THE MARITIME LIEN – AN OUTDATED CURIOSITY

1. Introduction

The maritime lien may look like an admiralty curiosity, but has a good deal to tell us about law more generally. For non-specialists, the maritime lien we are talking of here is a special instance of the more general right to arrest a ship for a maritime claim (itself a feature peculiar to Admiralty [1]). It protects four specific kinds of claim that give rise to a right of arrest – bottomry, salvage, mariners' wages and collision damage – by giving the beneficiary a super-preference through the medium of an overriding security interest in the vessel involved [2].

As a security available to claimants, the maritime lien is to say the least idiosyncratic: certainly so to a non-maritime lawyer. The institution hangs awkwardly between contract and tort. It is sometimes consensual, arising from an agreement – for example, in the case of wages, and also most cases of salvage [3]. But it does not need to be: the underlying security interest can equally well be engendered by a tort (as in the case of the collision lien), or out of an unjust enrichment claim (as with non-contractual salvage). Once attached, it is secret and indeed unregistrable. Despite this, it nevertheless binds the vessel even in the hands of a good faith and entirely non-negligent purchaser [4]. Furthermore, it provides a claimant with not only security but superpriority, prevailing as a matter of law not only over all claims by the shipowner's general creditors whenever arising [5], but also over more normal securities such as mortgages [6]. And as if this was not enough, the rules of priority as between liens are not rules at all, but curiously discretionary principles, with often a preference not for the first, but for the last in time [7].

Most Admiralty lawyers, it is fair to say, are happy with the concept, seeing the maritime lien as not only an engaging curiosity, good for the occasional article delving into the convoluted history of the Admiralty Court, but more importantly as something that remains a useful adjunct to Admiralty practice. The purpose of this article is more iconoclastic. It argues that however long-standing and picturesque it may be, today the maritime lien as an institution is confusing, anomalous and unnecessary. The time has come for England to abolish it, lock, stock and barrel.

2. The background: The Bold Buccleugh and the rise of the modern maritime lien

---

1 There is no equivalent process in respect of other property, or of land vehicles or aircraft, save in the case of the latter for claims for salvage, towage or pilotage when they are in, on or over water (see Senior Courts Act 1981, s.20(2)(j)-(l)) and A.Tettenborn and F.Rose, *Admiralty Claims*, Para.4-012).

2 And on occasion in certain other assets, such as cargo and freight. But we will not be discussing these further.

3 Salvage claims can be brought in the absence of agreement (for instance, where a vessel is simply found abandoned and rescued), and indeed on occasion against the will of her owner if the latter refuses such services wholly unreasonably: see *The Auguste Legembre* [1902] P. 123, 128–129 and now the Salvage Convention 1989, Art.19, incorporated into English law by s.224 of the Merchant Shipping Act 1995.

4 A point put beyond doubt in *The Bold Buccleugh* (1851) 7 Moo.P.C. 267; 13 E.R. 884, referred to below.

5 See e.g. *Re Rio Grande Do Sul SS Co* (1877) 5 Ch.D. 282 and *The Constellation* [1966] 1 W.L.R. 272. This still applies in liquidation cases. In principle there is a power to disapply it in administrations, though the possiblility is more theoretical than practical: see A.Tettenborn & F.Rose, *Admiralty Claims*, Para.10-037.

6 See e.g. *The Royal Arch* (1857) Sw. 269, 282 (bottomry); *The Mary Ann* (1871) L.R. 1 A. & E. 8 (wages); cf *The Manor* [1907] P. 339 (collision lien).

7 For the complex details of the priority system, see A.Tettenborn & F.Rose, *Admiralty Claims*, Paras.9-017 – 9-027.

For those whose background is not in shipping law, a brief introduction is necessary. Technically the modern maritime lien has its origins in two aspects of the practice of the pre-1875 High Court of Admiralty: its power to decide matters of collision, bottomry, salvage and wages, and its habit of taking jurisdiction in such cases by arresting the vessels concerned at the claimant's instance. The history is convoluted and often confused [8]; but it is not of great importance here. This is because in an 1851 collision case, *The Bold Buccleugh* [9], the Privy Council took in hand the rather spotty and variable earlier jurisprudence and comprehensively set down what is now the modern law.

The *Bold Buccleugh*, a Scottish-registered coaster, ran into and sank the *William* while the latter was at anchor in the Humber. *William*'s owner, Bell [10], sued *Bold Buccleugh*'s owners in the Court of Session in Edinburgh. Since Scots law at the time allowed a pursuer to attach a defender's property in support of a suit *in personam* [11], Bell arrested *Bold Buccleugh* in Leith. The defenders bailed her; the proceedings then attached to the bail money, and she was free to go. A few weeks later her owners sold her to Harmer. Shortly after that, Bell changed tack, issued parallel Admiralty Court proceedings in London against the vessel, and had her arrested when she docked in Hull. Having (he hoped) secured his position in England, he then abandoned his Edinburgh suit.

Harmer resisted the London proceedings and sought to vacate the arrest. He argued two technical grounds that fairly directly raised the issue of what a maritime lien was and how it worked. These grounds were (a) that while the Edinburgh action was on foot against *Bold Buccleugh*'s owners, the principle of *lis alibi pendens* prevented Bell taking a simultaneous second bite at the cherry in England, and (b) that in any case, since Harmer was not personally liable for the negligence of the vessel's previous owners, it made no sense to arrest her in his hands. The Admiralty judge, Dr Lushington, disagreed and upheld the arrest [12]. So also did the Privy Council on appeal [13]. In the latter court, Sir John Jervis reasoned that the arrest of the vessel in Hull was not simply a means of enforcing a personal liability against her owner, but rather the direct enforcement of an existing proprietary charge against the ship herself, which charge had arisen immediately on the happening of the collision. This neatly disposed of both of Harmer's points. If there was an existing charge burdening the ship, the fact of the intervening sale to Harmer was irrelevant; *nemo dat quod non habet*. And there was no *lis pendens* problem, because the effectuation of a lien or charge against the vessel in London was not the same thing as a personal suit against her owners in Edinburgh.

Sir John then took the opportunity to set out what is now accepted as the present legal position as regards all maritime liens – not only collision liens, as in *The Bold Buccleugh* itself, but also those arising out of bottomry, salvage and wages claims. "A maritime lien," said Sir John, was "a claim or privilege upon a thing to be carried into effect by legal process". And this claim, he continued,

---

8 For those interested, the best source is the enormously thorough discussion in E.Ryan, "Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective" (1968) 7 W. Ontario L. Rev. 173 (a very perceptive coverage). See also D.Cremean, "Historic Origins of the Admiralty Court" [2012] J.B.L. 350.

9 (1851) 7 Moo.P.C. 267; 13 E.R. 884. The vessel concerned was named after a notable sixteenth-century Scots freebooter, distantly related to the current Dukes of Buccleuch.

10 There were actually several owners, but we will refer for brevity to Bell.

11 A power it retains: see now Part 1A of the Debtors (Scotland) Act 1987. Scots law did not in 1851 recognise the maritime lien or anything like it. It did so somewhat later, as the result of the House of Lords' decision in *Currie v M'Knight* [1897] A.C. 97.

12 See *The Bold Buccleugh* (1850) 3 W. Rob. 220; 166 E.R. 944.

13 (1851) 7 Moo.P.C. 267; 13 E.R. 884. (The Privy Council heard appeals from the Admiralty Court until the Judicature Acts transferred this jurisdiction to the Court of Appeal and the House of Lords.)

> "… travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached." [14]

The "proceeding in rem" which he mentioned referred to the arrest of the vessel. This Admiralty remedy, he said, was part and parcel of, and coterminous with, the existence of a maritime lien in the sense above. If there was a right of arrest there was a lien, and vice versa [15]. (This latter statement later turned out to be rather misleading; we return to this below.)

This remains the law today as regards all liens, whether for collision, bottomry, salvage or wages. The only subsequent nineteenth-century development of note was confirmation that if a claim was indeed supported by a maritime lien, it prevailed not only over the rights of a purchaser, but also, by impeccable logic, over those of a mortgagee [16].

However, complications quickly followed. Although the traditional judge-made jurisdiction of the High Court of Admiralty had by the nineteenth century become increasingly limited to the four matters described above, namely bottomry, collision, salvage and wages (plus a few others not relevant here [17]), even before 1851 specific legislation had begun the process of extending it. So in 1840 the Court, besides receiving incidental jurisdiction over mortgages where a ship was already under arrest for some other cause of action, also got a new statutory jurisdiction over claims for towage and cargo damage [18], and also suits for necessaries supplied to foreign ships [19]. A further Act of 1844 extended the benefit of the Court's jurisdiction over wages claims to claims by masters [20]. In 1861, ten years after *The Bold Buccleugh*, the process again continued: as well as power to decide issues of ownership [21] and incidental jurisdiction over claims by builders and repairers where a ship was already under arrest [22], the Court obtained jurisdiction over further claims for necessaries supplied [23], over the enforcement of mortgages generally [24], and over a more extensive class of wages claims [25]. Since that time the statutory jurisdictions of the Admiralty Court have widened

---

14 (1851) 7 Moo.P.C. 267, 284-285; 13 E.R. 884, 890-891. This seems the first usage of the term "maritime lien" in the English courts. There had, however, been a mention of a "lien" for wages in s.5 of the Merchant Seamen Act 1835. The term "maritime lien" had appeared yet earlier in the US: see e.g. *The William and Emmeline* (1828) 29 Fed. Cas. 1288, 1289.

15 "[W]hilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists …" – see (1851) 7 Moo.P.C. 267, 284; 13 E.R. 884, 890.

16 See the cases referred to in Note 5 above: notably *The Royal Arch* (1857) Sw. 269, 282; 166 E.R. 1131, 1139 and *The Mary Ann* (1871) L.R. 1 A. & E. 8. The earlier authorities on the nature of maritime liens had been somewhat inconsequential, but analogous reasoning had on occasion appeared: e.g. from Dr Lushington in *The Glentanner* (1859) Swab 415, 422-423; 166 E.R. 1192, 1196.

17 For example, there was old authority that it would order the arrest of a ship to restore possession to a rightful owner whose title was clear: e.g. *The New Draper* (1802) 4 C.Rob. 287, 290; 165 E.R. 615, 616 and cf *The Warrior* (1818) 2 Dods 288; 165 E.R. 1490.

18 See the Admiralty Court Act 1840, s.6.

19 Admiralty Court Act 1840, s.5.

20 See s.16 of the Merchant Seamen Act 1844, later re-enacted in wider terms as s.191 of the Merchant Shipping Act 1854. This reflected the fact that masters were increasingly becoming simply paid employees rather that part-adventurers with the owners.

21 Admiralty Court Act 1861, s.8.

22 See the 1861 Act, s.4.

23 See the 1861 Act, s.5.

24 See s.11 (taking away the need for the vessel to be already under arrest, as previously required).

25 See s.10 (allowing all claims for wages to be brought: previously the Admiralty jurisdiction had excluded wages due under a "special contract" containing terms not normally found in a mariner's traditional contract of employment (e.g. *The Lord Hobart* (1815) 2 Dods 100; 165 E.R. 1428)).

exponentially [26]. Today's provisions, contained in s.20(2) of the Senior Courts Act 1981, cover almost all maritime claims by laying down twenty broad heads of jurisdiction [27]. These statutory jurisdictions, it should be noted, include all the heads of claim also protected by a maritime lien [28].

These additional statutory jurisdictions presented an awkward problem. That they gave a right of arrest was clear: since until 1883 the main form of originating process in the Admiralty Court – and indeed the source of its jurisdiction – was arrest of the vessel [29], it was clearly implicit that the new statutory jurisdictions carried with them a similar right of arrest which, once exercised, gave priority in insolvency. What was not clear, however, was whether they also possessed all the other features of maritime liens. Sir John Jervis's statement that the right of arrest and the maritime lien were co-terminous suggested a positive answer; and indeed in America, which at the time took much of its Admiralty law from England, this step was taken [30]. But not so in England, where in 1886 the House of Lords in *Northcote v The Henrich Björn* [31] took a different path. Northcote furnished necessaries to a ship, a claim over which the Admiralty had jurisdiction, but only by the 1840 Act. He later arrested her, but by then she had been sold. The Court of Appeal was in no doubt that, unlike a maritime lien, the right of arrest engendered by the statute was merely a procedural means of getting at the assets of the person who would have been liable in personam; from which it followed that the prior sale of the vessel to someone not so liable defeated it [32]. The House of Lords agreed [33]. This decision also confirmed the logic of a number of earlier holdings that, in contrast to the position with a maritime lien, the rights of a mortgagee prevailed over a purely statutory right of arrest [34]. It is now also clear that, on the same logic, a person exercising as mere statutory right of arrest gets no preference in insolvency if the owner is already in liquidation [35].

Four years after *Northcote v The Henrich Björn* was decided, the final keystone was added to the arch by the House of Lords, when it confirmed the earlier decision subject to the gloss that where a given type of claim had previously given rise to a maritime lien, any statutory extensions of Admiralty jurisdiction over it implicitly extended the maritime lien too [36].

3. The present situation: maritime liens and rights of arrest

---

26 Via piecemeal extensions and consolidations: see notably the Maritime Conventions Act 1911, s.5, the Merchant Shipping (Stevedores and Trimmers) Act 1911, the Administration of Justice Act 1920, s.5, the Supreme Court of Judicature (Consolidation) Act 1925, s.22 and the Administration of Justice Act 1956, s.1.

27 See s.20(2)(a)-(s) and s.20(3).

28 See the Senior Courts Act 1981, ss.20(2)(e), (j), (o) and (r).

29 In 1883 Admiralty originating process was finally assimilated to that elsewhere in the High Court, with actions being started by writ, and arrest only coming at a later stage, if desired. Another feature of the nineteenth and early twentieth century reforms was increasingly to allow the Admiralty Court to act in personam. Today this is universal: by s.21(1) of the Senior Courts Act 1981 all Admiralty proceedings can, subject to one exception immaterial here, be brought in personam.

30 See cases such as *The Rock Island Bridge*, 73 US 213, 215 (1867); also R.Force, *Admiralty and Maritime Law* (2nd ed, Federal Judicial Centre, 2013) at 173-189.

31 (1886) 11 App. Cas. 270

32 (1885) 10 P.D. 44

33 (1886) 11 App. Cas. 270

34 Notably *The Pacific* (1864) Br & Lush 243, 245; 167 E.R. 356, 358; *The Troubadour* (1866) L.R. 1 A & E 302 and *The Two Ellens* (1871) L.R. 4 P.C. 161.

35 This had long been accepted, being (one suspects) too obvious to litigate. It was finally confirmed by the Singaporean decision in *The Oriental Baltic* [2011] SGHC 75; [2011] 3 S.L.R. 487.

36 *The Sara* (1889) 14 App. Cas. 209 (disbursements by master, over which Admiralty Court given jurisdiction under s.10 of the Admiralty Court Act 1861, was equivalent to wages, and therefore prevailed over mortgagee).

Let us stand back a moment and see where we are. The upshot of the nineteenth and earlier twentieth century developments was that, through accident rather than design, we got two almost entirely separate systems of ship arrest running parallel with each other. This is still the case.

Firstly, as a result of the legislative process started in 1840 and culminating today in s.20(2) of the 1981 Senior Courts Act, we have a well-modulated list, effectively amounting to a carefully-drafted statutory code, of claims allowing ship arrest. These cover almost the whole gamut of maritime claims, from charter disputes to suits arising out of collisions, wages, pilotage, ship-repair and general average [37]. These rights are subject to their own regime. They give priority in respect of any insolvency postdating the commencement of proceedings, but not as regards previous insolvency [38]. They do not prevail against purchasers [39], nor against mortgagees [40]. They also provide limited, and carefully-delineated, further rights of arrest where the person who would have been liable in a claim in personam is a bareboat charterer [41], and in addition a limited scheme allowing the arrest of other sister-ships of the vessel over which a claim arose [42].

Second, and quite apart from that, and parallel to it, there remains the separate maritime lien regime dealing with the subset of those claims concerning collision, wages, salvage and bottomry. This regime is largely unaffected by statute [43], and if successfully invoked gives claimants different and often much more extensive remedies. In particular, these claimants' rights prevail against mortgagees [44] and purchasers [45], and obtain automatic preference even in prior insolvencies [46].

4. Is the maritime lien still justified?

Can we justify this curious division of arrest claims into two streams, largely due to historical accident, with some noticeably privileged over others? It is suggested that, for several reasons, the answer today is no. The law would lose little or nothing if we simply abolished the category of maritime lien claims, and left all maritime claimants to their rights of arrest, if any, under s.20(2) of the 1981 Act. This may sound like a drastic solution: but there are a fair number of arguments supporting it.

First, there is the matter of complexity. As well as the code for arrest of ships now laid down in s.21(4) of the Senior Courts Act 1981, with its detailed list of grounds and description of what property can be arrested, we then have attached, as a kind of appendix, separate provision for arrest wherever a maritime lien exists [47]. Unfortunately little more can be said legislatively here, since the

37 There are a few exceptions, but they are minor. For example, canal dues, contracts for the sale of a ship, and claims for insurance premiums, give rise to no right of arrest. In some jurisdictions, notably those applying the 1999 Arrest Convention (referred to below), they do.

38 See *The Oriental Baltic* [2011] SGHC 75; [2011] 3 S.L.R. 487, referred to above.

39 See *The Henrich Björn* (1886) 11 App. Cas. 270, above. A small exception is drawn where proceedings have been issued, but no arrest made, before the sale: *The Monica S* [1968] P. 741.

40 *The Two Ellens* (1871) L.R. 4 P.C. 161

41 See Senior Courts Act 1981, s.21(4)(b) (claim available "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 …") (italics supplied).

42 See Senior Courts Act 1981, s.21(4)(ii).

43 Section 21(3) of the Senior Courts Act 1981 says laconically: "In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property." It then leaves the extent of the right almost entirely to the case-law.

44 *The Royal Arch* (1857) Sw. 269; 166 E.R. 1131 and *The Mary Ann* (1871) L.R. 1 A. & E. 8.

45 *The Bold Buccleugh* (1851) 7 Moo.P.C. 267; 13 E.R. 884

46 See *Re Rio Grande Do Sul Steamship Co* (1877) 5 Ch.D. 282; *The Constellation* [1966] 1 W.L.R. 272.

47 See Senior Courts Act 1981, s.21(3).

criteria for the existence of a maritime lien, and most of its incidents, are entirely judge-made – and not always entirely clear at that [48]. In an aggressively transnational business like shipping, complications of this sort do not make English shipping law particularly user-friendly.

Secondly, there is a problem of arbitrariness. The division between the charmed circle of maritime lien claims and other rights of arrest is pretty capricious. Collisions are in: damage done to persons or property on board a vessel by the negligence of those in control of the ship is is out [49]. Wages are in: severance pay and claims for crew personal injury are out [50]. And so on.

Thirdly, the preservation of the two systems operating side-by-side creates curious anomalies. Take priorities, for example. With statutory rights of arrest, the issue is it seems straightforward, with all rights ranking pari passu [51]. With maritime liens, by contrast, matters are much less easy; here the determination of priorities is essentially a matter of the court's discretion, albeit subject to a number of general principles [52]. Either system has its advantages and pitfalls: against the idea that today one normally expects security rights to be ranked by bright-line rules, there is the valid point that marine claimants can vary a good deal in their merits. But one can reasonably be expected to choose between them: to have two systems of ship arrest running in parallel, each with different rules of priority, is simply bizarre. Again, while rights of arrest are rightly subject only to the substantive time-bars applicable to the underlying claim [53], in the case of maritime liens there is an extra time-bar, the rather vague doctrine of laches, superimposed [54]. Historically this distinction is perfectly explainable [55]. In contemporary commercial shipping law there can be no justification for it.

Fourth, there is the problem of secrecy. Whatever may have been the case in 1851, in 2022 a long-term security that is secret, unregistrable and binds a thing in the hands of an entirely faultless purchaser is uncommon and needs powerful justification [56]. The assumption today is almost universal that the buyer of any asset should have the ability to know what third party interests affect it, rather than have to be satisfied with a theoretical right of action for breach of warranty against the person selling it [57].

---

48 For example, there seems little difficulty in saying that a statutory right of arrest can be transferred with the underlying claim (see A.Tettenborn & F.Rose, *Admiralty Claims*, paras.9-047 – 9-049), whereas there is considerable doubt about whether, outside bottomry, a maritime lien can: compare *The Petone* [1917] P. 198 and *The Sparti* [2000] 2 Lloyd's Rep. 618.

49 See *Currie v M'Knight* [1897] A.C. 97 and *The Rama* [1996] 2 Lloyd's Rep. 281.

50 *The Tacoma City* [1991] 1 Lloyd's Rep. 330

51 This is suggested in J.R.Thomas, *Maritime Liens*, Para.444: see too e.g. *The Africano* [1894] P. 141; *The James W Elwell* [1921] P. 351, 370; and *Re Aro Co Ltd* [1980] Ch 196, 203. (There is some Canadian authority to the contrary – see notably *Montreal Dry-Dock Co v Halifax Shipyards Ltd* (1920) 60 S.C.R. 360 – but there must be some doubt whether it would be followed here.)

52 See G.Price, *Law of Maritime Liens* (1940), 103; A.Tettenborn & F.Rose, *Admiralty Claims*, Para.9-017. The discretionary nature of the ranking exercise has been emphasised by David Steel J: see *The Ruta* [2000] 1 Lloyd's Rep. 359, 364.

53 Some particular types of claim are subject to a particular time-bar, such as collisions: Merchant Shipping Act 1995, s.190. Where no specific regime applies the general rules under the Limitation Act 1980 obtain. This is because the 1980 Act 1980 applies to all "actions", the term including by s.38(1) any proceeding in any court of law and hence encompassing claims in rem. This was a 1980 innovation. The pre-existing 1939 Limitation Act had exempted claims in rem *en bloc*, save for those aimed at recovering wages: see s.2(6).

54 For details see D.R.Thomas, *Maritime Liens*, Paras.502-503.

55 It arose because the original Admiralty Court in rem procedure was outside the scheme of the Statute of Limitations of 1623, which would not even be applied by analogy (see *The Kong Magnus* [1891] P. 223, 227-228), and therefore a different means had to be found to get rid of stale claims.

56 A point long recognised: see e.g. A L Diamond, *A Review of Security Interests in Property* (1989) para 11.1.5; also D.Cabrelli, "Joined up Thinking—An Analysis of the Scottish and English Law Commissions' Proposals for the Reform of Rights in Security and Charges Granted by Companies" (2004) 4(2) J.C.L.S. 385, 391.

Fifth, a similar argument goes for the other feature of maritime liens: namely, their super-priority – especially over the rights of a mortgagee. To encourage lenders to provide finance to shipowners at a reasonable rate, we need to minimise the risks of matters later transpiring to affect the security that are entirely outside the control of the lender, and which either need to be budgeted for or insured against at some cost. The continued existence of the maritime lien has exactly the opposite effect.

Sixth, there remains scope for unnecessary uncertainty [58]; this is especially true as regards procedural matters. True, some of the issues now stand solved, albeit in a fairly rough-and-ready way: for example, whether an action in rem is barred by the sovereign immunity of the indirectly impleaded owner [59], and whether the availability of an action in rem counts as procedural or substantive for the purposes of the English conflict of laws [60]. But others remain. For example, the House of Lords has made it clear that, for the purpose of *res judicata* and merger of causes of action in a judgment, judgment following the exercise of a statutory right of arrest is still a judgment against the person otherwise liable in personam [61]. However, it specifically left it open whether the same rule applied where judgment had been given on the basis of a claim giving rise to a maritime lien [62]. Similarly, there is confusion over how far a party that obtains an arbitration award may, if unpaid, subsequently arrest the vessel in respect of the underlying claim: this is probably the case where there is a maritime lien [63], but no-one is entirely sure of the situation where there is not.

5. A counter-argument: do maritime lien claimants deserve special treatment?

It could of course be that the claims that give rise to a maritime lien are particularly deserving of special treatment despite all the above arguments: deserving enough to justify the continuing hiving off of maritime liens to a separate category. But are they? In this section we look at that possibility. Let us take each kind of claim – bottomry, salvage, collision and wages – in turn.

(a) Bottomry

We do not need to spend much time on bottomry [64]. This was a form of loan made to a shipowner in distress against the vessel [65] to allow her, often when far from home, to undergo repairs or complete an adventure, on terms that it was repayable only if she did safely return [66]. Whatever may have

57 A warranty implied in any ship sale: Sale of Goods Act 1979, s.12(2)(a). In practice the contract will invariably make this explicit: see e.g. the very widely used BIMCO 2012 Norwegian Sale Form, Cl.9.

58 Stemming largely from the rather sterile argument about whether a maritime lien is a claim against the ship or her owner: see R.Thomas, *Maritime Liens*, Paras.26-27; A.Shipman 'The maritime lien' (1893) 2 Yale Law Journal 9; and P.Hebert 'The origin and nature of maritime liens' (1929–1930) 4 Tulane Law Review 381.

59 The answer is Yes: see e.g. *The Parlement Belge* (1880) 5 P. D. 197, *The Tervaete* [1922] P. 259 and *The Cristina* [1938] A.C. 485.

60 It is procedural: see *The Halcyon Isle* [1981] A.C. 221 and also *Oceanconnect UK Ltd & Anor v Angara Maritime Ltd* [2010] EWCA Civ 1050; [2010] 2 C.L.C. 448 at [39]. But this is not so everywhere: in Canada it is substantive, as witness *The Ioannis Daskelelis* [1974] S.C.R. 1248. See generally S.Rares, “Ship arrests, maritime liens and cross-border insolvency” [2018] LMCLQ 398; M.Davies, “Choice of law and US maritime liens”, 83 Tul.L.Rev. 1435.

61 *The Indian Grace (No.2)* [1998] A.C. 878. The case strictly speaking concerned a foreign judgment and the effect of the Civil Jurisdiction and Judgments Act 1982, s.34; but it almost certainly also applies to an English judgment too.

62 The issue was left pointedly open by Lord Steyn in *The Indian Grace (No 2)* [1998] A.C. 878 above: see p.912.

63 So held in Hong Kong: *The Alas* [2014] HKCFI 1281.

64 See generally *The Prince of Saxe Cobourg* (1839) 3 Moo. P.C. 1; 13 E.R. 1.

65 Or, in even direr emergencies, against the cargo, when it was known as “respondentia.”

66 A requirement strictly construed: see *The James W Elwell* [1921] P. 351, 364-367 (Hill J).

been the position in the nineteenth century where vessels encountered trouble in remote and far-flung ports without the ability to contact owners, today, with the growth of universal worldwide communications and the ability of lenders to lend at short notice on vessels wherever they may be, it is obsolete [67]. There is indeed a respectable case for abolishing such loans completely. But whether one agrees with this or not, there can be no conceivable argument for giving them any kind of privileged status whatever.

(b) Salvage

Salvage at first sight looks more promising. This is certainly the case if one looks at it through eighteenth, nineteenth or even early twentieth century eyes. This was an era of relatively small ships, owned by small companies or even sometimes by individuals, that could well fortuitously come across other vessels abandoned or in difficulties, and might need encouragement to lend assistance. Salvage was often at a moment's notice and somewhat informal [68]. A salvor, often not being professional, had no means of knowing at the time they rendered the service whether the vessel was mortgaged; in addition they might have to wait some little time before they could have a chance to arrest her in England, during which time she might well have been sold. In such circumstances, the award of a very high priority to salvors had something to be said for it.

In the last 100 years, however, the industry has changed out of recognition. Ships are bigger and salvage operations infinitely more demanding. Furthermore, the large majority of salvage operations are now not one-offs but very carefully-planned and executed operations carried out by large and very professional companies. Organisations such as Smit, Donjon, Resolve Marine and T & T Salvage, which carry out a large proportion of salvage operations globally, are regular repeat players, with operations throughout the world and the ability to take proceedings anywhere in it. None is immediately obvious as being in need of special sympathy or protection from the law.

In addition, today a would-be salvor can in the vast majority of cases easily find out a great deal about the vessel whose salvage is proposed, evaluate the risks that others, such as mortgagees, may have interests in her, and negotiate with owners and others in some detail over what services they are prepared to provide and on what terms.

Another point is that salvage charges are in the vast majority of cases paid not from the ship following arrest or proceedings in rem, but by a combination of hull insurers, cargo insurers and P&I interests [69]. It follows that even if a salvor is not a large corporation [70], it is only in the case of uninsured or under-insured vessels that there is any serious risk of the salvor not being paid.

The upshot, it is submitted, is that the special treatment accorded salvors is of increasingly doubtful utility. Professional salvors present no strong case for any more extensive protection for their claim

67 The last reported English case even mentioning a bottomry bond as part of the facts seems to be *The Conet* [1965] 1 W.L.R. 479. Nearly 100 years ago such bonds were already said to be "out of common use": see Lord Merrivale P in *The St George* [1926] P 217, 222.

68 For an example of the popular imagination on the subject, see the story *Salvage for the Vital Spark*, in Neil Munro, *In Highland Harbours* (1911) (the second book in the Para Handy series).

69 Most hull policies cover the owner against the ship's proportion of ordinary salvage charges (see e.g. Clause 10 of the Institute Time Clauses (Hulls) 1995, Clause 10). Cargo insurance similarly covers cargo's share (see Clause 2 of all versions A, B and C of the Institute Cargo Clauses 2009). Life salvage and special salvage claims under Art.14 of the Salvage Convention 1989 or SCOPIC are routinely dealt with by P&I interests: see e.g. the 2021/2022 Rules of the Standard Club, Clauses 3.5 and 3.8.5.

70 Which some are not. It is said, for example (see G.Brice, *Maritime Law of Salvage* (5th ed), 75–77), that RNLI crews occasionally claim salvage personally, even though the RNLI itself explicitly does not.

in rem against the vessel than that available to any other maritime claimant. No-one denies that they should retain a right to arrest in the last resort, and to that extent obtain a limited preference in insolvency. But that is not the question here: the issue is whether they need or deserve a right with a super-priority over mortgagees, or which defeats a good faith purchaser. It is submitted that they do not.

(c) Collision

If the contemporary case for the salvage maritime lien is not strong, it is suggested that that for the marine collision lien is even more rickety. This is for two reasons.

First, unlike salvage remuneration, the entitlement to which cannot be readily insured and the loss of which therefore at least in theory affects the salvor's pocket, nearly all collision claims have for many years been subrogated claims. Although in name the claim in rem will come from the owner of the damaged vessel or cargo, in practice the arrest is made by, and the the risk of non-recovery is borne by, hull and machinery or cargo underwriters. Whether there is any call to give professional underwriters the kind of super-priority inherent in a maritime lien is, it is respectfully submitted, very doubtful.

True, this is not invariably so. Some collision claims will be for personal injury, especially to crew on the other vessel; and these will be brought personally by the actual crew member. But even here, the chances of mariners in such circumstances going without compensation in the absence of a maritime lien are often fairly small. This is because very often the owners of the vessel on which they are serving will have seen to the provision of injury payments to their crew, even where they are not strictly legally liable, by virtue of an amendment to their P&I cover reflecting some contractual or union-agreed scheme of no-fault compensation [71].

This matter aside, it is also worth noting that in the vast majority of cases collision liabilities, like those arising out of salvage, are in any case not taken out of the ship, but instead paid from a combination of hull insurance and P&I cover [72]. Vessels may, it is true, on occasion sail without such cover, or cash-strapped owners may omit to keep their contributions up-to-date. But this is is getting more difficult [73], and much less common.

It is true that this does leave a rump of (increasingly rare) cases where the defendant vessel is uninsured and the claimant is not suing under subrogated rights. But is this sufficient justification for maintaining the privileged treatment of collision claimants as a whole? It is suggested that it is not. The marginal effect of removing maritime lien status from collision claimants would be very small, especially since it would leave intact the statutory right to arrest a vessel for damage done by her. The tail here cannot be allowed to wag the dog.

---

71 It is true that P&I Clubs theoretically limit cover to sums for which the owners of entered vessels are legally liable to pay, and exclude it for further obligations contracted. In practice, however, cover is extended as a matter of course in respect of many agreed compensation schemes for industrial injury, provided the P&I Club has approved the agreement in advance. See D.Semark, *P & I Clubs Law and Practice* (4th ed), Para.10.152.

72 Under traditional English practice, hull insurance covers three-fourths of any liability, with P&I picking up the remaining one-fourth.

73 For example, EU Directive 2009/20/EC requires all EU-registered vessels in ports everywhere, and non-EU ships entering EU ports, to carry insurance or P&I cover for all maritime claims covered by the Limitation Convention 1996. This includes collision liability. The UK has kept the Directive's provisions and makes a similar demand on UK ships and ships entering UK ports: see the Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012, SI 2012/2267, as amended.

(d) Wages

It is the fourth category, the mariner's right to wages, that seems at first sight to provide the strongest case for keeping the separate, very protective, maritime lien regime, over and above the simple right to arrest the vessel (which a mariner also has) [74]. The arguments are not hard to see. Seafarers do not have equal bargaining power with their employers; omission to credit the bank account of a mariner at sea is an easy way for a cash-strapped owner to preserve its cash-flow. Furthermore, the duty to pay wages is enforceable on principle only against the employer and not (say) an insurer or P&I club: conversely, failure to be paid cannot in practice be insured against, thus leaving the unpaid seafarer and their family bearing the loss personally. Moreover, where a vessel owned by a near-bankrupt owner is holed up in a remote port with no prospect of early departure and an increasingly destitute crew on board, a threat to have her arrested and sold may be an effective way – indeed, perhaps, the only effective way – to extract payment.

No doubt that is why the seaman's entitlement has been described in the past in extravagant terms [75], and that our merchant shipping legislation ever since 1835 has stated that this lien, unlike others, cannot be ousted by contract [76]. All these points seem to lead to one conclusion: the right of the employee to not simply a right of arrest, but to a lien on the ship in the event of the employer's insolvency or intransigence, becomes yet more important as a protection for the vulnerable [77].

Or do they? In the nineteenth and early twentieth centuries, when sailors were almost universally underpaid and mistreated, and were also in severe danger of being abandoned far from home to fend for themselves, these arguments certainly had a great deal of force. Whether they still do, however, is not quite as clear as it might seem.

One recent development has been increasing unionisation, both nationally and globally under the aegis of the International Transport Workers' Federation, reducing the disparity in negotiating strength between mariners and employers. Another, possibly more important, one has been legal: namely, the development under the Maritime Labour Convention 2006, to which the vast majority of shipping nations belong [78], of an effective financial responsibility regime for shipowners, with enforcement provisions attached. Under this, a vessel cannot be traded unless equipped with a certificate that her owners have provided financial security in respect of their duty to pay the wages of incapacitated mariners [79], and also in the case of abandonment of seafarers (which is the commonest cause of non-payment) for repatriation costs and up to four months' wages [80]. A further development has already been mentioned in passing: namely, the now common practice of P&I Clubs to cover liabilities to injured seamen and, within reason, industrial injury payments made on the basis of collective agreements, both of which will include elements of lost wages [81]. It follows

74 See s.20(2)(m) of the 1981 Act.

75 For example, "These are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages" – *The Madonna D'Idra* (1811) 1 Dodson 37, 40; 165 E.R. 1224, 1225 (Lord Stowell).

76 See now s.39 of the Merchant Shipping Act 1995 (originally the Merchant Shipping Act 1835, s.5).

77 For a useful summary of the problems, see E.Jiankai, "The Effectiveness Of The Maritime Labour Convention's Financial Security Certificates In Resolving Claims For Unpaid Seafarers' Wages", NUS Centre for Maritime Law Working Paper 2020/008; and cf M.Ng, "The Protection of Seafarers' Wages in Admiralty: a Critical Analysis in the Context of Modern Shipping" (2008) 22 A. & N.Z. Mar. L. 133.

78 The Convention has been ratified by 101 states, making up over 96% of the world's tonnage. It sets up a Convention Code which has to be observed by owners of vessels registered in contracting states.

79 See the Maritime Labour Convention Code, Art.4.2 and Standard A4.2.1.

80 See the Maritime Labour Convention Code, Art.2.5 and Standard A2.5.2.

81 See above, Note 71.

that claims against the vessel herself are to this extent less significant, since this is a liability which will now be picked up to a large extent by guarantors or P&I interests.

In other words, under twenty-first century conditions a good deal of the sting has now been drawn from the prospect of non-payment of wages. Should this be sufficient to justify relegating mariners to their right to bring in rem proceedings under s.20(2)(o) of the Senior Courts Act 1981? It is suggested that it probably is, certainly when it comes to (for example) arresting a vessel in the hands of a bona fide purchaser.

Admittedly, the matter is finely balanced. The issue may be more controversial when it comes to the relative priorities of mariners on the one hand, and (say) mortgagees on the other. A vessel abandoned by bankrupt owners may well have a large mortgage hanging over her, and mariners serving aboard might feel hard done by if they came in after the mortgagee (which, without a maritime lien, they would). But if this was felt to be a problem, the answer might well be a simple legislative change making it clear that a person arresting a vessel over a wages claim prevailed over a financier and had some kind of preference in insolvency. This seems a neater and more proportionate solution than the maintenance of the maritime lien jurisdiction in all its cumbersome glory for this very limited purpose.

5. The relevance of practice elsewhere

So far we have been arguing from an Anglocentric viewpoint. But we have to remember that the privileging of maritime lien-style claims over other rights of ship arrest is not a purely English phenomenon. It obtains in some form in most of the Commonwealth, either directly by importation from England, or in legislative schemes created as part of a later updating [82]. It also applies in substance in the US. There, despite the original refusal to follow the *Henrich Björn* line of authority, something faintly resembling like the English orthodoxy has now in practice been restored, with the creation under federal statute of a category of “preferred mortgage” that does not trump claims such as collisions, wages and salvage, but does prevail over many other claimants, such as cargo claimants or bunker suppliers [83].

Privileged maritime liens exist in civil law jurisdictions too, despite the fact that their details vary fairly widely [84], and also despite attempts to unify the subject through two major international conventions on the subject: namely, the Mortgages and Liens Conventions of 1926 [85] and 1993 [86]. Under the 1993 scheme, for example, maritime liens prevailing over the rights of both mortgagees and purchasers must be afforded, as in England, in respect of claims for wages, salvage and compensation for damage to property outside the vessel (corresponding to our collision lien).

---

82 See, for example, the Australian Admiralty Act 1988 (Cth), s.15, or New Zealand Admiralty Act 1973, s.5(1), the latter essentially reproducing s.21(3) of the English Senior Courts Act 1981.

83 See 46 U.S. Code § 31322. The similarity with the English priority order of maritime liens, followed by mortgages, followed by statutory rights of arrest, is obvious.

84 On this whole subject, see the massive and comprehensive F.Berlingieri, *Berlingieri on the Arrest of Ships* (5th ed), esp. Ch.5.

85 Formally the Geneva International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1926.

86 Formally the Geneva International Convention on Maritime Liens and Mortgages 1993. In effect this is an updating and simplification of the 1926 Convention mentioned in the previous footnote. On this see generally J.Alcántara, “A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993” (1996) 27 JMLC 219 and F.Berlingieri, “The 1993 Convention on Maritime Liens and Mortgages” [1995] L.M.&C.L.Q. 57.

It is therefore true to say that if England were to abolish the maritime lien and make claimants rely entirely on their statutory rights of arrest under the Senior Courts Act 1981, it would put itself in a slightly unusual position. Nevertheless it is submitted that this is not a fatal objection, and that the UK would not suffer unduly were it to engage in a degree of exceptionalism. There is certainly no treaty bar to its doing so. The UK is not, and never was, party to either the 1926 or the 1993 Convention, or for that matter to any other instrument constraining its action [87]. Nor, it is suggested, would the UK become an appreciably less attractive arrest jurisdiction were the maritime lien to go: the vast majority of arrests and threatened arrests concern non-maritime lien claims.

Furthermore, while it is true that (for example) the scheme under the 1993 Convention does require the creation of a separate category of maritime liens, for instance by requiring that some rights against the vessel prevail over a mortgagee while some do not [88], the parallel is not enormously close. In some ways the 1993 scheme is wider than that in England [89]; in some ways narrower [90]. In other words, were England to abolish the maritime lien concept, it would not even be as much of an outlier as might at first seem.

6. Conclusion

The suggestion made in this article can be simply encapsulated. England's law on ship arrest has, largely through inadvertence, come to embrace two entirely separate but parallel strands. One is judge-made and highly generous to the limited number of claimants it serves; the other is statutory, more wide-ranging and more carefully thought out. There are very few convincing arguments in favour opf retaining the former, and a great many against; as regards the one class that still arguably does need particular protection, mariners seeking to recover wages, this advantage can be afforded in other less disruptive ways. In short, the time has come to abolish the maritime lien as an unnecessary historical relic, thereby greatly simplifying the law, and ushering in a more rational, if less picturesque, system of ship arrest.

87 The nearest thing to any such requirement is Guideline B2.2.2 (4)(l) attached to Regulation 2.2 of the 2006 Maritime Labour Convention (to which the UK is a party). But while this encourages states to give mariners protection equivalent to that in the 1993 Liens and Mortgages Convention (i.e. a maritime lien), it leaves it open to them to replace this with a simple preference in insolvency. And in any case guidelines under the 2006 Convention are explicitly non-binding: see Art.VI(1).

88 This is by way of a combination of Arts.4, 5.1 and 6(c).

89 For instance it requires liens for port, canal and pilotage dues (Art.4(1)(d)), and for all claims for injury and death arising out of the operation of the vessel, including to those on board (Art.4(1)(b)); neither of these carries a maritime lien in England.

90 Thus it imposes a strict one-year time-bar (Art.9). Again, while allowing claims with some resemblance to our statutory rights of arrest, ranking behind mortgages, these are subject to a six-month time-bar as well as a requirement that they expire 60 days after any bona fide sale of the affected vessel (Art.6(b)).