shall make an order for the cross-examination of the expert by all the parties either:-
- (a) at the trial, or
- (b) before a Judge or Registrar at such time and place as may be specified in the order.
- (5) (a) The remuneration of the court expert shall be fixed by the Court and shall include a fee for his report and a proper sum for each day during which he is required to be present either in Court or for cross-examination.
- (b) Without prejudice to any order providing for payment of the court expert's remuneration as part of the costs of the cause or matter, the parties shall be jointly and severally liable to pay the amount fixed by the Court for his remuneration, but where the appointment of a court expert is opposed the Court may, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the expert as the Court thinks fit.
- (6) Where a court expert is appointed any party may, on giving to the other parties a reasonable time before the trial notice of his intention to do so, call one expert witness to give evidence on the question reported on by the court expert but no party may call more than one such witness without the leave of the Court, and the Court shall not grant leave unless it considers the circumstances of the case to be exceptional.

#### 19. FORMS

Where any form in the Schedule hereto is prescribed or authorised to be used such variations may be made therein as the circumstances of any particular case may require.

20. COSTS

The scale of costs payable in Admiralty matters shall be in accordance with Table C of the Third Schedule of the Code of Civil Procedure of the Supreme Court.

SCHEDULE

FORM 1

IN THE SUPREME COURT OF NEW ZEALAND  
IN ADMIRALTY  
REGISTRY

No. Ad /         

BETWEEN

Plaintiff

A N D

Defendant

ACTION IN PERSONAM

FORM 2

IN THE SUPREME COURT OF NEW ZEALAND  
IN ADMIRALTY  
REGISTRY

No. Ad \_\_\_\_ / \_\_\_\_

BETWEEN (Name)  
of (Address)  
(Occupation)

Plaintiff

A N D The ship (Name)  
or the ship (Name) and her cargo  
or the ship (Name) her cargo  
and freight  
or the cargo ex the ship (Name)  
or the proceeds of the ship  
(Name)  
or the proceeds of the cargo  
ex the ship (Name)

DefendantACTION IN REM FOR

FORM 3

IN THE SUPREME COURT OF NEW ZEALAND  
IN ADMIRALTY  
REGISTRY

BETWEEN

Plaintiff

A N D

Defendant

WRIT OF SUMMONS IN REM

TO: The owners and all others interested in the Ship  
(her cargo and  
freight etc, or as the case may be)

TAKE NOTICE that unless within thirty (30) days after and  
exclusive of the day this Writ is served upon you, you file  
in the office of the Court at \_\_\_\_\_ a statement of  
your defence to the Plaintiff's Claim a copy of which is  
hereunto annexed, the plaintiff may proceed in its action  
without having it heard in the Court and Judgement may be  
given in your absence. The trial and action, if a trial is  
necessary will take place at \_\_\_\_\_ at a time fixed  
by the Court.

Issued under the seal of the )  
Supreme Court at )  
this day of 19 ) Deputy Registrar

N.B. This writ is issued by (the plaintiff in person) (or by  
his solicitor (YZ)) whose address for service is \_\_\_\_\_

Endorsement:

This Writ must be served within twelve months from the date  
thereof or within six months from the date of renewal, if renewed.

If the last day for filing your statement of defence falls on a Saturday, a Sunday or a holiday, you may file your statement of defence on the day next following that Saturday, Sunday or holiday, as the case may be, which is not a holiday.

In calculating the time for filing your statement of defence you must disregard the period which commences with the 20th day of December and ends with the 20th day of January. (This paragraph must be deleted if it conflicts with a direction given by the Court or a Judge under Rule 592 or Rule 593 of the Code of Civil Procedure.)

If you file a statement of defence you must also, within the time limited for filing the same in the office of the Court, serve a copy of such statement on the plaintiff.

The Court or a Judge has power under Rule 594 of the Code to enlarge the time for the filing of a statement of defence. If you require additional time before filing a statement of defence an application should be made forthwith to the Court.

If you have a counterclaim against the plaintiff you should, within the time limited for filing your statement of defence, file in the office of the Court and serve on the plaintiff a statement of such counterclaim.

If the claim is for a sum of money only and you admit the whole claim, you may, within the time limited for filing your statement of defence, pay such sum and costs and proceedings in the action will be stayed; if you pay after the expiration of that time you will be liable to pay any further costs your delay may have caused the plaintiff to incur.

If you confess the plaintiff's claim or any part thereof, you should sign and file your confession in the office of the Court before the expiration of the time limited for filing your statement of defence; but you may file a confession at any time before the case is called on, subject to the payment of any further costs which your delay may have caused the plaintiff to incur.

If you admit only a part of the claim, you may, at any time before hearing, pay the amount admitted into Court, together with such amount for costs as you may consider yourself liable for, and you must forthwith give notice of such payment to the plaintiff. If the plaintiff proceeds and recovers no further amount than shall have been paid into Court, he may be ordered to pay any costs incurred by you subsequent to receipt of such notice as aforesaid.

Summonses to secure the attendance of witnesses will be issued on application at the office of the Court.

The office hours are from 10 a.m. to 3 p.m. except on Saturdays, Sundays and Court holidays, and except during the Easter Vacation and from the 23rd day of December to the 20th day of January (both days inclusive) when they are from 10 a.m. to 1 p.m.

FORM 4

(INTITULING AS IN FORM 2)

CAVEAT

TAKE NOTICE that I (Name)  
of (Address)  
(Occupation)

HEREBY FILE AND LODGE a Caveat against the issue of any Warrant for the Arrest of (state name or description of the ship or property) and I undertake within three (3) days after the service of a Writ of Summons upon me in respect of the same or within three (3) days of receiving Notice so to do to pay into Court or give satisfactions to the Registrar of the Court to the amount claimed in any action in rem against the ship or property.

This Caveat shall be limited to a sum not exceeding \$\_\_\_\_\_.

My address for service is (here specify address within three miles of Central Registry).



FORM 6

(INTITULING AS IN FORM 2)

NOTICE TO CONSULATE (Name of Consulate)TO:WHEREAS (Name of Applicant for Warrant of Arrest)

intends to apply for a Warrant of Arrest in respect of the ship (Name) being a ship registered or believed by the applicant to be registered at (here state country of Consulate) AND WHEREAS the Supreme Court Admiralty Rules 1972 require notice to be given to the Consulate of any foreign vessel in respect of which it is intended to apply for a Warrant of Arrest

NOW TAKE NOTICE that unless within twenty-four (24) hours of the service of this notice you or your solicitor files a notice in this office of the Supreme Court of New Zealand at \_\_\_\_\_ and serves a copy of such notice upon the Applicant at the address for service in this notice claiming diplomatic immunity in respect of the vessel or unless within such time you take such other action as may be proper, the applicant may proceed without further notice to you to apply for the issue of a Warrant of Arrest of the said vessel

AND TAKE FURTHER NOTICE that you are advised to consult a solicitor in respect of this matter.

DATED the \_\_\_\_\_ day of \_\_\_\_\_ 19

Applicant (or Solicitors for Applicant)

THIS NOTICE IS SERVED BY THE APPLICANT IN PERSON

(OR BY HIS SOLICITOR) \_\_\_\_\_

whose address for service is \_\_\_\_\_

\_\_\_\_\_

FORM 7

(INTITULING AS IN FORM 2)

INDEMNITY TO REGISTRAR AND MARSHAL

TO: The Registrar of the Supreme Court at

AND: To the Marshal

The applicant hereby indemnifies you for any fees and expenses (including Harbour dues) incurred by you in the execution of the warrant of arrest issued against (name or description of ship or property) and against any liability arising out of or incidental to any act lawfully done by you in such execution.

DATED this                      day of                      19

Solicitor for the Applicant

FORM 8

(INTITULING AS IN FORM 2)

WARRANT OF ARREST

Elizabeth the Second etc.

TO: The Marshal at \_\_\_\_\_ and to all and singular  
substitutes, GREETING

We hereby command you to arrest the (state name or description  
of ship or property) and to keep the same under safe arrest  
until you shall receive further orders from us.

Witness \_\_\_\_\_ the Chief  
Justice of New Zealand, the \_\_\_\_\_ day of \_\_\_\_\_ 19

.....  
(Deputy) Registrar

This Writ of Arrest is taken out by

Marshal's endorsement as to service:

This warrant was executed by (name)  
by (specify manner of effecting execution)  
on (state name or description of ship or property)

at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon on the  
day of \_\_\_\_\_ 19

MARSHAL



FORM 10

(INTITULING AS IN FORM 2)

BOND (party seeking release of property under arrest)

WHEREAS the above action in rem against the above-mentioned property is pending in this Honourable Court and the parties to the said action are the above-mentioned plaintiffs and defendants:-

NOW, THEREFORE we (party claiming together with an approved Insurance Company or two sureties approved by the Registrar) hereby jointly and severally submit ourselves to the jurisdiction of the Court and consent that if they, the above-named defendants do not pay what may be adjudged against them in this action with costs OR do not pay any sum due to be paid by them in consequence of any admission of liability therein or under any agreement by which this action is settled before judgment and which is filed in this Court, THEN execution may issue against us, our executors or administrators or assigns, and the goods and chattels of us, our executors or administrators or assigns, for the amount unpaid or ~~specify~~ maximum amount of bond fixed by Registrar ~~/~~

This bond was signed by the said

..... at .....

this day of 19

before me:-

A Solicitor of the Supreme Court of New Zealand

and executed by the said Insurance Company Limited (or approved sureties) at this day of 19

in the presence of:-

FORM 11

(INTITULING AS IN FORM 2)

RELEASE FROM ARREST

To the Marshal at \_\_\_\_\_ and to all and singular  
his officers or agents.

WHEREAS in this action you were commanded to arrest (name  
or description of ship or property) and to keep the same  
under safe arrest until further order of the Court:

NOW THEREFORE you are hereby commanded to release the said  
(name or description of ship or property) from the arrest  
effected by virtue of the said warrant of arrest.

Given under my hand and seal at \_\_\_\_\_ this  
day of \_\_\_\_\_ 19 \_\_\_\_\_

By the Court

Registrar



SCHEDULE CDRAFT RULE FOR MAGISTRATES' COURTS

- (1) In all proceedings before the Court, or any Magistrate or Registrar, or over which the Court has jurisdiction under the Admiralty Act 1972 where no other provision is made by the Act or this rule, the practice procedure and regulations shall, unless the Court otherwise in any special case directs, be in accordance with the Magistrate's Court's Rules 1948 and the practice of the Court.
- (2) In an action arising out of a collision between vessels, unless the Court otherwise orders, the plaintiff must, within fourteen (14) days after the filing of a plaint, and the defendant must, at the time of filing his statement of defence, file a document (in these rules referred to as "a preliminary act") containing a statement of the following particulars:-
  - (i) (a) the names of the ships which came into collision and their ports of registry;
  - (b) particulars of the person in command, the persons on the bridge and the persons keeping a look-out on the plaintiff's ship where the plaintiff is filing a preliminary act, and on the defendant's ship when the defendant is filing a preliminary act immediately prior to the collision;
  - (ii) The date and time of the collision;
  - (iii) the place of the collision;
  - (iv) the direction and force of the wind;
  - (v) the state of the weather including visibility;
  - (vi) the state, direction and force of the tidal or other current;
  - (vii) the course steered and speed through the water of the ship when the other ship was first seen or immediately

- before any measures were taken with reference to her presence, whichever was the earlier;
- (viii) the lights (if any) carried by the ship;
  - (ix) (a) the distance and bearing of the other ship if and when her echo was first observed by radar;
  - (b) the distance, bearing, and approximate heading of the other ship when first seen;
  - (x) what light or combination of lights (if any) of the other ship was first seen;
  - (xi) what other lights or combinations of lights (if any) of the other ship were subsequently seen before the collision, and when;
  - (xii) what alterations (if any) were made to the course and speed of the ship after the earlier of the two times referred to in article (vii) up to the time of the collision, and when, and what measures (if any), other than alterations of course or speed, were taken to avoid the collision, and when;
  - (xiii) the parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact;
  - (xiv) what sound signals (if any) were given, and when;
  - (xv) what sound signals (if any) were heard from the other ship, and when.

Every preliminary act shall be sealed by the Registrar and shall be filed in a closed envelope (sealed with the seal of the Court and showing the date of filing) and, unless the Court otherwise orders, no envelope shall be opened until the pleadings are closed and a consent signed by each of the parties to the opening of the preliminary acts is filed.

NOTE:

This rule is intended to make it clear that the ordinary rules apply to Admiralty actions in personam within the jurisdiction of the Court subject to the filing of preliminary acts in collision cases.

APPENDIX I

ELABORATION OF MAJOR TOPICS

1. DEFICIENCIES OF THE EXISTING LAW

When the 1890 Act was passed, certain causes of action available at common law or in equity were not within the Admiralty jurisdiction of the High Court. In particular, it had been recognised for many years that a Court of Admiralty had no jurisdiction to entertain an action to enforce a charter-party under English law. (See Edwards on Admiralty Jurisdiction (1847) at pp. 211-213.) Such a head of jurisdiction (*inter alia*) was first added by section 5 of the Administration of Justice Act 1920 and was re-enacted in a consolidating measure of 1925. (Reference may be made here to clause 4(1)(h) of the Draft Bill in Schedule A to this Report.)

In 1927 the Judicial Committee of the Privy Council decided on two appeals from Canada that the extended jurisdiction did not apply to Colonial Courts of Admiralty. The Colonial Courts of Admiralty Act provided in section 2(2):-

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

The appellants claimed that "existing" meant "existing from time to time". This contention was rejected, the Privy Council holding that the jurisdiction of Colonial Courts had been stabilized at the level exercised by the High Court in England in 1890 and that it could be extended only by an Imperial enactment. This has never been done. (See The Yuri Maru: The Woron / 1927 7 A.C. 906; 96 L.J. 137 (J.C.), and also the judgment of Windeyer J. in Union Steam Ship Company of New Zealand Limited v. Ferguson 119 C.L.R. 191 at pp. 197-8).

Australia is in the same position as New Zealand but, following the passing of the Statute of Westminster, Canada in 1934 adopted as the Admiralty jurisdiction of the Exchequer Court of Canada the jurisdiction acquired in England between 1890 and 1934.

2. GEOGRAPHICAL BOUNDARIES

Doubts over the geographical boundaries of Admiralty jurisdiction have provided another source of confusion. The 1890 Act provides in section 2(4) as follows:-

"Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise."

The significance of the words "the body of the county" was explained so recently as 1946 in the English Court of Appeal. With reference to the historic struggle between the courts of common law and the High Court of Admiralty in England for mutually exclusive areas of jurisdiction, Scott L.J. said in The Tolten / 1946 7 P.135 at pp. 158-159:

"There was never any attempt by the common law courts ... to prohibit the Admiralty Court in dealing with a 'cause of damage' in respect of damages caused in English

territorial waters unless the scene lay inside 'the body of a county.'; and for this purpose the body of a county ended at low water mark, seawards of that boundary was accepted as the exclusive jurisdiction of the Admiral. Every tort on the high seas was within Admiralty jurisdiction. The struggle with the common law courts was not about the kind of claim but about the geographical area of Admiralty jurisdiction: and then it was only to keep it outside the body of the county that they fought so hard; but they construed that expression geographically as defined not by the limit of territorial waters or by the fauces terrae, but by the line of low water mark."

Section 2(4) (*supra*) fell for interpretation in the recent case, Union Steam Ship Company of New Zealand Limited v. Ferguson (*supra*) where Barwick C.J. said (at p.208 of the report):

"Does this subsection work inferentially a limitation upon the jurisdiction given by subs. (2) (see *supra*: "Jurisdiction ... over the like places, persons, etc."): or does it merely ensure that whenever jurisdiction is exercised by a Colonial Court in respect of matters occurring beyond the territorial limits of the colony, which would of course include enclosed waters, the jurisdiction shall exclusively be that conferred by the Act. There is, in my opinion, much to be said for the latter alternative, which if adopted would result in the Colonial Court of Admiralty having jurisdiction in the enclosed waters of the colony below low water mark, though the Colonial Court of general civil jurisdiction could also exercise its non-admiralty jurisdiction whether common law or statutory in those waters."

We note that so far at least as municipal law is concerned the question of whether the territorial limits of New Zealand extend to the outer boundary of territorial waters has been settled affirmatively by the Territorial Sea and Fishing Zone Act 1965 and, in particular, by the amendments made by s.11 and the Schedule of that Act to s.4 of the Acts Interpretation Act 1924. The latter section now defines for general purposes the territorial limits as the outer limits of the territorial sea: and, as far as New Zealand is concerned, disposes of the question whether this country may exercise jurisdiction over marginal waters. (See Sir John Salmond's article in 34 L.Q.R. 235 especially at pp.242/3; Barwick C.J.'s judgment in Bonser v La Machia 43 A.L.J.R. 275 at pp.278/9; and O'Connell's International Law (2nd Ed. 1970) 469/475.7

### 3. EXTRA-TERRITORIAL JURISDICTION

Any inquiry into the extra-territorial jurisdiction which is exercised by Courts of Admiralty must inevitably find its way back to the words of Lord Mansfield in Luke v. Lyde (1759) 2 Burr. 882, 887; 97 E.R. 614, 617:

"... the maritime law is not the law of a particular country, but the general law of nations ..."

Just over a century later Dr Lushington explained that:

"The Court has original jurisdiction because the matter complained of is a tort committed on the high seas."

These words appear in the judgment in The Sarah [1862] Lush. 549; 167 E.R. 248, 249. But it is clear that as far as the common law was concerned at that time an entirely different state of affairs prevailed. The headnote to British South Africa Co. v. Compania de Mocambique [1893] A.C. 602 reads as follows:

"The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad...."

and this was accepted as an accurate statement of the position at common law. This apparent conflict was considered and explained in detail in The Tolten [1946] P.135 which came before the Court of Appeal in England for argument on the preliminary question of whether the Admiralty Court had jurisdiction in respect of a claim for damage done by the "Tolten" to a wharf in Lagos, Nigeria. The Court answered in the affirmative, the essence of the matter being summed up by Scott L.J. in the following statement:

"In my opinion (Admiralty jurisdiction) too is today so wide, so self-sufficient and of such a character that in an admiralty "cause of damage" the Mocambique rule can have no place, whether the proceeding be in rem or in personam, and even apart from the maritime lien to which the damage gives rise. The Mocambique rule is, in short, a conception wholly foreign to the essential nature of admiralty jurisdiction, as shown by its history, judicial and Parliamentary. The limiting rules of the common law about venue were unknown in the Court of Admiralty, and the universality of the world area, over which it administered justice both civil and criminal, affords a striking contrast to the locally restrictive rules of common law jurisdiction." (p.154.)

We are of the opinion that it is essential that this jurisdiction be preserved in Admiralty matters. While we have no doubt whatever of the legislative competence of the New Zealand Parliament to legislate extra-territorially, we realise that s.53 of the Constitution Act 1852 (Imp.) is still in force and the Supreme Court has recently held, in R. v Fineberg (1968) N.Z.L.R. 119, that this provision still imposes a legislative restraint in the absence of clear language to the contrary elsewhere. This point was not resolved, for the reason that it was not argued, when Fineberg's case went to the Court of Appeal. For this reason we have added clause 14 to the Bill.

#### 4. THE MARITIME LIEN

As early as the 17th century the Admiralty Court in England had held that maritime liens existed in respect of bottomry and seamen's wages, and by the end of the 19th century there had been added to the list salvage, disbursements, liabilities and damage (The Ripon City [1897] P.226). In that case, and more recently (e.g. in The Tolten [1946] P.135) (cit. sup.) the following definition of a maritime lien given by Lord Tenterden received judicial approval:

"It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process."

In addition, however, certain other liens have, by statute, been given the same procedural effect as maritime liens, the more prominent of these being in relation to mortgages, disputes between co-owners as to possession and ownership, towage and necessities. It is of the utmost importance that one vital distinction between these two types of lien be noted. A maritime lien is inchoate until it is brought into effect by proceedings in rem but it then relates back to the time when it first attached (see The Bold Buccleugh (1851) 7 Moo. P.C.C. 267, (1843-60) All E.R. Rep. 125). A statutory lien, on the other hand, accrues only upon the institution of the suit (The Two Ellens [1872] L.R. 4 P.C. 161, The Monica S. (1968) P. 741 [1967] 2 Lloyd's Rep. 113). The importance of this distinction is briefly but clearly summed up by Willmer, J. in The Igor [1956] 2 Lloyd's Rep. 271, 272, a case concerning damage to cargo:

"It hardly requires to be stated, of course, that a claim of the nature of that indicated on behalf of the plaintiffs in this case is one which does not carry a maritime lien. It merely confers a statutory right to arrest the ship, and to enforce the claim against the ship, so long as the ship remains in the same ownership. It is not a claim which is supported by a maritime lien, which follows the ship into the hands of the new owners."

In The St. Merriel (1963) P.247, 253, Hewson, J. referred to "... a statutory lien, which perhaps should more properly be called a statutory right in rem".

In brief, then, a maritime lien follows the ship even if the ownership has changed since the lien first attached, whereas a statutory lien accrues only when proceedings have been issued.

## 5. IMPERIAL LEGISLATION

From early colonial times the Imperial Parliament exerted control over British shipping in every part of the Empire. "At first ... the system of Navigation Laws was enacted imperially and the colonies were given no authority, but when in 1849 these were repealed, the way was open for the passing in 1854 of s.547 of the Merchant Shipping Act, which provided that 'the legislative authority of a British possession shall have power by Act or Ordinance confirmed by Her Majesty in Council to repeal wholly or in part any provisions of this Act relating to ships in such possession ...'" (Keith, Responsible Government in the Dominions (2nd Ed. 1928) 942, where a full discussion will be found of the evolution of legislative autonomy in the colonial control of shipping and of the Imperial Conferences which preceded the passing of the Statute of Westminster 1931.)

A considerable body of British shipping law, including provisions touching Admiralty jurisdiction, is now contained in the Shipping and Seamen Act 1952. Many of the New Zealand provisions have British counterparts within the Merchant Shipping Act 1894 and its amendments. Section 513 of the New Zealand statute provides that from the commencement of Part XVII no provision of the United Kingdom Act (so defined as to include all the United Kingdom Merchant Shipping Acts, which are to be construed as one with the 1894 Act) shall have effect as part of the law of New Zealand; and that the relevant subordinate legislation of the United Kingdom shall continue in force here, subject to the power of the Governor-General in Council to declare that any of such legislation shall cease to have effect in New Zealand.

Despite the policy of the New Zealand Parliament in enacting in the Shipping and Seamen Acts so much of British law, some instances may be found where beneficial British legislation has not found its way into the statute law of New Zealand. One such case may be the failure to extend to this country such of the provisions on limitation of liability as appear in the Merchant Shipping (Liability of Ship owners and others) Acts 1900-1958 (U.K.) and s.7 of the Crown Proceedings Act 1947 (U.K.). These enactments extend to dock, canal, and harbour authorities the benefit of limitation of liability. While the definition of the word "owner" in s.458 of the Shipping and Seamen Act 1952 includes a ship builder, it does not apparently include a ship repairer. See Ruapehu (Owners) v. R. & H. Green and Silley Weir Ltd [1927] A.C. 523-9 (H.L.). A.C. 523 (H.L.)

SEE ERRATA

## 6. FORFEITURE

It may not be readily apparent on the face of some provisions of the Shipping and Seamen Act that they may be administered in the Admiralty jurisdiction of the Supreme Court, or that, under the Bill,

they may be administered in the Admiralty jurisdiction of the Magistrates' Courts. One of these heads of jurisdiction is the forfeiture of a ship or, as the case may be, an interest in a ship, as a droit of the Crown, for which provision is made, for example, in ss.395 (use of improper certificate), and 440 (acquiring ownership if unqualified). (These provisions correspond with ss.16 and 28 of the Merchant Shipping Act 1894 (Imp.)). Proceedings in such cases are justiciable in the Supreme Court under s.44 of the Shipping and Seaman Act; and admiralty jurisdiction therefor is provided in clause 4(1)(s) of the Bill. The Limitation Act 1950 does not apply to proceedings for the forfeiture of a ship: see s.32 of that Act. The topic of forfeiture is elaborated in Robertson's Proceedings By and Against the Crown [1908] at p.517.

#### 7. CARRIAGE BY SEA AND BY AIR

As a result of the virtual repeal of the United Kingdom Merchant Shipping Acts almost all of the shipping law to be administered by the Supreme Court sitting in Admiralty will be found in the Shipping and Seamen Act 1952. In addition it may be considered appropriate to include within the same jurisdiction the provisions of Part I of the Carriage by Air Act 1967 which deals with cognate rights and obligations.

#### 8. LACUNAE

As a consequence of the passing of the Crown Proceedings Act 1947 (U.K.) and the Crown Proceedings Act 1950 (N.Z.) both in the United Kingdom and in New Zealand claims against the Crown may be brought only against Her Majesty in right of the government in the United Kingdom, or in New Zealand, as the case may be. See, e.g. s.2 (definition of "Her Majesty" and "the Crown") and s.35(1)(b) of the Crown Proceedings Act, 1950, and s.2 of the Shipping and Seamen Act 1952.

This may produce some anomalies in litigation involving naval vessels of other Commonwealth countries in New Zealand waters, or New Zealand naval vessels in the waters of other Commonwealth countries. The rules on limitation of liability may be taken as an example. Let it be supposed that a British warship is damaged in a New Zealand port by a vessel of New Zealand ownership and that the British Government brings an action in the Supreme Court in Admiralty against the New Zealand owners. It seems that the latter may not claim limitation of their liability under Part XIII of the Shipping and Seamen Act - and that such is the case notwithstanding the provisions of s.460(1) which extend the benefit of that section to "any ship", whether or not she is a Commonwealth ship, and notwithstanding those of s.465 which apply the earlier provisions of Part XIII and ancillary provisions to "Her Majesty's ships". Machinery for resolving the difficulty is provided in s.4(2) of the Act but does not seem to have been set in motion. On the other hand, the Crown may take advantage of such provisions. For a discussion on the capacity in which the government of another British jurisdiction seeks to sue in a New Zealand Court, see Currie's, Crown and Subject 132-133, where, at p.133, that learned author said, "It follows from the principle of indivisibility /of the Crown/ that as a rule of statutory construction a reference to the Crown in an Act is prima facie a reference to Her Majesty in right of every British country, unless restrictions of legislative competence require a narrower construction to save the Act from invalidity." Such a presumption is rebutted in the case just considered by the provisions of the Crown Proceedings Act and the Shipping and Seamen Act which exclude ships of other Commonwealth countries.

## 9. SALVAGE SERVICES TO THE CROWN

In contrast to the general policy of the Shipping and Seamen Act, which excludes claims in New Zealand against the Crown in right of other Commonwealth Countries, s.368 permits claims for civil salvage services rendered to Her Majesty's ships or aircraft, or in saving life therefrom, to be made in respect of the ships or aircraft of any Commonwealth country other than New Zealand. Provision for claims in respect of New Zealand Crown vessels or craft is contained in s.367. This is an adaptation of ss.8 and 9 of the Crown Proceedings Act 1947 (U.K.) and confers a right where none existed before.

## 10. DEFINITION OF "SHIP"

Finally, on the subject of claims by and against the Crown, it will be noticed that clause 10 of the Bill declares that the Admiralty Act shall bind the Crown, subject to the provisions of s.28 of the Crown Proceedings Act 1950. This section excludes proceedings in rem against the Crown "and the arrest, detention, or sale of any ships or aircraft or any cargo or other property belonging to the Crown, whether in right of the New Zealand government or otherwise." (Emphasis supplied.)

The word "ship" is defined in s.2 of the Act, apparently following the definition in the Shipping and Seamen Act 1908, and the Imperial Merchant Shipping Acts, to exclude vessels propelled by oars. The definition of the word "ship" in the Shipping and Seamen Act 1952 varies in the several parts of the Act but for general purposes includes vessels propelled by oars.

It may be a matter of government policy that Her Majesty's boats if propelled by oars, may be the subject of proceedings in rem but that similar boats propelled by motor may not be. On the other hand the older definition appearing in the Crown Proceedings Act may be designed to ensure uniformity of treatment with respect to vessels belonging to the Crown in right of other Commonwealth countries such as Great Britain and Australia which are bound by the Imperial Merchant Shipping Acts.

## 11. COLLISION REGULATIONS

At first sight it might appear that the provisions of ss.286 and 287 relating to the Collision Regulations (which apply the International Convention for the prevention of collisions at sea) are not binding on naval and military ships and aircraft of other Commonwealth countries notwithstanding the express application of those sections to Her Majesty's ships and aircraft. So far at least as Her Majesty's ships of the United Kingdom are concerned the Collision Regulations (applying the International Convention) would seem to apply in the sense that, while they may not bind the Crown of the United Kingdom, the Court of Appeal in England has held that the regulations prescribe a standard of care to which those in charge of such ships should conform: The Albion /1953/ P.117. That case would doubtless be followed by New Zealand Courts were a British warship involved in a collision in New Zealand waters. See also H.M.S. Truculent (1952) P.1.

## 12. ASSESSORS (See Para. 10 of the Report)

The general practice in England is that in an action for damage, collision or salvage two of the Elder Brethren of London Trinity House are summoned as assessors to advise the Court on matters of nautical skill and knowledge and in other cases Elder Brethren may be summoned. Assessors only advise the Judge on matters of nautical skill on which he desires knowledge and it is the duty of the Judge, having received that information, to exercise his own judgment and decide the case on his own

responsibility. (See The Nautilus (1927) A.C. 145). If Trinity Brethren reduce their advice to writing a party to the proceedings is not entitled to such written advice for the purposes of appeal. The law is that, where assessors are appointed, evidence on questions of general nautical skill and practice and deductions therefrom is inadmissible and will not be allowed to be given. (For further explanation of the above see Roscoe's Admiralty Practice, 5th Edition, page 329 et seq and McGuffie's Admiralty Practice, para. 1213.) The Committee considers that, whilst the historical development of the use of Elder Brethren has proved satisfactory in England, it is undesirable to continue a similar practice in New Zealand because:-

1. There is no established body similar to London Trinity House from which assessors can be drawn.
2. No expert evidence may be given on matters of nautical skill and procedure where there are assessors.
3. The difficulty or impossibility of the parties to the litigation ascertaining the advice given by the assessors to the Judge.
4. Any advice given by the assessors to the Judge is not subject to cross-examination.

Consideration has been given to the provisions of the Admiralty Rules of the United States Code 1964 Edition Rule 43 and to provisions in England, Australia and Alberta for the appointment of court experts. The Committee have come to the conclusion that in New Zealand the appointment of assessors should be discontinued and the Court should have power to appoint a court expert whose report is available to all parties, who is subject to cross-examination on his report and whose conclusions are subject to challenge by the parties. It is considered that this provision will ensure that not only is justice done but it is seen to be done. The proposed rule 17 follows closely the rules in force in the High Court in England and Australia and the Supreme Court of Alberta.

### 13. TIME LIMITATION IN ADMIRALTY ACTIONS

Section 471 of the Shipping and Seamen Act 1952 gives effect in the same terms as the United Kingdom Maritime Conventions Act 1911 to the International Convention for the Unification of Certain Rules of Law in Regard to Collisions (Brussels 1910) which prescribes a basic two year limitation period (see article 7) in collision cases and the same period has been adopted for salvage claims.

Section 4(8) of the Limitation Act 1950 provides in general terms that the Limitation Act 1950 shall "not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem".

The general position in New Zealand is that apart from a number of specific limitation periods there is no general limitation period in Admiralty actions which must be brought within a reasonable time. (See also Roscoe's Admiralty Practice 5th Edition, page 102, for the position in England.)

For examples of existing specific limitation periods in Admiralty matters in New Zealand see Shipping and Seamen Act 1952 sections 76, 111(2) and 471; Sea Carriage of Goods Act 1940 section 2; Deaths by Accident Compensation Act 1952 section 10; and Workers Compensation Act 1953 section 53 and see also the effect of the Limitation Act 1950 sections 2, 4(8), 20(5), 32 and 33".

APPENDIX 2HISTORICAL DEVELOPMENT OF ADMIRALTY JURISDICTION  
WITH SPECIAL REFERENCE TO NEW ZEALAND1. LORD HIGH ADMIRAL OF ENGLAND

The Lord High Admiral filled an ancient office of state long before a regular navy existed. In medieval times admirals were appointed for different parts of the seas around the British Isles. (In particular from 1300 there was an "admiral of the Cinque Ports". This seems to be the first English use of this word as a title. The Court of Admiralty of the Cinque Ports still exists, with the same inherent jurisdiction which was vested in the High Court of Admiralty before the Judicature Act 1873.) These officers held disciplinary powers over vessels under their command and were the only maritime officers with power to determine disputes over captured enemy property. In time they acquired power also to arbitrate in maritime disputes. Later, deputies whom they appointed became recognized as judges in maritime causes. Finally there emerged from among these deputies one who, from deputy of the Lord High Admiral, became the appointed judge of the English High Court of Admiralty. Originally he had criminal jurisdiction. In time of war he acted as judge of the Prize Court, and he exercised in the Instance (or civil) Court a jurisdiction finally limited to certain maritime causes where the common law could not give redress.

In 1360 Edward III appointed Sir John de Beauchamp, Lord Warden of the Cinque Ports, as Lord High Admiral of England. His patent contained for the first time power to appoint a deputy; and by 1364 the Admiralty Court seems to have become recognized at Westminster as a Court dealing principally with piracy and also as a rival of the Common Law Courts in purely mercantile and personal disputes.

2. CUSTOMARY LAW

Sixteenth century writers on maritime law employed the term "sea laws" to indicate medieval collections of usages of the sea which had been recognized as having the force of customary law; either by judgments of maritime courts sitting in the sea ports of Europe, or by the resolutions of a congress of merchants and shipmasters. To the former class belong the sea laws of Oleron (an island near La Rochelle), which embody the usages of seafarers of the Atlantic; to the latter class belong the sea laws of Wisbuy, which reflect the customs of seafarers of the North Sea and the Baltic. The judgments of Oleron are inserted in the Black Book of the Admiralty as a code of maritime law. They are not in themselves part of the Admiralty law of England, "but they contain many valuable principles and statements of marine practice which ... were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court": Lord Esher M.R. in The Gas Float Whitton No. 2 (1896) P.42 at p.48.

3. STATUTORY JURISDICTION

The early conflict which developed between the Admiralty and the Common Law Courts is shown by the Act 13 Ric.II stat. I c.5 passed in 1389. It recites, "Forasmuch as a great and common Clamour and Complaint hath been oftentimes made before this Time, and yet are, for that the Admirals and their Deputies hold their Sessions in divers places within the Realm ... accroaching to them greater Authority than belongeth

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to their Office...." and it enacts "It is accorded and assented, that the Admirals and their Deputies shall not meddle from henceforth with any Thing done within the Realm, but only such Things done upon the Sea ..." This Act was repealed in the United Kingdom in 1879 "but with a saving of its effect so far as jurisdiction is concerned":  
1 Halsbury's Laws of England (3rd Ed.) 47, n.(g).

#### 4. CRIMINAL JURISDICTION IN ENGLAND

The Court having continued to assert jurisdiction in particular over contracts whatever the subject matter, a further statute, 15 Ric. 2. c.3, was passed two years later which enacted, "That of all Manner of Contracts, Pleas, Quarrels, and all other Things rising within the Bodies of the Counties as well by Land as by Water and also of Wreck of the sea, the Admiral's Court shall have no manner of Cognizance, Power nor Jurisdiction". Nevertheless the statute provided that the Court was to have jurisdiction in the case "of the Death of a Man and of Maihem done in great Ships being and hovering in the main Stream of great Rivers, only beneath the Bridges of the same Rivers nigh to the Sea".

The modern Admiralty jurisdiction dates from this statute. It was repealed in part in England in 1879 (42 & 43 Vict. c.59) and wholly repealed there by the Criminal Law Act 1967, but is still apparently in force in New Zealand.

✓The statutes of Richard raised a formidable barrier against the encroachments of the Admiralty Court but its Judges adhered to the idea of general maritime jurisdiction and refused obedience to the statutes. Accordingly in the reign of Henry IV an Act was passed to give a remedy to persons aggrieved by proceedings in Admiralty (2 Hen. 2 c.11). This Act was repealed by s.31 of the Admiralty Court Act 1861 (24 Vict. c.10). This latter Act (the second Act passed in England to extend Admiralty jurisdiction) has been progressively repealed from 1894 onwards, most of its provisions being now incorporated either in procedural rules of the High Court or in the jurisdictional provisions of the Administration of Justice Act 1956. (See 1 Halsbury's Statutes of England (3rd Ed.) 6 and 7.)<sub>7</sub>

The criminal jurisdiction continued until 1536. But as the Admiral's Court proceeded without a jury and in the words of Stephen, "in a method much conformed to the civil law, the exercise of its criminal jurisdiction was contrary to the genius of the law of England ... By the Offences at Sea Act 1536 (28 Hen. 8 c.15) it was enacted that all treasons, felonies, robberies, murders and confederacies on the sea or within the jurisdiction of the Admiral, should be tried by commissioners under the Great Seal; viz. the admiral or his deputy and three or four more (among whom two common law judges were usually appointed)" - 4 Commentaries on the Laws of England (7th Ed.) 311). The criminal jurisdiction in England was ultimately regulated by the Central Criminal Court Act 1834 (4 & 5 Will. 4 c.36) and the Admiralty Offences Act 1844 (7 & 8 Vict. c.2) which enacted that all admiralty offences should be tried in the ordinary criminal courts. (See also R. v. Keyn (1876) 2 Ex.D.63 at pp. 66, 67 and the Territorial Waters Jurisdiction Act 1878 - now repealed in New Zealand.)

#### 5. CRIMINAL JURISDICTION IN THE COLONIES

The transfer of jurisdiction to the common law courts in the colonies proceeded more slowly. By the statute 11 Will. 3. c.7 (now called, in England, the Piracy Act 1698) it was provided that all piracies, felonies or robberies committed on the sea or in any place where the Admiral had jurisdiction

might be tried at sea or on land in any of the King's colonies according to the rules of the civil law by a Court of Admiralty. The Offences at Sea Act 1806 (46 Geo. 3. c.54) virtually assimilated the procedure in the colonies to that prescribed under the Statute of Henry VIII - the Offences at Sea Act 1536 - so that "all treasons, piracies, felonies, robberies, murders, conspiracies and all offences within the admiral's jurisdiction should be tried and punished 'according to the common course of the laws of England'".

The Supreme Court Ordinance 1844 (N.Z.) purported by sections 6 and 7 to confer criminal jurisdiction as well as instance jurisdiction on the Supreme Court. The Ordinance was disallowed by the Queen until such time as those sections, amongst others, were repealed, the Colonial Office observing with some asperity, that criminal jurisdiction was not conferred on colonial courts except by the Imperial Parliament, nor instance jurisdiction except under the prerogative and upon the advice of the Lords Commissioners of the Admiralty (1846 Gazette 83-84).

Section 4 of the Australian Courts Act 1828 (9 Geo. 4 c.83) conferred jurisdiction in Admiralty on the Supreme Courts of New South Wales and Van Diemen's Land. These Courts were empowered "to inquire of, hear and determine all treasons, piracies, felonies, robberies, murders, conspiracies and other offences, of what nature and kind soever, committed or that shall be committed upon the sea, or in any haven, river, creek or place where the Admiral hath power, authority or jurisdiction, or committed or that shall be committed in the islands of New Zealand, or Otaheite, or any other island, country or place situate in the Indian or Pacific Oceans and not subject to His Majesty or to any European state or power, by the master or crew of any British ship or vessel ..."

This provision has not been repealed. Apparently it could not be caught by the New Zealand Ordinance 5 Vict. No. 19 of 1842, which abrogated the laws of New South Wales in New Zealand, and the State Legislatures of New South Wales and Tasmania, which are still in the position of Crown Colonies, are not free to repeal the provision.

Further Imperial enactments on the trial and punishment of admiralty offences in the colonies were the Admiralty Offences (Colonial) Act 1849, the Admiralty Offences (Colonial) Act 1860, the Courts (Colonial) Jurisdiction Act 1874, and the Territorial Waters Jurisdiction Act 1878. The end result was that colonial courts were empowered to try offenders and also to punish them in accordance with the local law.

## 6. PRESENT NEW ZEALAND LAW

Virtually all imperial enactments dealing with piracy, offences akin to or allegedly conducive to piracy, with all other offences formerly within the criminal jurisdiction of the Admiralty have now been repealed in New Zealand in the course of the codification of the criminal law under the Criminal Code Act 1893 and its amendments, the Crimes Act 1908 and the Offences at Sea Act 1953. All these are now consolidated in the Crimes Act 1961. Section 2(3), proviso (c) of the Colonial Courts of Admiralty Act provides that no Colonial Court of Admiralty may try or punish a person under the Act for an offence which according to the law of England is punishable on indictment. Section 9 of the Crimes Act 1961 provides that all offences shall be punishable according to New Zealand law. Parliament has refrained, however, from repealing enactments which give instance jurisdiction to Courts of Admiralty or Vice-Admiralty in relation to piracy and

related offences. This is the subject matter of the Piracy Act 1850 (13 & 14 Vict. c.26), ss. 2, 3 and 5<sup>a</sup> of which are still in force in New Zealand, although ss. 2<sup>a</sup> and 3 were repealed in England in 1963.

#### 7. MERCHANT SHIPPING ACTS

The Criminal Code Commissioners who were appointed in England in 1878 to prepare a draft criminal code of indictable offences referred in their report of 1879 (Cmd.2345) to a number of statutory offences which were "of so special a nature and so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, that it seems better to leave them as they stand than to introduce them into a Criminal Code." Amongst the enactments there mentioned are the Merchant Shipping Acts. The policy proposed by the Commissioners was adopted by the New Zealand Commissioners appointed under the Revision of Statutes Act 1879 in para. (a) of their report of 7 August 1883; and was reflected in the omission from the Criminal Code Act 1893 of such offences as forcing seamen to leave their ship before completion of the voyage and sending a ship to sea in an unseaworthy state. The Crimes Act 1961 similarly omits such offences and recognizes them as a distinct class - see ss.8(7) and 400(2). The crimes defined, for example, in ss.118 and 314 of the Shipping and Seamen Act 1952 have not, at least in modern times, been classed as admiralty offences. It is of interest to note that the policy of the Criminal Code Commissioners has been tacitly accepted in the recent report of the Commission of Inquiry into New Zealand Shipping. (See para. 17, chapt. 29 of the Report dated June 1971.)

#### 8. DROITS OF ADMIRALTY

In addition to his pay the Lord High Admiral was entitled to perquisites or droits so numerous as to require separate investigation; and a suit in Admiralty was originally an inquisition for ascertaining and securing to him such part of his income as consisted of droits. Those formerly attaching to his office, as enumerated in the patent of Lord High Admiral, consisted of flotsam, jetsam, ligan, treasures of the sea, deodands, derelicts found within the Admiral's jurisdiction, all goods picked up at sea, all fines, forfeitures, ransoms, recognizances and pecuniary punishments; all sturgeons, whales, porpoises, dolphins, grampuses; all ships and goods of the enemy coming into any creek, road or port by stress of weather, mistake, or ignorance of war; and all ships seized at sea, salvage and a share of prizes. Similarly extravagant was the definition of the Admiral's judicial powers, which included, as already noticed, taking cognizance of all matters maritime, both criminal and civil within his jurisdiction, the arrest of goods and persons, and the control of public streams, ports, rivers and fisheries within his jurisdiction (Roscoe's Admiralty Practice (3rd Ed.) 7, 28). These powers were conferred on the early governors of New Zealand under letters patent granted by the Admiralty. The Governors were authorised, as Vice-Admirals, to appoint deputies for performing their judicial functions, which included the exercise of criminal jurisdiction. Governor Hobson appointed as his deputy, Edmund Storr Halswell an English barrister who was also a Judge of the County Court at Wellington. See 1842 Gazette 77. The Governors were also required to levy and collect, to the use of the Lord High Admiral, all droits of admiralty as above defined. See, e.g. the Commission of Governor Gore Browne in 1857 Gazette 6-8.

9. INSTANCE JURISDICTION

The jurisdiction of the High Court of Admiralty developed in two main divisions described, according to the older terminology, as instance jurisdiction and prize jurisdiction. By the reign of William IV the instance jurisdiction, much curtailed as a result of the assertion of jurisdiction by the Common Law Courts, was confined to the following:-

- (a) collisions between ships and injurious acts committed on the high seas outside the body of the county;
- (b) salvage services rendered on the high seas and between high and low water-mark but not otherwise within the body of the county;
- (c) droits of admiralty;
- (d) possession of ships where no title was in question;
- (e) bottomry (so-called because money had been lent on the security of the bottom of the ship) and respondentia bonds on cargo; and
- (f) claims of seamen's wages where there had been no special contract.

The Court had also jurisdiction over the goods of pirates and goods piratically taken (the criminal aspect of piracy was disregarded, the proceedings being for restitution); and as part of its old criminal or disciplinary jurisdiction, the Court entertained suits against masters or ships for assaults and battery committed on the high seas where the complainants were officers, seamen, or passengers of the ships. (1 Halsbury's Laws of England (3rd Ed.) 48.) Actions in respect of necessities supplied on the high seas and for towage on the high seas seem also to have been within the jurisdiction, but seldom occurred in practice: (Ibidem).

Beginning with the Admiralty Court Act 1840 the instance jurisdiction of the High Court and its successor, the Admiralty Division, was gradually extended by statute, the most recent of which is the Administration of Justice Act 1956. The jurisdiction of this Division has recently been transferred to a new Admiralty Court, administered as part of the Queen's Bench Division.

10. ADMIRALTY (OR CROWN) DROITS

The jurisdiction of the High Court of Admiralty to condemn as droits of Admiralty unclaimed wreck, flotsam, jetsam, ligan and derelict found in or on the shores of the sea or any tidal water, as well as derelict found on the high seas, is now within the jurisdiction of the Admiralty Court in England. But no necessity for the exercise there of such jurisdiction can ordinarily arise, for in time of peace such droits are dealt with by Receivers of Wreck (formerly, under 9 & 10 Vict. c.99 called "Receivers of Droits of Admiralty") appointed under the Merchant Shipping Act 1894 (1 Halsbury's Laws of England 68). The statute of 9 & 10 Vict. c.99 abolished the rights of any Vice-Admiral in England to receive any such droits, which became to all intents and purposes after 1846 droits of the Crown. The Merchant Shipping Act 1894 repealed the reference to "Wreck of the Sea" in the statute De Prerogativa Regis (temp. incert.), thereby confining all rights in wreck to those recognized or created by the Act. In New Zealand, Receivers of Wreck appointed under the Shipping and Seamen Act 1952 have wide powers under Part IX of that Act over wreck and "articles washed ashore". These statutory provisions extend to wrecked

aircraft. Section 208 of the Harbours Act 1950 confers powers on Harbour Boards and the Minister of Marine for the removal of vessels or aircraft "sunk, stranded, or abandoned in any harbour or tidal water". Section 169 of the Customs Act imposes a duty, subject to Part IX of the Shipping and Seamen Act, "on all goods derelict, flotsam, or jetsam, or landed, saved, or coming ashore from any wreck", and thereby widens the category of goods which may be the subject of a charge of smuggling. Section 370 of the Shipping and Seamen Act 1952 subjects all foreign wreck to the same duties under the Customs Act as if the wreck has been imported into New Zealand. In the 18th and early part of the 19th century most of the smaller droits which came before the High Court of Admiralty consisted of barrels of wine and spirits. These were usually smugglers' goods anchored to the bottom of the sea and buoyed for the purpose of being "run" at a convenient time. High duties and an inefficient preventive service had thus provided the Admiralty with a new and valuable droit. See, for example, The King v. Forty-nine Casks of Brandy, 3 Hagg. 257; 166 E.R. 401.

#### 11. TREASURES OF THE SEA

The question has arisen in New Zealand (but has not been decided) of the Crown's right to ambergris, discovered in a stranded whale, as a droit of the Crown. The claim of the Crown in England to whales, stranded or caught in territorial waters, rests on the statute De Prerogativa Regis, sometimes cited as 17 Ed.II st.2, c.11. This statute has been held not to be in force in New Zealand: Baldick v. Jackson (1910) 30 N.Z.L.R. 343 per Stout C.J. It appears however that the statute is declaratory of the common law. The Court seems not to have considered Lord Watson's dictum in Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick [1892] A.C. 437, at p.441, - "The prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain."

The right to ambergris floating in the sea or washed ashore, however, may be differently determined from the right to the substance found in a stranded whale or in one killed at sea. In England, according to Sir George Robertson in Civil Proceedings By and Against the Crown (1908), ambergris is a valuable droit, and may be regarded as falling within the classification "treasures of the sea", in the customary catalogue of droits. On this view the substance is subject to condemnation to the Crown as such a droit - at all events when separated from a whale.

#### 12. PRIZE

"Prize" is the term applied to goods and to a ship (whether armed or not) belonging or, in the case of a ship adhering to, an enemy belligerent, which are captured by a maritime force at sea, or in the enemy's territory, or seized in the port of the captor. Before the property in prize passes from the owner, a decree of condemnation is necessary in a prize court.

"All rights of prize belong originally to the Crown, and the beneficial interest derived to others can proceed only from a grant from the Crown", but from ancient times a certain portion of those rights were assigned to maintain the dignity of the Lord High Admiral; hence arose the distinction between droits of the Crown and droits of Admiralty"; The Maria Françoise 6 C.Rob. 282, 293; 165 E.R.932: The Abonema (1919) F. 41, 48 per Lord Phillimore.

"At the outbreak of war it was the practice of the Crown to grant its interest in any prize taken to the captors thereof - that is, to the officers and men of the ship which effected the capture ... When the office of Lord High Admiral ceased to be filled, and the Crown in lieu thereof appointed Lords Commissioners of the Admiralty, droits of admiralty reverted to the Crown, and upon the surrender of the hereditary revenues of the Crown ... passed to the Exchequer. Hence arose the somewhat paradoxical position that droits of the Crown went to the Navy, and droits of Admiralty went to the Exchequer": The Abonema (supra).

Grants of prize were not made at the outbreak of World War I or World War II but distributions of prize money were made under the Naval Prize Act 1918 and the Prize Act 1948. The latter Act abolished for future wars the prerogative right to grant droits of the Crown to the captors or to the naval forces as a whole.

The Colonial Courts of Admiralty Act 1890 did not alter the application of droits of Admiralty or of the Crown in a British possession; but s.8 of the Act directs that, subject to any British Order in Council directing that droits or forfeitures should form part of the revenues of a particular possession, they should be dealt with in accordance with the directions of the (British) Treasury.

### 13. PRIZE JURISDICTION

Before 1864 jurisdiction in the United Kingdom in matters of prize was exercised by the High Court of Admiralty under a commission issued by the Crown under the Great Seal at the outbreak of war. Statutory jurisdiction was first conferred on the High Court by the Naval Prize Act 1864. The Court then became a permanent court of prize independent of such commission. But although the practice of issuing commission is no longer a prerequisite to jurisdiction it continued to be issued, as a matter of custom, as late as 1914. A commission is still necessary, under s.2 of the Prize Act 1894, to confer jurisdiction on a Colonial Court of Admiralty. The commission may be issued at any time - even in peace. In the case of New Zealand, it is directed to the Chief Justice and all other Judges of the Supreme Court, and requires them "to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be seized and taken ... and to hear and determine the same" - a formula that has remained substantially the same since at least the 17th Century. But the commission cannot be exercised until a proclamation is made by the Vice-Admiral that war has broken out. Under s.10 of the Colonial Courts of Admiralty Act, in default of a formal appointment of Vice-Admiral, the Governor-General executes that Office. Rules of Court in prize matters are made under the Naval Prize Act both for the Admiralty Court in England and for Colonial Courts of Admiralty. The current rules are the Prize Court Rules 1939, which are in force in New Zealand, and which were followed in The Pamir (1939) (not reported). Appeals in prize causes lie directly to the Judicial Committee of the Privy Council, as of right in the case of a final decree and with the leave of the court making the decree in other cases: Naval Prize Act 1864, s.5. Every Colonial Court sitting in prize must enforce within its jurisdiction all orders of the Privy Council in prize appeals and of the Admiralty Court in England: s.9 ibidem. In all other respects the jurisdiction of a Colonial Court is local.

14. PROCEDURE IN PRIZE

Prize jurisdiction proceeds both in rem and in personam. It proceeds in rem with regard to the ship or goods brought in for adjudication or by reason of the payment into court of the proceeds of the sale of captured vessels and cargoes. It proceeds in personam with regard to any acts of persons who are captors or who have intervened. The Prize Act 1939 extended the law of prize to aircraft and the goods carried in them. Proceedings for the condemnation of a ship or aircraft as prize must be instituted in the name of the Crown, but may, with the consent of the Crown, be conducted by the captors, or by any person to whom the res would on condemnation be condemned as prize: Prize Court Rules 1939 ord.2 rule 3.

15. PRIZE LAW

The traditional commission which conferred jurisdiction on prize courts required the Judges to determine cases coming before them "according to the course of Admiralty and the Law of Nations, and the Statutes, Rules and Regulations in that behalf for the time being in force". (See 1939 Gazette 3454.) Prize courts are municipal, not international, courts, although they take judicial notice of international law. But the Crown has no power by Order-in-Council to alter the law which they have to administer, - except where an Order in Council mitigates the rights of the Crown in favour of enemies or neutrals: The Zamora /1916/ 2 A.C. 77. The law relating to prize and prize salvage is not affected by the Crown Proceedings Act 1950: see s.35(2)(a) of that Act.

16. PRIZE AND BOOTY

Prize differs from booty in that the former is taken by a maritime force and the latter by a land force. There is, however, a species of booty which consists of goods belonging to the enemy state which are taken in a fortress or possession on land. Booty may also be a ship taken in waters defended by or belonging to a fortress or possession. In those cases a British prize court has jurisdiction as if the capture was effected at sea: Naval Prize Act, s.34.

17. PRIZE SALVAGE

Section 40 of the same Act, as amended by the Prize Act 1939, provides that where a ship, aircraft or goods belonging to a British subject, after being taken as prize by the enemy, is retaken from the enemy by a British ship of war or military aircraft, the same shall be restored by decree of a prize court to the owner, on his paying as prize salvage one-eighth part of the value of the prize, to be decreed and ascertained by the court or such sum not exceeding one-eighth part of the estimated value as may be agreed on between the owner and the re-captors, and approved by the order of the Court. Where the recapture is made in circumstances of special difficulty or danger a larger part, not exceeding one-quarter of the value may be awarded as prize salvage. The Crown Proceedings Act 1950 does not affect the law relating to prize salvage, or apply to proceedings within the jurisdiction of the Supreme Court of New Zealand as a prize court. The Prize Salvage Act 1944 (U.K.) which restrains claims for prize salvage except with the consent of the Secretary of State (Defence) does not apply to New Zealand.

18. PIRACY

As mentioned in para.(9) (ante), the High Court of Admiralty had, in its instance jurisdiction, inherent power to adjudicate in cases of piracy for the restitution of goods taken piratically on the high seas and to condemn goods belonging to pirates as droits of Admiralty. Such jurisdiction is now vested in the Admiralty Court (administered in the Queen's Bench Division of the High Court of Judicature) under s.1(1)(s) of the Administration of Justice Act 1856, and is contemplated by clause 4(1)(s) of the Admiralty Bill as part of the jurisdiction of the Supreme Court when sitting in Admiralty.

The High Court has inherited jurisdiction also under s.5 of the Piracy Act 1850 to condemn as droits of Admiralty or restore to the former owners "all ships, vessels, boats, goods, merchandise, specie or other property taken possession of from pirates by any of Her Majesty's ships or vessels of war ...". If such property is restored to a former owner by the Court, he is to pay an eighth of the value for distribution to the re-captors as salvage remuneration.

Section 5, together with s.2, conferring jurisdiction on Vice-Admiralty Courts (now Colonial Courts of Admiralty) to inquire into alleged cases of piracy, and s.3 requiring such courts to make annual returns to the Admiralty (now Secretary of State (Defence)) of all cases of condemnation dealt with under the Act, are still in force in New Zealand (although ss.2 and 3 have been repealed in England) by virtue of s.2(3) of the Colonial Courts of Admiralty Act.

Other statutory provisions still technically in force in New Zealand are s.12 of the Suppression of Piracy Act 1698-9 (11 Will.3 c.7), which requires a reward to be paid to informers of conspiracies to destroy or run away with a ship by the captain of the ship in which the offenders conspire; and ss.2 and 7 of the Piracy Act 1721 (8 Geo.1 c.24). Section 2 provides for the forfeiture of ships fitted out for trading with pirates, and s.7, provides for the recovery by the Admiralty Court from a master of the excess of any advance made to a seaman beyond half his wages while his ship is in foreign parts. The intention of the latter provision was to prevent seamen from deserting and turning pirates. These provisions were not touched by the Criminal Code Act 1893, which repealed the other provisions of the Acts.